LAW, RACE AND EDUCATION: A STUDY OF THE ROLE OF THE COURT EXPERT IN THE BOSTON SCHOOLS DESEGREGATION LITIGATION

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Abstract

In the United States, following the case of Brown v. Board of Education (1954),[1] federal judges with responsibility for public school desegregation but no expertise in education or schools management appointed experts from the social sciences to act as court advisors. In Boston, MA, educational sociologists helped Judge W. Arthur Garrity design and implement a desegregation plan which required the restructuring of the city's public school system and judicial oversight lasting for a period of twenty years raising questions of legitimacy which have become more important over time. Moreover, the Boston plan embraced an initial commitment to educational enhancement, but the educational outcomes were subsequently marginalized by a desegregation jurisprudence conceptualized in terms of race rather than education and thus largely doomed to fail.

This inquiry takes as its focus a series of memos written by the expert advisors to the judge. They cover more or less every aspect of the Boston schools case but came into the public domain only once the case was closed and the judge donated his chambers papers to the Healey Library, University of Massachusetts in 1997. Little studied by scholars to date, these papers permit questions to be explored in a way which was not possible at the time and provide a focus for exploring contemporary concerns. To that extent, this research breaks new ground.

This work draws on the archival resource to develop narratives of the experts' work which move from the initial underlying legitimacy concerns of traditional liberal analysis towards perspectives which foreground the indeterminacy of legal rights and are thus skeptical of the long-term value of rights-based constitutional litigation. The outline of a theory of the role of the court experts in schools desegregation with which this work concludes constitutes an attempt to theorize the relationship between the judge and his assistants in such a way as to make a further contribution to these debates.

[1] Brown v. Bd. of Educ., 347 U.S. 483 (1954)

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Introduction

I. The Boston Schools Case

When Judge W. Arthur Garrity Jr., chosen at random to hear allegations by NAACP (National Association for the Advancement of Colored People)-backed plaintiffs of systematic discrimination against black students in the Boston public schools, handed down his decision in *Morgan v Hennigan*, he embarked upon a relationship with the Boston public school system and its politics which lasted for over twenty years but the immediate effect was to provoke a political crisis.[2] The scale of the ensuing violence was exceptional even by reference to the turbulence which had accompanied the desegregation process in the South.[3] The litigation and the civil disobedience which it provoked became a cause celebre gaining notoriety for the city and hero status for the presiding federal judge. As elected members of the school committee with overall responsibility for the Boston public schools made clear their intention to take no action towards desegregation except under direct court order, they forced the judge to take over what was in effect a major piece of social policy reform: the restructuring and repositioning of the Boston public school system.

No education expert himself, Judge Garrity opted at an early stage for assistance in the form of four "masters", of whom two were lawyers and two social scientists, and gave them the task of devising a desegregation plan. To equip himself to exercise his own independent evaluation, he secured the appointment of two "court experts", academics with expertise in educational policy, on partial secondment from the University of Boston, who acted more or less as his personal advisers. It was these court experts as key members of the judge's personal team who provided the judge with the expertise he needed to accomplish the task he had undertaken.

In the course of the litigation that followed, Judge Garrity handed down over four hundred orders most of which were heavily contested by a range of interested parties.

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2 Morgan v. Hennigan 379 F. Supp.410 (D. Mass. 1974) aff'd sub nom. Morgan v. Kerrigan 509 F.2d 580 (1st Cir. 1974),cert denied, 421 U.S.963 (1975), enforced, 388 F. Supp. 581 and 401 F. Supp. 216 (D. Mass. 1975), aff'd, 530 F. 2d 431 (1st Cir. 1976).

3 In Little Rock, Arkansas, order had to be restored by federal troops when State Governor Orvil Faubus authorised the use of the national guard to resist the admission of black children to the Little Rock Central High School. *See* Cooper v. Aaron, 368 U.S.1, 8-10 (1958).

These orders were drafted by the judge by and in consultation with his experts. Widely seen as powers behind the judicial throne but not subject to any of the traditional forms of accountability, their advice remained largely behind the scenes and unpublished. It is the assumption of this research that this advice which the judge treated as confidential to him is an important part of the documentary record of this case and thus worthy of study in its own right. It is further assumed that examination of the relationship between the judge and his experts will cast light on the arguments of liberal political theory concerning the inherently anti-democratic nature of judicial activism and add to the debate concerning the so-called limits of rights discourse by providing a concrete example of the difficulties of translating articulations of constitutional rights into long-lasting measures of social change which operate to improve the conditions of life of the plaintiffs for whose benefit the rights have been asserted.

II. Aims of this Investigation

The aims of this investigation are three-fold:

- To undertake an examination of the relationship between court expert and federal judge in the Boston Schools desegregation case by reference primarily to the documentary record.
- To consider the extent to which the relationship raises issues of judicial impropriety or excess of authority.
- To theorise the relationship in such a way as to contribute to debates in legal theory concerning the value of rights-based litigation as a mechanism for achieving lasting social change.

III. Research Questions and Significance

The focus of this research is the relationship between Judge W.Arthur Garrity J., the federal judge charged with supervising the desegregation of the Boston Schools and his team of advisers, specifically his "court experts", the social scientists Robert Dentler and Marvin Scott who assisted his efforts to design and implement an

effective remedy. The research inquires: "why and how did the experts help the judge desegregate the Boston schools?" As, to date, no detailed study of their work has been undertaken answers to these questions will be of importance to everyone who has an interest in the troubled history of Boston's public schools. They assume a more general importance if we ask a number of additional questions.

The first set of questions arises from the nature of the relationship between the judge and his advisers and raises issues of propriety. Was the relationship within the proper bounds of judicial behavior? If not, why not and why was the judge not challenged?

The second set of questions arises out of the first but includes more general questions which relate to debates in legal theory about the strategic value of constitutional litigation. These perspectives might seek to explain the failure of the Boston school litigation to bring about lasting change by reference to the alleged limits of rights-based strategies or rights discourse in the struggle to bring about social change. This research envisages two reciprocal questions: What, if anything, can we say about the Boston experience from this perspective? What does the Boston experience tell us about the nature of law and the possibilities of legal change?

IV. Constructing a Framework of Analysis

Questions of legitimacy in relation to the exercise of judicial power are properly located within the mainstream of liberal political thought which continues to draw heavily on the traditions of John Locke and John Stuart Mill concerning the proper limits to be placed upon the power of the state. [4] Within this tradition, explanations of the nature and boundaries of the judicial role lay stress upon the importance of the proper separation of the judicial function from the other functions of government and rely on conceptualizations of "due process" based upon a commitment to adversarialism and natural justice as the proper characteristics of judicial procedure.[5] This type of discourse also accords weight to the importance of rights as a mechanism for mediating the relationship between citizen and state. Although recent

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4 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 1960 (Peter Laslett ed. 1960); JOHN STUART MILL ON LIBERTY AND OTHER ESSAYS (John Grey ed. 1991).

5 *See* PATRICK DEVLIN, THE JUDGE (1979).

contributions to the literature chart an increasingly global acceptance of the value of the constitutionalization of rights in the liberal democratic state, the history of the desegregation experience in the United States lends support to sceptics who query the ability of law and legal process to bring about social change which endures.[6] Particularly influential has been the work of former NAACP Legal Defense Fund attorney and Harvard law professor Derrick Bell.[7] Bell's skepticism of the value of the NAACP's long-standing commitment to desegregation as a mechanism for improving the quality of education for black children found resonance in the Boston case, influencing the strategies of the black plaintiffs' attorney and contributing to the difficulties experienced by the judge in withdrawing from the case.

It is the assumption of this research that whilst the first set of research questions concerning the issue of propriety falls squarely within the preoccupations of mainstream liberal theory, the second set of research questions requires a critical perspective. By challenging the promise of equal justice for all, the so-called indeterminacy thesis puts into question the assumptions of mainstream liberalism and foregrounds the role of contested power in producing litigated outcomes. A perspective which views the civil rights suit as a site in which the content of constitutional rights falls to be negotiated offers the basis for analysis of the role of experts in school desegregation cases as an important part of the mechanism by which content is given to the scope of the constitutional rights of the Fourteenth Amendment.[8] The basic argument to be developed arises out of the interaction

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6 *See* eg RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

7 *See eg* Derrick A.Bell, *Remembrances of Racism Past: Getting Beyond the Civil Rights Decline* in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 73-82 (Herbert Hill & James. E Jones eds. 1993).(hereinafter "Bell, Remembrances"). *See also* DERRICK A. BELL,SILENT COVENANTS: BROWN V BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM, 196-7 (2004) (hereinafter "Bell, Silent Covenants") (returning to the limits of the Brown decision.: "Rewiring the rhetoric of equality (rather than laying bare Plessy's white-supremacy underpinnings and consequences) constructs state-supported racial segregation as an eminently fixable aberration. And yet, by doing nothing more than rewiring the rhetoric of equality, the *Brown* Court foreclosed the possibility of recognizing racism as a broadly shared cultural condition. In short, the equality model offered reassurance and short-term gains, but contained within its structure the seeds of its destruction").

8 U.S. CONST. Amend. XIV S. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

between the judge and experts as representative of rival discourses of law and social science and is explored in my paper entitled "From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science and Law" which appeared in the fall edition of the Michigan Journal of Race and Law for 2008. My paper draws heavily on sections of this work and a copy is attached hereto.[9]

V. Methodology

A. Source Material and Rationale: The Archival Record

This research examines the relationship between court expert and federal judge in the Boston school desegregation case by reference primarily to the documentary record. This is identified as comprising three principal components all of which are now housed in the Archives and Special Collections Department of the Healey Library, University of Massachusetts (UMASS), Boston:

1 The series of memoranda written between 1975 and 1995 by court experts Dr. Robert A. Dentler and Dr. Marvin B. Scott. These form part of the Judge's chambers papers which he presented to the Library shortly before he died. [10]

2 The four hundred plus court orders handed down by federal court judge W. Arthur Garrity Jr. in the Boston Schools case. These cover all aspects of the desegregation process and reflect the degree of micromanagement on the part of the judge which makes the Boston case distinctive.

3 The court transcripts. These provide a verbatim record of court proceedings and thus a narrative context for the judge's orders and the experts' memoranda.

The judge's chambers papers are extensive and arranged in seventy series comprising fifty-seven ISO cartons. The court experts' memoranda alone comprise thirty-nine folders. There is a helpful Finding Aid prepared by staff of the Archives and Special

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9 Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law* 14 MICH J. RACE & L. 61 (2008).

10 The papers were donated on December 8 1998. The judge died on September 16 1999 aged 79.

Collections Department of the Healey Library, UMASS. [11] It seems however, that the memoranda are not complete, having been edited by Robert Dentler with Judge Garrity's permission and certain papers removed.[12]

As far as the court transcripts are concerned, there are in fact two sets which are available for consultation but it has been a set-back to discover that there are significant gaps in each. [13] The Archives and Special Collections Department, Healey Library, University of Massachusetts houses the papers of the Center for Law and Education which acted for the black plaintiffs in the Morgan litigation. Its papers were donated to the Healey Library on October 30, 1995, by Robert Pressman of the Center who acted in the litigation from start to finish. The papers include a set of transcripts of the various hearings in the schools case but these are incomplete. There is another set of transcripts in the Federal Archive at Waltham, MA. and two trips were undertaken in the course of this research in the hope that the volumes missing from the Center papers might be duplicated in the federal collection. Some gaps have been filled in this way but others remain which are more or less identical in both collections. I have been unable to discover the reason for this, but the fact of the missing material coupled with the need to find a way of managing the large volume of material has had consequences for the design of my research strategy. Thus for example, the treatment of the Boston plan relating to teacher and staff desegregation, parent participation and the various aspects of special needs provision which include bilingual and vocational and occupational education is peripheral only. Similarly, the budgetary problems of the school committee and the city which had considerable impact on the course of the litigation are not dealt with here. Readers seeking narrative details of the former are referred to Dentler and Scott's own account published in 1981, while Adam Nelson's 2005 investigation of the impact of federal funding on the Boston public schools and its relationship with the growth of special

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11 W. Arthur J Garrity Jr. Papers Finding Aid, Archives and Special Collections Department, Healey Library, University of Massachusetts, Boston.

12 Interview with Robert A. Dentler, 14 September 2005, University of Massachusetts, Boston, MA (hereinafter "Dentler 2005").

13 The Archives and Special Collections Department, Healey Library, University of Massachusetts houses the papers of the Center for Law and Education which include a set of transcripts. The Center acted for the black plaintiffs in the *Morgan* litigation. There is another set of transcripts in the National Archives and records Administration's Federal Archive at Waltham, MA.

needs provision during this period contains interesting accounts and much detailed material concerning the latter.[14]

B. Referencing and Citation

Given the large volume of paper material, I have attached considerable importance to the issues of identification and referencing. Having opted for American orthography throughout in the interests of maintaining consistency between commentary and source material, which is virtually all American, I have taken a similar approach in relation to citation. There are two systems in use in American law schools, the so-called "Bluebook" citation manual [15] which is used for court documents and is preferred by law journals, and the citation manual published by the Association of Law Writing Directors (ALWD). This work uses the eighteenth edition of the "Bluebook" supplemented in relation to the Garrity chambers papers by the Healey Library archive reference where appropriate. Thus the reference "90 Garrity XXXVII" indicates the number allocated to the series "Masters and Experts 1973-1997", additional letters connoting the sub-series and folder number. Court documents are identified first by docket number and date as required by the Bluebook and then by reference to the Garrity papers. In similar fashion the court transcripts are identified by court docket number and date as required by the Bluebook. In order to access the transcripts, the Healey Library reference is required. This is "84 Center for Law & Education: Morgan v. Hennigan Case Records, 1964-1994 Series V, Transcripts" (84 Center for Law & Educ.) and this should be taken as the default reference. On the rare occasions when the Healey Library records were incomplete

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14 ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CRISIS (1981) ADAM R. NELSON, THE ELUSIVE IDEAL EQUAL OPPORTUNITY AND THE FEDERAL ROLE IN BOSTON'S PUBLIC SCHOOLS, 1950-1985 (2005).

15 The Bluebook: A Uniform System of Citation (18th ed.). The Bluebook is one of two general citation manuals in use in American law schools, the other being the ALWD Citation Manual. In the absence of specific court rules, court documents and most law journals generally require Bluebook observance. I am indebted to Professor Gary Edles for contributing the following comments: 1) The 11th Circuit requires Bluebook or ALWD Manual, observance. Some circuits require state court decisions to be cited a particular way - e.g., they want both the state and regional reporter citations given -- but otherwise they do not specify anything. The Supreme Court and South Georgia follow their own often peculiar citation format, which does not always correspond to the Bluebook. 2) The ALWD (Association of Legal Writing Directors) Citation Manual has emerged in the past decade or so as an alternative to the Bluebook and its producers claim that it eliminates the confusion, inconsistency, and discrepancies found in the former. For example, in ALWD there is no difference between the way things are cited in a legal brief and a scholarly article. At a rough estimate 90% or more of law reviews still use the Bluebook. Since it is published by the law review editors at Harvard, Yale, University of Pennsylvania, and Columbia, this is likely to continue.

but the Federal Archive supplied the material this is indicated as appropriate by the reference "NARA" (National Archive and Records Administration).

C. Interview Material and Rationale

This research has made only limited use of interview material. The research-gathering process involved three visits to Boston, MA plus a visit to Indianapolis, IN and a total of eight weeks intensive research in the UMASS archive. With the help of the archivist and her assistant, it was possible to compile a more or less complete record of the content of the extant Dentler and Scott memos, the Garrity orders and the court transcripts in so far as they are available.

Interviews with the court experts themselves were regarded as a priority. Robert Dentler who was then in poor health and is now deceased was interviewed twice, once in 2005 at UMASS and the second time the following year at his home in Lexington, MA. Marvin Scott was visited at Butler University, Indianapolis, IN in 2007. The decision to structure Part II of this research around the theme of "race versus education" was a direct outcome of my discussions with Robert Dentler. Whereas Dr Dentler remained closely involved with the Boston schools case throughout the period of judicial supervision, Dr Scott left prematurely in 1981. His knowledge of the later stages of the case, particularly the attempts by the court to disengage and the exit strategy which the Judge devised in order to bring this about, is thus necessarily limited. He did, however, confirm the assumption on which Part II rests that what was important for him on both professional and personal levels, was "integration" rather than "desegregation" and he provided help with constructing a narrative account of the first part of the remedial process.

Insights from all three interviews have generated material which has assisted the construction of narrative and have influenced the selection of topic areas for particular analysis (see section on Method below). I have gained supplementary narrative material from the unpublished doctoral work of Marcia Murninghan who as Superintendent Robert Wood's assistant was a direct participant in the negotiations that took place between the school department, the court and the state that I examine in Part I and the Wood plan discussed in Part II. Her account draws on interviews

which she conducted with some of the major players together with her own experience and may thus be regarded as first-hand.[16] The primary focus of this work however remains the documentary record. The decision to focus the research in this way reflects both practical and academic considerations.

D. Practical Considerations

The extended nature of the litigation which lasted more than twenty years means that the cast of personnel involved in the case is very large and the narrative issues relatively well documented, at least in relation to the earlier part of the litigation. The principal actors (some of whom are by now no longer alive) were interviewed extensively in contemporaneous newspaper coverage. Day to day news reportage appeared in the Boston Globe and other local newspapers and most of the published studies and accounts to date have drawn heavily on this material.[17] Two journalistic accounts reached wide audiences.[18] Robert Dentler and Marvin Scott, the "experts", published their own account in 1981.[19] Whilst it is undoubtedly the case that there are lawyers and educators still working in the Boston area whose personal contributions would enhance a general understanding, the practical difficulties of attempting this kind of research from the UK are considerable. Documentary research is both manageable and, I argue next, academically desirable.

E. Academic Considerations

Academic analysis (as opposed to commentary) of the Boston Schools case has to date been limited. A search of Dissertation Abstracts International (DAI) reveals a large number of doctoral and masters dissertations dealing with aspects of schools desegregation and a number which deal in particular with the Boston experience. In the main, however, the perspective is that of education and the focus is that of evaluation: what has the experience achieved for Boston's public schools? There are

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16 *See* Marsha Marie Murninghan, Court Disengagement in the Boston Public Schools: Toward aTheory of Restorative Law (unpublished Ed. D. Thesis Harvard University, 1983) (on file with Kenrick Library, Birmingham City University, Birmingham U.K.).

17 J. MICHAEL ROSS & WILLIAM M. BERG, " I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER" THE BOSTON SCHOOL DESEGREGATION CONTROVERSY (1981).

18 ANTHONY J. LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985); ALAN LUPO, LIBERTY'S CHOSEN HOME: THE POLITICS OF VIOLENCE IN BOSTON (1977). *See also* THOMAS COTTLE, BUSING (1976).

19. ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL; AN INSIDER ACCOUNT OF THE BOSTON DESEGREGATION CASE (1981).

two exceptions which do take a legal perspective but nothing to date with a focus of the kind outlined here. [20] Most of the material identified above has never been systematically considered by researchers in general and legal researchers in particular.

Judge Garrity allowed researchers access to correspondence he received from members of the public, but refused all requests for interviews or public comment while the case remained on the active docket. After 1985 when he handed responsibility for day to day management back to the School Committee (whilst retaining jurisdiction until he finally closed the case in the early 1990s), he did begin to grant interviews and to speak publicly on the case though few records remain. To date however, scholarly attention has focused primarily on the issue of conflict seen from historical[21] and social anthropological perspectives.[22] In focusing on material hitherto excluded from the public record and the questions which it raises, this research treads upon new ground.

F. Research Strategy and Structure

This investigation pursues two main lines of enquiry: why did the judge use experts and how did the judge use experts? The goal is to arrive at a theoretical explanation which will contribute to the discussion concerning the value of rights-based litigation. To that end, the work is structured in two parts around two main themes: "legitimacy" and "race and education". Part I addresses the first set of research questions (why and how did the judge use court experts?) by reference to the issue of legitimacy. The question here is to what extent the confidential nature of the rapport which was established, particularly with Robert Dentler, undermined the presumption of judicial neutrality which is a fundamental attribute of due process in an adversarial system. By consistently refusing defendants' attempts to depose "the Deans",[23] Judge Garrity shielded them from the adversarial process which requires that all information be produced in open court and available for testing by the familiar processes of

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20 Murninghan, *supra* note 16 and Donald Norman Jensen, School Desegregation in Boston: The Courts and Public Policy (unpublished Ph.D. Thesis, Harvard University 1979) (copy on file with author).

21 RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 1960S AND 1970S (1991).

22 BRIAN J. SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE SOCIAL CHANGE AND LEGAL MANEUVERS (1984).

23 His common term of reference to Drs. Dentler and Scott who were respectively Dean and Associate Dean of Education at Boston University, MA.

examination and cross-examination. Moreover the judge evaded repeated attempts to require him to define in open court the precise nature of the experts' role and the extent of their powers.[24]

At the time he received no serious challenge from the First Circuit on this account but more recently, the judicial climate has changed.[25] The Rehnquist court withdrew its support for the process of institutional reform and the use of civil rights law suits to bring about social policy reform. [26] Circuit courts have become correspondingly more circumspect in their support for judges who use advisors in such cases. In a number of more recent cases outside the field of schools desegregation Circuit courts have upheld allegations of impropriety where judges have had one-sided communications with their advisors outside the courtroom.[27] The question can now be asked: does the documentary record support an inference that the relationship between the judge and his advisors exceeded the boundaries of what would now be considered acceptable judicial behavior?

Consideration of these issues leads into Part II and the second main theme: race and education. This I analyze in terms of a conflict between two imperatives: the legitimacy imperative of law and the "harm-benefit thesis" of social science. I argue

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24 *Infra*, Part 1.

25 The "First Circuit" is one of 12 regional, or "circuit," Courts of Appeal which sit directly below the Supreme Court in America's federal judicial hierarchy and hear appeals from federal district courts within their geographic jurisdiction. Each circuit court is autonomous within its own region, *i.e.*, the precedential decisions of one circuit court are not binding on the others. Collectively, however, they are akin to the Court of Appeals in Britain. *See generally*, PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 83-85 (1989). The federal district court in Massachusetts is geographically part of the First Circuit.

26 The practice of attempting to reform public institutions, usually schools, prisons and hospitals, via injunctive relief from the federal courts, for the purpose of enforcing the constitutional rights of a class of plaintiffs is sometimes referred to as "structural reform litigation". The use of the term 'structural injunction' belongs to Owen Fiss. *See* OWEN FISS, INJUNCTIONS 415-82 (1972) *See generally* Abram Chayes, *The Role of the Judge in Public Law* Litigation 89 HARV. L. REV. 1281; Owen Fiss, *The Supreme Court 1978 Term – Forward: The Forms of Justice*93 HARV. L. REV. 1 (1979).

27 Edgar v. K.L. et al. 93 F. 3d 256 (7th Cir. 1996) (removal of judge and experts ordered on basis of "cozy relationship" which undermined the appearance of neutrality); In re: Phillip A. Brooks 383 F. 3d 1036 (D.C. Cir. 2004) (petition to remove Judge denied because he had stated that he did not receive ex parte communications from Special Masters and Court had no reason to conclude that he abused his discretion by refusing to recuse himself). *See also* Cobell v. Norton 357 U.S. App. D.C. 306, 334 F.3d 1128 (D.C. Cir. 2003) (removal of Special Master ordered on grounds of ex parte communications); cf., Bradley v. Milliken 620 F.2d 1143 (6th Cir. 1980) (no impropriety where post-trial the trial judge attended a meeting with a political body that would be charged with implementing the relief).

that the basic requirement of civil litigation that the successful plaintiff must have a remedy entails that, as an aspect of legitimacy, the objective of the court must be to return the plaintiff to the position that she would have occupied but for the defendant's fault. Two consequences follow: a) the existence of a remedy is predicated on a finding of fault and b) the nature and extent of the fault shapes the form of the remedy. The significance for schools desegregation litigation is that Supreme Court jurisprudence defines "fault" in terms of "racial discrimination". In the absence of evidence of intentional discrimination, legitimacy considerations limited the extent to which Judge Garrity and his advisers could bring about educational reform; the case was a "race" case and not an "education" case. I explore these themes in relation to specific aspects of the Boston plan and its implementation, paying particular attention to the issues of school closings and the Boston Latin schools.

The advantage of this strategy is that it permits theorization of the first set of research questions (why and how did the experts help the judge) in a way which leads into the second set of questions (What does the Boston experience tell us about the nature of law and the possibilities of legal change?). To see the term "desegregation" as a site of contested meaning which the judge and the court expert work together to fill is to understand why it is that Professor Bell has argued that the value of civil rights litigation is inherently limited.[28] In accordance with this approach, the legitimacy issues associated with my first questions are resolved at the end of Part I and are not revisited in my final chapter which does not set out to present a summary of research findings in what may be described as the conventional manner of empirical research. Instead the aim here is to develop a contextual matrix within which to locate an outline of an interpretive theory of the role of the court expert with which this work concludes.

G. Method

The themes outlined above are explored in relation to five main issues: the restructuring of the school department, the receivership of South Boston High School (SBH), the development of a strategy of court disengagement, the desegregation of

[28] *See* Bell, Remembrances and Bell, Silent Covenants *supra* note 7.

the examination schools, and the search for an acceptable facilities plan. The research reconstructs the narrative background of all five areas by reference to court transcripts and other published material, supplemented as appropriate by interview material, and identifies the advice given by the experts which it attempts to correlate with the judge's orders.

In relation to the first and second research aims which seek to uncover and assess the extent of the experts' influence on the decision-making process, the focus is the restructuring of the school department, the receivership of South Boston High School, and the development of a strategy of disengagement. A specific example relating to the difficulties relating to disturbances at South Boston High School illustrates the method and result. Racial conflict at the school required an urgent response from the court and was eventually resolved by removing the head teacher and staff and placing the school under the control of a receiver directly answerable to the federal court. This decision was preceded by a week of hearings in the course of which evidence was received from a range of interested parties, some of whom were directly questioned by the judge. The memoranda disclose that the Judge received from Robert Dentler a list of questions which in his opinion should be put to the principal, Dr Reid. The court transcripts reveal that, to the extent that the questions were not raised by the attorneys involved, the judge himself took the initiative in questioning the witness. The inference of Dr Dentler's influence is readily drawn. Other example situations show Dr Dentler making suggestions to the judge concerning the timing and content of particular orders and submitting to him preliminary drafts. Comparison of the terms of the orders as published or other action taken by the Judge with the recommendations provide a basis for initial conclusions by reference to the criteria outlined above.

The third research aim ([t]o theorise the relationship in such a way as to contribute to debates in legal theory concerning the value of rights-based litigation as a mechanism for achieving lasting social change) is similarly addressed via specific issues, in this case the particular difficulties presented by the requirement for a facilities plan and the problems of desegregating the elite Latin schools. Again, the intention is to undertake a comparison of the judge's orders with the experts' memoranda. This time, however, the expectation was that the experts' recommendations were not accepted by

the judge and the anticipated outcome of the investigation was to expose the disparity between the educational agenda of the experts and the constitutional mandate which confined the judge to matters of intentional racial discrimination. Uncovering the extent to which legal constraints prevailed over educational aims highlights the malleability of the term 'desegregation' which then becomes the basis for a theory of the court expert and a return to Professor Bell's views on the limits of rights-based action as outlined above. [29]

H. Theoretical Toolkit

To explore the assertion that the role of the court expert is to assist the judge in giving content to the term "desegregation", I have relied on two theoretical perspectives which foreground the malleability of the law and legal meaning. The first is the so-called "indeterminacy thesis" associated with the Critical Legal Studies Movement and currently echoed by Critical Race Theorists and asserts the indeterminacy of legal rights as representing the limits of the possibilities of civil rights litigation. [30] I use these arguments to contend the negotiability of the term "desegregation" which opens up a role for social science and the social scientist.

I then re-conceptualize this argument by reference to concepts drawn from post-structural theory, specifically the role of discourse as a vehicle for generating and resolving social antagonism and thus as a channel of social power.[31] I see the desegregation dispute in terms of a clash between two rival discourses; the discourse of law and the discourse of the social sciences. Carol Smart has argued that the power of law lies in its ability to "colonize" and absorb the knowledge of other disciplines, in this case specifically the social sciences.[32] Law is a legitimizing discourse that for a period gave authority to the attempt by education professionals to transform the nation's schools for the benefit of black children. But law is also a hegemonic

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29 *See* Bell, Remembrances and Bell, Silent Covenants, *supra* note 7.

30 *See* eg Lawrence B. Solum L., *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 54 U. CHI. L. REV. 462 (1987); Ken Kress (1989) *Legal Indeterminacy,* 77 CAL. L. REV.283 (1989) Mark V. Tushnet *Critical Legal Theory (without Modifiers) in the United States,* 13 JOURNAL OF POLITICAL PHILOSOPHY 99 (2005).

31 These arguments are generally associated with the French post-structuralist, Foucault *See generally,* Anne Barron, *(Legal) Reason and its 'Others': Recent Developments in Legal Theory* in JURISPRUDENCE AND LEGAL THEORY, COMMENTARY AND MATERIALS (James Penner et al., eds. 2002).

32 *See* CAROL SMART, FEMINISM AND THE POWER OF LAW 20 (1989).

discourse with its own imperatives which will take priority over those of other disciplines. I use this argument to explain the ultimate inability of the social scientist to prevent the re-emergence of the pattern of resegregated schooling which characterized the last decade of the twentieth century and will continue into the foreseeable future.

Finally, I draw on post-structural theory to justify the use of the case study as an appropriate strategy of interpretative endeavor. Specifically, I reference the work of Howarth and Torfing who urge the value of discourse theory in general and the case study method in the toolkit of empirical study of the "core topics" of the social and political world.[33]

I. The Value of Discourse Theory and the Case Study Method for this Research

Barron has commented on the tendency of critical legal theory in the last decade to attempt direct engagement with the themes of contemporary cultural theory which draws heavily upon the methodological and philosophical inquiries of late twentieth century European thought.[34] In line with this trend, this research draws upon some of the analytical tools of post-structuralist theory to construct explanations of the role of the court experts in the Boston schools case and their relationship with the judge. Specifically it employs the concepts of discourse, hegemonic struggle, the empty signifier and the hermeneutic community as a tool for explaining the mechanisms for transfer of power, specifically, in this case, the transfer of the power from the imperatives of one type of discourse (the social sciences) to those of another (the law) and with it, the transfer of political power from elected representatives to the unelected federal judge.

It also embraces a commitment to the value of the case study as a tool of interpretation in the examination of social phenomena. Howarth has said that the main

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[33] Jacob Torfing, *Discourse Theory: Achievements, Arguments and Challenges* in DISCOURSE THEORY IN EUROPEAN POLITICS: IDENTITY POLITICS AND GOVERNANCE (David Howarth and Jacob Torfing, eds., 2005). By "core topics" he means topics from the mainstream of the political and social sciences, ie "other than the 'allegedly 'soft' topics such as gender, ethnicity and social movements", Torfing, *id.* at 25.

[34] *See* Barron, *supra* note 31.

aim of discourse theory is to move beyond the descriptive towards the interpretive.[35] The task is to produce "new *interpretations* either by rendering visible phenomena previously undetected by dominant theoretical approaches, or by problematizing existing accounts and articulating alternative interpretations".[36] This is a task to which the case study with its ability to focus on the tension between the particular as opposed to the general is peculiarly suited. Locating this research within Howarth's fourfold typology of case studies,[37] the Boston schools litigation as an extreme case becomes a dramatic focus to this attempt to offer an interpretation of the desegregation endeavor in terms of the discursive opposition which lies at its heart.

VI. Desegregating the Boston Schools: An Overview

Although Boston never officially segregated its public schools by race, arguably the struggle for racial integration began in 1849 when black parent Benjamin Roberts brought suit against the city in the name of his daughter, Sarah, challenging the city's practice of maintaining separate schools for black students and seeking admission for Sarah to a white school more conveniently situated to her home than the run-down black school to which she had been assigned. In ruling that segregated schools were not per se unconstitutional Chief Justice Lemuel Shaw set a precedent for the decision of the Supreme Court in *Plessy v Ferguson*[38] establishing the doctrine of "separate but equal" which governed the country's race relations until the landmark ruling of *Brown v Board of Education* that the existence of segregated educational facilities, no matter how equal, were inherently unconstitutional. [39]

Whilst the detail of the struggles that have beset the Boston public school system has been well-documented by historians, political scientists, educators and journalists and is in general terms outside the scope of this research, some knowledge of the scale and narrative contours constitutes a necessary part of the contextual background. To that

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35 David Howarth (2005) Applying Discourse Theory: The Method of Articulation in Howarth & Torfing (eds) *supra* note 33 at 320.

36 *Id.*

37 *See* Howarth *supra* note 35 at 330-331 (identifying 1) "extreme or deviant cases" 2) "critical cases", 3) "maximum variation cases", and 4) "paradigmatic cases").

38 Roberts *v.* City of Boston, 59 Mass. 198 (Mass. Dist. Ct. 1849); Plessy v. Ferguson, 163 U.S. 537 (1896).

39 Brown *v* Board of Education 347 U.S. 483 (1954) (*Brown I*).

end I have drawn on the accounts provided by Formisano,[40] Lukas[41] and above all Ross and Berg[42] to now summarize briefly in narrative form the twentieth century events which culminated in Judge Garrity's decision in June 1974 that the city of Boston was unlawfully maintaining a discriminatory dual system. Ross and Berg's account is a more-or-less day-by-day record drawn primarily from contemporary newspaper reportage and has been particularly useful for this purpose. On reaching the point of Judge Garrity's decision, I depart from a narrative in favour of a time line in the hope that this will make for ease of reference by the reader as she progresses through the text that follows.

A. The Pre-Morgan Events

The path that led directly to the federal courtroom may be said to have started in 1965 with the decision of the Massachusetts Board of Education to appoint a committee to study the effects of racial segregation in the state's public schools. At that time the Boston public school system contained forty-five majority non-white schools.[43] As a result of the Kiernan Report's conclusion that racial imbalance in the public schools was educationally harmful and should be eliminated, the state of Massachusetts enacted the nation's first Racial Imbalance Act.[44] The Boston school committee was unsuccessful in its efforts to attack the law as unconstitutional[45] but steadfastly resisted State Board attempts to require it to produce a Racial Imbalance Plan. The school committee and state board engaged in protracted adversary administrative and court proceedings provoking a Department of Justice Office of Civil Rights review in 1970 and in fall 1971 sanctions as the State Board withheld an initial sum of $14 million of funding, the total withheld rising eventually to $52 million.[46]

In August 1971 in order to meet the Board of Education requirements, the Boston school committee voted that the Lee School, newly constructed in black Dorchester, should open with racially balanced enrolments, but a month later, following protests by white parents whose children had been compulsorily assigned to the Lee, the

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40 *See* Formisano, *supra* note 21.
41 *See* Lukas, *supra* note 18.
42 *See* Ross & Berg, *supra* note 17.
43 *Id.*, at 252.
44 MASS.GEN.LAWS ANN. Ch 71 SS37C, 37D (2008).
45 School Committee of Boston v. Board of Education, 352 Mass. 693 (1967).
46 See Sheehan, *supra* note 22 at 79-87.

school committee reversed its decision and the state Board of Education withheld funding in retaliation.[47] The school committee sued in the Suffolk County Superior Court for recovery, the State Board counter-suing on Fourteenth Amendment grounds, thus escalating the conflict to a constitutional issue.[48] In September 1971 attorneys Leubsdorf and Adams of Foley, Hoag & Eliot, representing black clients, met attorneys Flannery, Pressman and Jones representing the NAACP who were developing a class action suit on constitutional grounds and decided to merge their two suits.[49] In March 1972 suit was filed in the Federal District Court alleging governmental discrimination in creating and maintaining a segregated public school system.[50] Judge W. Arthur Garrity Jr. chosen by random selection was assigned to hear the case.

Early in the following year Charles Glenn, Director of the State Education Department's Bureau of Equal Educational Opportunity, prepared a racial balance plan twinning white South Boston with Roxbury, a black area of the city. Professor Louis Jaffe of Harvard Law School conducted public hearings and made recommendations in favour of the state.[51] In October 1973 the Massachusetts Supreme Judicial Court ordered the school committee to put the state drawn plan into effect the following September and in February 1974 the Archdiocesan Board of Education ostensibly lent support by prohibiting all but a few special transfers into the parochial schools.[52] As the policy exempted 172 Catholic schools in the suburbs, many of which promptly admitted "refugees" from the city, this strategy has subsequently been described as "deeply flawed." [53]

On April 3 1974 a crowd of 25,000 people headed by leaders of the anti-busing coalition demonstrated on Boston Common for repeal of the Racial Imbalance Act.[54] The state legislature passed a measure repealing the Racial Imbalance Act which was

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47 Ross & Berg, *supra* note 17 at 79.
48 *Id.*, at 80-82.
49 *See* Lukas *supra* note 18 at 219.
50 Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).
51 Ross & Berg, *supra* note 17 at 82-83.
52 *See* Lukas, *supra* note 18 at 400
53 *Id.*
54 *See* Ross & Berg, *supra* note 17 at 124.

sent to Governor Sargent on May 1. [55] On May 10 1974 Governor Sargent announced a veto of the bill and his intention to introduce replacement legislation employing voluntary rather than mandatory methods of achieving racial balance. An amended version of the Act was passed into law on July 26 1974 but by then had been overtaken by Judge Garrity's finding, released on June 21, that the Boston public school system was an unconstitutional dual system which in the words of the Supreme Court was required to be "eliminated root and branch".[56]

B. The Morgan Litigation: Time Line

June 21, 1974

Federal District Judge W. Arthur Garrity Jr. releases his liability opinion in the case of Morgan v. Hennigan[57] In a judgment of 152 pages he finds that the Boston school committee, the city of Boston and the Massachusetts State Board of Education have intentionally discriminated against the black plaintiffs on the grounds of race. He orders that the school committee:

"be permanently enjoined from discriminating upon the basis of race in the operation of the public schools in the city of Boston and from creating, promoting or maintaining racial segregation in any school or facility in the Boston public school system [...] [and to begin] forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston including all consequences and vestiges of segregation previously practiced by defendants."[58]

As a temporary measure he orders the state racial imbalance plan to be implemented for the school year 1974-7 (Phase 1).[59]

August 1974

The anti-busing pressure group ROAR (Restore Our Alienated Rights) led by Louise Day Hicks asks for a meeting with the two senators, Kennedy and Brooke, in the John F Kennedy Building before the rally planned for September 9. Senator Kennedy attends the rally, is heckled and pelted with eggs and tomatoes by a crowd of eight to ten thousand and is forced to take refuge in the Federal Building, the glass doors of which shatter under the attacks of the crowd.[60]

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55 *Id* at 127.

56 Green v. County Sch. Bd., 391 U.S.430, 438 (1995).

57 Morgan v. Hennigan, 379 F. Supp. 410, (D. Mass. 1974).

58 *Id*, at 484.

59 *Id*.

60 Formisano, *supra* note 21 at 76.

September 12, 1974 — The Boston public schools open. Buses carrying black children home from South Boston High School are pelted with eggs, beer bottles, soda cans & rocks. School bus windows are shattered and nine students injured.[61] In the aftermath Governor Sargeant mobilizes the National Guard. The Pentagon places on standby the 82nd Airborne Division troops stationed in Fort Bragg, NC.[62]

October 31, 1974 — Judge Garrity requires the school committee to submit a desegregation plan by December 16 1974.[63] Five days before the deadline a seventeen year old white boy is stabbed by a black student at South Boston High School. The leader of ROAR Louise Day Hicks is unable to control the crowd.[64]

December 16, 1974 — The Boston school committee vote 3-2 to defy the judge and refuse to submit a plan drawn up by officers of the school department.[65]

December 18, 1974 — Judge Garrity threatens the school committee with receivership and civil contempt proceedings.[66]

January 20, 1975 — The Plaintiffs submit a desegregation plan[67]

January 20, 1975 — The Boston Home and School Association (BHSA) file a desegregation plan[68]

January 27, 1975 — The Boston school committee file a plan allowing parents several options including provisions for once weekly (for elementary pupils) or fortnightly (for middle level pupils) visits by paired black and white schools to a "Third Site" resource center for training and experience in race relations.[69]

January 31, 1975 — Judge Garrity orders the appointment of Drs Robert A. Dentler and Marvin B. Scott as court experts.[70]

February 7, 1975 — Judge Garrity appoints a panel of four masters under Rule 53 Fed. R. Civ. P. to consider the plans already submitted commencing with the school committee's January 27 plan, hold hearings and to make recommendations to the court. The

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61 Ross & Berg, *supra* note 17 at 197-263.
62 *Id,* at 263.
63 *See* Morgan v. Kerrigan, 401 F. Supp. 216, 225-227 (D.Mass. 1975).
64 Ross & Berg, *supra* note 17 at 315-316.
65 *Kerrigan*, 401 F. Supp. at 215-227.
66 *Id.*
67 *Id.*
68 *Id.*
69 Ross & Berg, *supra* note 17 at 367.
70 *Kerrigan,* 401 F. Supp. at 227.

	masters are required to consult the court experts in evaluating the plans. The masters hold hearings over a two-week period and after hearing argument addressed to a draft report, issue their final report on March 31 1975.[71]
March 31, 1975	The masters submit their plan to Judge Garrity[72]
April 10, 1975	Hearings on objections to the masters' report are convened. Judge Garrity calls for updated data from the school committee.[73]
April 17, 1975	The district court issues its draft revision of the masters' report[74]
April 18, 1975	The district court hears comments.[75]
April 1975	Marion Fahey is named as the new superintendent of schools[76]
May 10, 1975	The court issues its desegregation plan/decision on Phase II. The court plan creates citywide magnet district and community school districts as well as closing numerous schools, creating college/university-school pairings, requiring more busing and reassigning students once again. The plan, however, leaves out East Boston. The plan also creates citizen participation groups and calls for a Citywide Coordinating Council (CCC) to monitor implementation of desegregation court orders. The plan has many firsts for school desegregation cases: it is the first time a citizen group is given authority to monitor, and the first time a desegregation case combined quality of education with desegregating the schools. The court also appoints an ad hoc committee of three attorneys to assist in obtaining support from colleges and universities and to conduct discussions regarding implementation with college and university personnel.[77]
June 1975	The court authorizes the court-appointed experts to resolve some remaining issues relating to facilities utilization, program allocation and enrolment limits. Subsequently each of these actions are challenged before the First Circuit[78]

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71 *Id.*
72 *Id.*
73 *See* Dentler & Scott, *supra* note 14 at 25-26.
74 *See* Morgan v. Kerrigan, 401 F. Supp. 216, 225-227 (D. Mass. 1975).
75 *Id.*
76 *See* Sheehan, *supra* note 22 at 152-153.
77 *See* Morgan v. Kerrigan, 401 F.Supp. 216 (D. Mass.1975).
78 *See* Morgan v. Kerrigan, 530 F.2d 401(1st Cir. 1976)

November 1975	Plaintiffs move to close South Boston High School (SBHS) alleging that black students were being denied a peaceful, integrated and non-discriminatory education. The court holds lengthy hearings and makes several visits to the school.[79]
December 9, 1975	The court orders the temporary receivership of SBHS effective as from 10/12/75. Area Superintendent Joseph McDonough is appointed receiver. Superintendent Fahey is given enhanced powers regarding safety and implementation. [80]
December 11, 1975	The court removes school committee authority over the Office of Implementation and places it under the control of the Superintendent.[81]
January 9, 1976	Superintendent Marion Fahey takes over as receiver of South Boston High School[82]
January 14, 1976	The First Circuit upholds the court desegregation plan[83]
April 5, 1976	Black lawyer Theodore Landsmark is attacked by a Charlestown mob advancing on the Federal Courthouse. The picture makes the national and international press.[84]
April 1976	Jerome Winegar is appointed Head of South Boston High School.[85]
May 1976	The court announces Phase IIB of the desegregation project emphasizing continuity and stability. The order leaves intact the major elements of Phase II such as the nine school districts, magnet schools and university involvement, but orders a number of minor changes to reflect a reduced and increasingly non-white student body. [86]
September 1976	Phase IIB begins amidst confusion over the costs of financing the desegregation plan estimated at $22 million. Teachers strike against reductions in force following Mayor White's decision to cut the budget request from the school committee by $30 million[87]

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79 *See* Morgan v. Kerrigan, 409 F.Supp. 1141 (D. Mass. 1975).

80 *Id.*

81 *See* Transcript of Hearing of Dec. 9 1975, 94, Morgan v. Kerrigan, No.72-911-G (D. Mass. 1975) (NARA).

82 *See* Morgan v. McDonough, 540 F.2d. 527 (1st Cir.1976).

83 *See* Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976).

84 *See* Formisano, *supra* note 21 at 150.

85 *Id.* at 117.

86 Morgan v. Kerrigan, Memorandum and Orders Modifying Desegregation Plan No.72-911-G (D.Mass. May 3 1976).

87 Sheehan, *supra* note22 at 165-169.

May 6, 1977	Phase III orders are issued calling for the establishment of conditions to enable the court to terminate its jurisdiction. The court orders the creation of a permanent Department of Implementation (DI) with responsibility for implementing court orders and calls for the parties to work together as joint planners to produce a United Facilities Plan (UFP) which will be a long-range plan for construction and repair of facilities. The DI is in existence by July 1977.[88]
September 1977	Phase III begins. Monitoring duties are transferred from the court-ordered Citywide Coordinating Committee to the Department of Implementation.[89]
November 1977	John O'Bryant becomes the first African-American to serve on the Boston school committee since 1901. Anti-busing leaders Louise Day Hicks, John Kerrigan and Elvira "Pixie" Palladino fail to gain re-election to City Council. With the election of a moderate school committee direct opposition to busing fades but is replaced by opposition to school closings and revision of the geocodes which are the basis for student assignments. A coalition of teachers and parents begins to emerge. Dentler and Scott later state: "no development in the entire case compares with this one in significance" [90]
March 21, 1978	School closings issues dominate the court agenda. The court rejects the proposed UFP and calls for a plan which will meet future needs and gain the understanding and support of parents and community groups.
July 1978	After a nationwide search Dr. Robert Wood is appointed as Superintendent of Schools, the first such appointment from outside the Boston public school system.[91]
August 1978	The court terminates the receivership of South Boston High School[92]
June 1979	Judge Garrity lists the criteria for federal district court withdrawal from the *Morgan* case.
October 3, 1979	The Joint Planners publish a draft UFP which becomes known as the "Green Book".[93]

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88 Morgan v. McDonough, Memorandum and Orders Modifying Desegregation Plan No. 72-911-G (D. Mass. May 6 1977).

89 *Id.*

90 Dentler & Scott, *supra* note 19 at203.

91 Robert Wood, *Looking Back Without Anger: Reflections on the Boston School Crisis* 120 NEW ENG. J.PUB. POL'Y 19, 20 (2005).

92 Morgan v. McDonough, 456 F.Supp. 1113 (D. Mass. 1978).

93 Morgan v. McDonough, 689 F. 2d 265,269-272 (1st Cir. 1982).

November 29, 1979	As a result of Superintendent Wood's intervention, plans for "linkage" and "beacon" schools are put forward for approval. The number of schools put forward for closing is reduced from sixteen to ten. [94]
January 1980	Hearings are held into the Wood plan. The proposals are supported by the school committee but the court expresses dissatisfaction.[95]
April 2, 1980	Judge Garrity rejects the proposals for linkage and beacon schools and adds two more to the list of schools scheduled for closing. School defendants seek a stay of the school closing orders and appeal to the Court of Appeals contending the District Court exceeded its authority[96]
April 30, 1980	Attorney Johnson for the plaintiffs withdraws opposition to the motion for a stay of the school closings orders which is then granted.[97]
September 1980	With the rejection of his plan Superintendent Wood loses the confidence of the school committee and is fired - ostensibly for budgetary reasons.[98]
June 1981	Judge Garrity asks all parties in the desegregation case to prepare a Consent Decree so that he can withdraw from the case. Negotiations chaired by State Education Commissioner Anrig commence.[99]
July 1981	Marvin Scott retires from the case for personal reasons. Robert Dentler continues as sole court expert.[100]
February 1982	Attorney Johnson withdraws from the consent decree negotiations. Thomas Atkins, General Counsel for the NAACP, moves for permission to replace him. Judge Garrity agrees that both attorneys may represent the plaintiffs.[101]
June 1982	Judge Garrity loses faith in the consent decree negotiations and embarks upon active direction of the disengagement process.[102]

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94 *Id.*

95 *Id.*

96 *Id.*

97 *McDonough,* 689 F. 2d at 273 n.11.

98 *See* Dentler & Scott, *supra* note 19 at 235.

99 *See* Morgan v. McDonough, Memorandum and Draft Orders Toward Closing Case, No. 72-911-G (D. Mass. Aug. 3 1982).

100 By letter of resignation dated July 26 1981. *See* Letter Garrity to Scott Aug. 21 1981 (90 Garrity LVXII Judge's Reference File f 11).

101 *See* Morgan v. McDonough, Memorandum and Draft Orders Toward Closing Case No 72-911-G (D.Mass. Aug. 3 1982).

102 *See* Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

August 1982	Judge Garrity issues his draft final order designed to establish a transitional mechanism for terminating the court's involvement with the Boston public schools and proposing to appoint Robert Dentler as special master with responsibility for compliance monitoring.[103]
September 1982	Attorney Johnson for the plaintiffs files a motion for a "freedom of choice" desegregation plan. The Court of Appeals for the First Circuit upholds Judge Garrity's orders rejecting the linkage and beacon proposals but warns the district court not to interfere with educational matters that are properly the province of the state: desegregation is not per se a mandate to equalize schools.[104]
December 1982	In the face of universal opposition, Judge Garrity abandons proposals to appoint Robert Dentler as special master. He gives the Department of Implementation responsibility for desegregation implementation and the State Board of Education responsibility for compliance monitoring. He establishes a dispute resolution mechanism but retains default jurisdiction.[105]
July 1985	Dr Laval S. Wilson becomes the first African-American selected by the Boston school committee to be superintendent.[106]
	Judge Garrity issues draft final judgment and notice of hearing.[107]
September 1985	Judge Garrity having terminated permanently the court's original remedial orders regarding student transportation, bilingual education, school safety, and security, and school discipline, issues "final orders" in areas where compliance has not yet been achieved including vocational and occupational education, school facilities, student assignments, staff desegregation and parent and student organizations and requiring implementation of the Unified Facilities Plan (approved contemporaneously).[108]
	Between May 1990 and July 1994 the final judgment is amended four times, three times by the district court and once by the Court of Appeals[109]

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103 *See* Morgan v. McDonough, No. 72-911-G (D. Mass. August 3 1982) (Memorandum and Draft Orders Toward Closing the Case).

104 *See* Morgan v.McDonough, 689 F.2d 265, 275-277(1st Cir. 1982).

105 *See* Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

106 ADAM R. NELSON,THE ELUSIVE IDEAL: EQUAL OPPORTUNITY AND THE FEDERAL ROLE IN BOSTON'S PUBLIC SCHOOLS, 1950-1985 239-40 (2005).

107 *See* Morgan v. Nucci, 620 F. Supp. 214, 220 (D. Mass. 1985).

108 *See Nucci,* 617 F. Supp. 1316.

109 *See* Morgan v. Gittens, 915 F. Supp. 457, 460 n.2 (D. Mass. 1996).

September 1987	The Court of Appeals for the First Circuit holds that the Boston public school system has attained unitary status regarding student assignments and vacates the district court orders. The orders requiring continued compliance with hiring practices to ensure a faculty and staff consisting of not less than 25% black and 10% other minority personnel are affirmed as these will expire naturally when the targets are reached.[110]
December 1988	Consultants Michael Alves and Charles V. Willie, hired by Mayor Raymond Flynn to develop a new student assignment plan, propose a Controlled Choice plan which is accepted by the Boston school committee. Shortly afterwards the school committee votes to continue the set-aside for black and Hispanic students of 35% of seats at the examination schools, thereby converting it into a voluntary affirmative action program.[111]
February 1991	The Court of Appeals for the First Circuit dismisses an appeal by the teachers union against Judge Garrity's orders regarding faculty and staff desegregation. The record showed that unitariness in these areas had still not been achieved.[112]
August 1996	Judge Garrity grants Julia McLoughlin, a student challenging the voluntary affirmative action program on equal protection grounds, a preliminary injunction enjoining the school committee from denying her admission to Boston Latin School.[113]
November 19, 1998	The First Circuit finds the admissions policy for the public examination schools which included racial/ethnic guidelines to be insufficiently narrowly tailored to withstand strict scrutiny and therefore unconstitutional.[114]
July 12, 2004	The First Circuit dismisses appeals from district court rulings that the city's neighbourhood school assignment plan which was facially race-neutral was "rationally related to achieving legitimate governmental interests in fostering excellence, equity and diversity through access and educational opportunity throughout the public school system" and therefore did not violate the Equal Protection Clause.[115]

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110 *See* Morgan v. Nucci, 831 F.2d 313 (1st Cir, 1987).

111 *See* McLaughlin v. Boston Sch. Cee, 938 F.,Supp. 1001,,1006-1007 (1996).

112 *See* Morgan v. Burke, 926 F.2d 86 (1st Cir. 1991); cert. denied Boston Teachers Union v. Morgan, 503 U.S. 983 (1992).

113 *See* McLaughlin v. Boston School Committee, 938 F. Supp. 1001 (D. Mass. 1996).

114 *See* Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

115 *See* Anderson v. City of Boston, 375 F.3d 71 (1st Cir. 2004).

Part One: Legitimacy and the Use of Court Experts in Boston

I. Introduction: Research Questions and the Significance of Legitimacy

> *(A) judge's actions must conform to that narrow band of conduct considered appropriate for so antimajoritarian an institution. Whenever a court appears to manipulate the rules of litigation for the attainment of social outcomes, its authority wanes.* [116]

This section addresses research questions one and two: "why and how did the judge use experts?" by reference to the issue of legitimacy. It assumes that Judge Garrity used experts a) because this was the standard pattern of dealing with school desegregation suits where school boards were uncooperative and b) because he required expert assistance to help him understand and evaluate complex issues of educational policy and management,[117] but suggests that the use of experts in this way is problematic from the perspective of fundamental conceptions of due process as they prevail throughout the common law world. Specifically, considerations of adversarialism and the need to set limits to the judicial role are reflections of the concern with the legitimation of public power which permeates traditional legal ideology and represents the traditional focus of liberal political theory.[118] This is a tradition which conceptualizes justice in terms of due process, and correct outcomes as a function of the consistent application of rules and adjudicative procedures based upon a commitment to principles of neutrality and participation.[119] From this perspective a confidential relationship between judge and private advisor is problematic to the point of illegitimacy.

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116 Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions,* 65 VA. L. REV. 43, 104 (1979).

117 Morgan v. Kerrigan, 530 F. 2d 401, 430 (1st Cir. 1976). Boston School Committee objected to district court orders requiring court experts to supervise student assignments and the nature of instruction. Per the First Circuit citing Hart v. Community School Board of Brooklyn, 383 F. Supp. 699, 764-67 (E.D.N.Y. 1974) aff'd, 512 F.2d 37 (2d. Cir. 1975): 'We see nothing unusual in these orders. Experts are commonly used to assist the court in planning desegregation [...]_and under the circumstances of this case were justifiably used to assure implementation as well'. 530 F.2d at 430.

118 Nicola Lacey, *The Jurisprudence of Discretion* in THE USES OF DISCRETION, 370 (Keith Hawkins ed. 1994).

119 The so-called rules of natural justice: *nemo iudex in causa sua potest* (no-one can be judge in his own cause) and *audi alteram partem* (hear both sides).

Legitimacy arguments in connection with the use of judicial power can be couched in terms of absence or excess of power on the one hand or improper exercise or abuse of power on the other[120]. In Boston Judge Garrity deflected challenges to his experts which were couched in terms of legitimacy but represented thinly disguised attempts to reject his authority.[121] School committee arguments of absence or excess of power failed because the underlying purpose was civil disobedience and the First Circuit was supportive of the judge.[122] Since then more recent judicial pronouncements provide a framework for alternative arguments formulated in terms of abuse which might have been more successful. This chapter examines the underlying assumptions of these arguments and considers the relationship between Judge Garrity and his court experts by reference to the Dentler and Scott memos. This material which was not available to attorneys at the time but is now in the public domain forms the basis for the narrative constructions which follow.

II. Structure

This section has three main chapters. Chapter 1 introduces the role of the court expert in the context of a desegregation suit then problematizes it by reference to considerations of adversarialism and due process as they apply to the use of judicial assistants in a common law jurisdiction. It notes that although the use of court experts in desegregation planning was sanctioned by the Supreme Court,[123] in different contexts and more recently case law has recognized its problematic potential.[124]

For the purposes of developing a critical matrix, I identify two themes for discussion. The first derives from the suggestion of the Seventh Circuit in *Edgar v. K.L*[125] that "excessive coziness" between judge and expert can undermine the presumption of judicial neutrality. The extent to which the use of court experts or advisors will raise an appearance of partiality when the appointment is not per se improper and has

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120 *See* D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION, (1992) at 8 and note the parallels with Professor Dworkin's terminology of strong versus weak discretion discussed in Galligan at 14. The literature is reviewed at 18, n. 9. *See* also Hawkins (ed.) *supra* note 118 for a useful collection of essays which analyze both the concept of discretion in judicial and extra-judicial contexts and the limitations to which it may be subject.

121 *Infra*, Section II.

122 *Id.*

123 Swann v. Charlotte- Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (aff'g without comment the decision of MacMillan J. at 306 F. Supp. 1299 (W.D.N.C. 1969)).

124 *Infra* note 139 and accompanying text.

125 93 F. 3d 256 (7th Cir.1996).

indeed been actively encouraged in complex or difficult cases is not clear.[126] I suggest that the apparent willingness of some courts to adopt justificatory arguments to legitimize ex parte communications between judge and experts reflects instrumental considerations relating to the efficiency of the decision-making process but concerns with the appearance of neutrality arise out of a normative commitment to adjudicative fairness which underpins common law conceptualizations of due process.[127]

The second arises out of recent attempts by some circuits and notably by Ninth Circuit Judge Tashima to develop procedural guidelines for transparency and disclosure where a court uses a technical advisor and raises similar issues.[128] I argue that requirements designed to bring onto the record the nature and content of all advice received address considerations of adversarialism which are primarily instrumental in character; evidence which has been tried and tested in open court produces good decisions and transparency facilitates appellate review,[129] but the relationship of prophylaxis to issues of appearance has been insufficiently explained and discloses a tension between the normative and instrumental concerns of due process which remains largely unresolved.

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126 *See* Justice Breyer's concurrence in General Elec. Co. v. Joiner, 522 U.S. 136, 149-521 (1997) citing with approval an amici brief filed on behalf of the New England Journal of Medicine to the effect that "[j]udges should be strongly encouraged to make greater use of their inherent authority... to appoint experts". Justice Breyer's concurrence was relied upon in MediaCom Corp. v. Rates Tech., Inc., 4 F. Supp. 2d 17, 29 (D. Mass. 1998) and Ass'n of Mexican-American Educators v. California (AMAE), 231 F.3d 572, 590 (9th Cir. 2000).
See also Justice Breyer's remarks at the American Association for the Advancement of Science's annual meeting in Philadelphia: *Justice Breyer calls for Experts to Aid Courts in Complex Cases*, New York Times, Feb 17 1998 at A17. The Court-Appointed Scientific Experts (CASE) project launched in 1998 by the American Association for the Advancement of Science ("AAAS") offers help to federal judges seeking to appoint experts and may lead to an increase in the use of technical advisors. *See* Robert L. Hess II, Note, *Judges Cooperating With Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547, 580-582 (2001) and www.aaas.org/spp/case/case.htm.

127 *See* Gerry Maher, *Natural Justice as Fairness* in THE LEGAL MIND: ESSAYS FOR TONY HONORE, 103, 110-119 (Neil McCormick & Peter Birks eds. 1986) (arguing that the normative basis for natural justice arises out of 'respect for the moral personality of those involved in decisions which may adversely affect their interests' when, as members of civil society, they have given up their right to judge in their own cause and thus become entitled to an unbiased judge. *Id* at 118, 116 and note his suggested parallels with Laurence H. Tribe's reasoning in respect of the due process provisions of the United States Constitution, *Id.* at 115, n.29).

128 *AMAE*, 231 F.3d at 611 (9th Cir. 2000) Judge Tashima dissenting; applied in Techsearch, L.L.C. v. Intel Corporation, 286 F.3d 1360, 1378, 1379.

129 *See AMAE*, 231 F.3d 572, 611.

In chapters II and III I move the focus from the general to the particular as represented by the Boston schools case via the mechanism of narrative development. Chapter II considers a narrative of illegitimacy as it was articulated by counsel for the Boston school committee. The narrative was formulated in terms of judicial excess but the judge's chambers papers donated to the Archives and Special Collections Department of the Healey Library at the University of Massachusetts Boston Library one year after the case was closed in 1997 reveal for the first time the extent of the confidential relationship between the judge and his advisors and suggest an alternative framed in terms of abuse.[130] Chapter III draws upon the court experts' confidential briefing memoranda which span a period of over twenty years to develop this second narrative by reference to specific themes which characterized the Boston litigation and defined its problematic character. To the extent that they shaped the experts' work, these themes provide both context and focus for this inquiry and the contours of a retrospective appraisal.

It has been asserted that the right to an independent adjudicator 'constitutes the floor of due process.'[131] In the United States as elsewhere in the common law community, the commitment is generally to an objective standard and an analytical framework which poses questions of judicial independence or neutrality in terms of the perception of a hypothetical observer.[132] This reflects common law conceptualizations

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130 Federal Circuit courts apply an abuse of discretion standard of review in recusal cases (*See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, § 33.1 (2d. ed. 2007) (hereinafter 'Judicial Disqualification')) This is a lenient standard of review which is deferential to the trial judge's decision. (MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE, § 5.06 (3d ed. 1999). *See* generally Reilly v. U.S., 863 F.2d 149, 156-57 (1st Cir. 1988). Accord In re School Asbestos Litigation, 977 F.2d 764, 778 (3d Cir. 1992) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 31 (1943) and Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1816-20 ([The inherent jurisdiction] "may not be exercised in a way that amounts to an abuse of discretion, as determined by the appropriate appellate court." *Id.* at 1820); Less deferential standards including 'de novo', 'plain error' and 'clearly erroneous' standards have been applied by state courts in recusal cases (*See* Flamm, Judicial Disqualification, § 33.1).

I do not however use the term in this sense but rather to connote the difference between absence of power on the one hand and failure to exercise a power in accordance with 'correct' considerations. *See* Galligan, *supra* note 120. The agenda of this paper is to highlight the need for new guidelines to shape review in this context. On this *see* In re Kensington Intern. Ltd, 368 F.3d 289, 301 n.12 (3d Cir. 2004).

The Garrity papers are filed as Series 90 Garrity, Archives and Special Collections, Healey Library, University of Massachusetts, Boston, MA (hereinafter 90 Garrity).

131 Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Due Process*, 95 YALE L.J. 455, 479 (1986). For the origins of the requirements of due process in 'the rich tradition of English constitutionalism' *see* John V. Orth, DUE PROCESS OF LAW: A BRIEF HISTORY, 8 (2003).

132 Liteky v. United States, 510 U.S. 540, 548 (1994); Liljeberg v. Health Services Acquisition

of natural justice as they have developed since the time of Lord Chief Justice Coke: justice must not only be done but must be seen to be done,[133] but articulation of the precise requirements raises questions to which both foreign and national courts have struggled to provide workable answers: Who is the observer? What does she know? What is she looking for? The Supreme Court has recently had an opportunity to grapple with these issues[134] but United States' formulations do not differ in principle from those of fellow jurisdictions and all raise difficult questions concerning the relationship between substance and appearance in common law grounded principles of adjudicative fairness. [135]

In cases involving the use of court experts where questions of judicial propriety arise from the closeness of the relationship and generally also involve the status of ex parte communications, the shift of emphasis from appearance to justification which the case law discloses has implications for the wider issue. When the purpose of inquiry is formulated in terms of perception and justification (did the special circumstances of the case justify the appearance of 'partiality'?) the answer is likely to depend upon the view the review court takes concerning issues of fact: Was there in fact an improper delegation of judicial function? Was the judge in fact improperly influenced by matters which were not tested via the normal mechanisms of adversarial procedure? The danger then is that the distinction between substance and appearance upon which conceptions of judicial propriety have traditionally drawn is eroded. In attempting some conclusions this paper revisits the legitimacy theme with which this inquiry

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Corp., 486 US 847, 860 (1988). For analyses of recusal standards in foreign common law jurisdictions see R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices,* 62 WASH. & LEE L. REV. 1799, 1814-1829 (2005).

133 *See* Lord Coke's formulation:" *quia aliquis non debet esse judex in propria causa, imo iniquum est aliquem sui rei esse judicem"* (because no one ought to be a judge in his own cause, it is wrong for anyone to be the judge of his own property) in Dr. Bonham's Case, 77 Cong. Rep. 646, 8 Coke 114(a) (1610). For a well-known formulation of this principle see Lord Hewart LCJ in R v. Sussex JJ ex p. McCarthy, [1924] 1 K.B. 256, 259 "(it) is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" and Justice Frankfurter's reformulation: "justice must satisfy the appearance of justice" (Offutt v. United States, 348 U.S. 11, 14 (1954)). See generally Redish & Marshall *supra* note 131 and at 480 (arguing that_concern about "potential adjudicatory bias" came into constitutional jurisprudence via the English common law and that the terms of Article III of the United States Constitution "reflect the framers' sensitivity to the problem"). Richard E. Flamm suggests that early English common law required recusal only where there was a direct proprietary interest and that the extension of British recusal jurisprudence to concern with bias was a nineteenth century development. *See* http://www.cce-mcle.aom/tests/ss6005a.htm and Flamm, (Judicial Disqualification) *supra* note 130 at § 1.4.

134 Caperton v. A.T. Massey Coal Co., Inc., _U.S._, 129 S.Ct. 2252 (2009).

135 *See* Pearson, *supra* note 132 at 1814-1829.

began and asks once again whether the pursuit of legitimate ends can justify the adoption of procedures which fit uncomfortably with fundamental intuitions of due process and thus threaten the legitimacy of the ends they have been employed to achieve.

Chapter One: Court Experts in an Adversarial System of Justice

I. Court Experts and the Desegregation Toolkit

By 1975 when Judge Garrity had to devise a strategy to deal with the defiance of the Boston school committee, the court expert or advisor had become a recognized part of the desegregation toolkit. In 1969 in a case which provided the pattern for Northern schools desegregation, Judge McMillan rejected a plan submitted by the school board for Charlotte-Mecklenburg, NC and ordered the appointment of a "consultant" to prepare a new plan and make desegregation recommendations in accordance with the legal and practical guidance outlined in his opinion. [136] This was not however, the first time that this had been done. In Oklahoma, when the city Board of Education refused a request to employ experts who were "competent, qualified, unbiased, unprejudiced, and independent of any local sentiment",[137] Judge Bohanon issued an order directing four experts to carry out a study and file a desegregation report which was then adopted by the Court[138]. In New York, Judge Weinstein, claiming to follow Judge McMillan, appointed housing expert Curtis J. Berger as his advisor with the status of "Special Master"[139] and undertook a review of federal court authority in this field, concluding that both the inherent remedial jurisdiction and Rule 53 of the Federal Rules of Procedure permitted the appointment of expert advisors to "bridge the gap between the court as impartial arbiter of plans placed before it and advocates protecting their clients' positions that are often narrower than that of society at large."[140]

In Boston, Judge Garrity responded to the refusal of the elected school committee to submit a constitutionally acceptable desegregation plan by appointing a panel of four masters assisted by two experts to conduct hearings and produce a plan in accordance

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136 Swann v. Charlotte-Mecklenburg Bd. Of Educ., 306 F. Supp. 1299 (W.D.N.C. 1969), 1308. *See generally* DAVISON M. DOUGLAS, READING, WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS (1995). For a discussion of McMillan's order, see B. SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986) Ch 1.

137 Dowell v. School Bd. of Oklahoma City Public Schools, 244 F. Supp. 971, 973 (244 D.C. Okl. 1965).

138 *Id.* at 973.

139 For a discussion of the nature of the task and the way in which he went about it *see* Curtis J. Berger, *Away From the Courthouse and Into the Field: The Odyssey of a Special Master*, 78 COLUMBIA L. REV. 707 (1978).

140 Hart v. Community School Board, 383 F. Supp. 699, 764 (E.D.N.Y.1974).

with guidelines set out by him.[141] When members of the school committee asserted that they would obey only the direct orders of the court, the judge assumed direct responsibility for the implementation of the court desegregation plan and retained the experts to assist him, although he never formally defined their role. Such was the magnitude of the task that the judge retained active involvement for a period of 10 years[142] and default jurisdiction thereafter. During much of this time the court experts became the judge's private advisors and the visible manifestation of his authority outside of the federal court room.

Whilst Judge Garrity was successful in resisting challenges to his experts' authority and indeed did everything he could to enhance their apparent status[143] he was undoubtedly aware that District Judge Battisti's use of academic advisors in Cleveland had attracted the disapproval of the Sixth Circuit.[144] Noting that the academic advisor appointed to assist the special master had met with the court and the judge's law clerks on a number of occasions and that he had written memoranda and drafted orders for the judge, the appeal court concluded that the academic "functioned frequently as an advisor to the court on constitutional law issues. These activities and communications did not occur in open court and the parties had no opportunity to question [him] as a witness."[145] To that extent there had been a "partial abdication" by the judge of his judicial role.[146]

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141 *See* Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass. 1975).

142 In 1982 he returned responsibility for implementation to the school committee subject to the supervision of the State Board of Education. See Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982). In 1985 he removed the case from the active docket whilst retaining default jurisdiction. Morgan v. Nucci, 620 F. Supp. 214 (D. Mass. 1985).

143 By for example, insisting that they be addressed by their academic titles. *See* Dentler (2006) *infra* note 197.

144 Reed v. Cleveland Board of Education, 607 F.2d 737 (6th Cir. 1979).

145 *Id.* at 747.

146 *Id.* "[W]e do not approve the practice of appointing legal advisors to a master or the court. To the extent that the master was not qualified to make recommendations to the court because of a lack of experience in constitutional law, he should have submitted such legal issues to the court. The court could rely on his own experience and learning and the assistance of his staff and all counsel in the case. The District Judge clearly had no intention to abdicate his judicial responsibility in this case. Nevertheless, to the extent that he relied on advice received in chambers from a "legal expert" there was a partial abdication of his role. [...] [T]he adversary system as it has developed in this country precludes the court from receiving out-of-court advice on legal issues in a case. He must depend on his own resources, which include the work of his staff and the offerings of counsel". *Id.* at 747-748.

II. Adjudication in an Adversarial Model of Justice

Models of adjudication commonly distinguish between the procedure of the civil law deriving from Roman law which characterizes the legal systems of the countries of mainland Europe and their former colonies and the procedure of the common law which is found throughout most of the Anglophone world and in particular in the U.K. and North America. Civil law procedure is said to be "inquisitorial" whilst that of the common law is termed "adversarial". The difference lies in the role of the Court, specifically the role of the judge. The inquisitorial model is said to posit a much more active role for the judge than that of "adversarialism" which sees the judicial role as primarily passive in character. [147]

Recent research has tended to question the extent to which such a juxtaposition accurately represents the degree of difference between the two models and points to the effects of late twentieth century changes which suggest that the two models may be moving towards convergence.[148] Nevertheless it is true to say that as ideal types there are significant differences of emphasis with implications for conceptualizing the role of the judge. Broadly speaking an adversarial system is one in which the judge assumes the passive role of a neutral adjudicator. Responsibility for the production of evidence rests with the parties who have control over the way in which they construct

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147 P. DEVLIN, THE JUDGE (1979). *See also* Jerold H. Israel, *Cornerstones of the Judicial Process,* KANSAS J. OF L. & PUB. POLICY, Spring, 1993; G.E.P. Brouwer, *Inquisitorial and Adversarial Procedures: A Comparative Analysis,* 55 AUSTRALIAN L.J. 207 (1981); Amalia D. Kessler *Our Inquisitorial Tradition: Equity Procedure, Due Process and the Search for an Alternative to the Adversarial,* 90 CORNELL L. REV. 1181 (2005). A classic text is Lon L. Fuller, *The Adversary System,* in TALKS ON AMERICAN LAW, 30 (Harold J. Berman ed. 1961).

148 Kessler *supra* note 147 at 1248-1250.
As Professor Resnik has pointed out adversarialism in the United States has always been qualified: 'The American system was not, of course, purely adversarial. Inquisitorial traits included the right of the state, as personified by trial judges, to exercise some control over the evidentiary process: judges could summon or exclude witnesses and comment on testimony. Nevertheless, our tradition is considered more adversarial than most, and its basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute." Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 381-82 (1982) (hereinafter "Resnik, Managerial Judges"). See also Judith Resnik, *Whither and Whether Adjudication,* 86 BOSTON U. L. REV. 1101, 1125 (2006) (hereinafter "Resnik, Whither and Whether") (commenting on the move from formal adjudication in favor of alternative methods of ADR, support for which can be in some measure attributed to dissatisfaction with adversarial process).
In the United Kingdom, the introduction in 1998 of new Civil Procedure Rules represented an attempt to bring about a change of culture away from the party control of classic adversarialism in favor of a new culture of judicial case management in the interests of efficiency. *See* Deirdre Dwyer, *Changing Approaches to Expert Evidence in England and Italy,* INTL. COMMENTARY ON EVIDENCE, Vol. 1 No. 2 (2003) Art. 4 at 3-10.

their case and the evidence which they choose to present[149]. This model contrasts with the examining magistrate or juge d'instruction of civil law inquisitorial procedure which gives much greater control in procedural matters to the presiding judge.[150]

Under an adversarial system, the receipt of information by a judge outside of the courtroom from a source which was not made available to the parties for cross-examination is prima facie contrary to common law due process conceptualizations of the principle of judicial neutrality.[151] In the United States, where the constitutional guarantee of due process derives from the Fifth and Fourteenth Amendments,[152] these principles find specific reflection in 28 U.S.C. § 455 which provides that a federal judge must disqualify himself 'in any proceeding in which his impartiality might reasonably be questioned',[153] and specifically where the judge has 'personal knowledge of disputed evidentiary facts'[154] in which case partiality is presumed.[155] The provisions overlap but are nevertheless distinct and the existence of circumstances specified in § 455(b) mandates recusal even though the judge takes the

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149 *See generally* Resnik, Managerial Judges, *supra* note 148 at 380-82.

150 *Id.*

151 *See* Reed v. Cleveland Board of Education, 607 F.2d 737, 747-8 (6th Cir. 1979) *supra* note 144; In Ebner v The Official Trustee in Bankruptcy, 176 A.L.R. 644 (2000) the Australian High Court asserted: "Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta (with its declaration that right and justice shall not be sold) and the Act of Settlement 1700 (with its provisions for the better securing in England of judicial independence). It is a principle which could be seen to be behind the confrontation in 1607 between Chief Justice Coke and King James about the supremacy of law. It could be seen to be applied when Bacon was stripped of office and punished for taking bribes from litigants. Many other examples could be drawn from history. It is unnecessary, however, to explore the historical origins of the principle. It is fundamental to the Australian judicial system."
See generally Brian Flanagan, *Scalia, Hamdan and the Principles of Subject Matter Recusal*, 19 DENNING L.J. 149, 154 n. 23 (2007) (noting that the objective appearance of partiality constitutes the standard for judicial recusal in several common law jurisdictions.).

152 "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V;_"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1. See In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

153 28 U.S.C. § 455(a).

154 28 U.S.C. § 455(b)(1).

155 *See* United States v. Gipson, 835 F.2d 1323, 1325 (10th Cir. 1988) "Viewing subsections 455(a) and (b) together, we come to the conclusion that a judge must recuse himself when two kinds of circumstances are present. First, recusal is mandatory when any fact reasonably suggests the judge appears to lack impartiality. Second, recusal is mandatory when past or present associations of the judge specifically enumerated in § 455(b) create the presumption the judge lacks impartiality. If either circumstance exists, recusal is mandatory.

view that they do not create an appearance of impropriety.[156] In similar vein [157]Canon 3A(4) of the Code of Conduct for United States Judges prohibits a judge from initiating or considering ex parte communications from "persons who are not participants to the proceedings"[158] although the provisions of the Code are advisory and failure to comply does not necessarily attract sanctions.[159]

The Supreme Court has considered the scope of § 455 on two occasions,[160] ruling that it is not limited by a requirement of an "extrajudicial source factor"[161] but is an objective test of appearance[162] to be judged from "the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[163] These

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156 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 n.8 (1988). Note also that whereas waiver is permitted under 28 U.S.C. § 455(a), this is not the case with § 455(b): See 28 U.S.C. § 455(e).

157 In re School Asbestos Litigation, 977 F.2d 764, 783 (3d Cir. 1992): '[A]ppearances of partiality are likely if conduct is inconsistent with the related canons of judicial ethics regarding judges' out-of-court associations with actual and potential litigants.'

158 CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3A(4) Commentary 150 F.R.D. 307, 313 (1992). Canon 3A(4) reads in full: A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters. Canon 3A(4) 150 F.R.D. 307, 310-311.
On the history of § 455 *see* Liteky v. United States, 510 U.S. 540, 543-548 (1994) and Flanagan, *supra* note 151 at 37.
See also 28 U.S.C. § 144 which applies in cases of actual bias or prejudice and provides a procedure whereby either party by filing an affidavit can force the disqualification of a judge. The section only applies to district judges. For the relationship between § 455 and § 144 *see* FEDERAL JUDICIAL CENTER, RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, 1 (2002) (noting that "[t]he relationship between the two has been a source of some confusion.").

159 *See* Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1073 (1996). It should be noted that 'the rule enjoining ex parte communications with nonparties has typically not been interpreted to preclude judges from having ex parte discussions with their judicial colleagues, particularly when they are presiding over related proceedings'. Flamm, *supra* note 130 at § 14.5.5.

160 Liljeberg v. Health Services Acquisition Corp, 486 U.S. 847 (1988); Liteky v. United States, 510 U.S. 540 (1994).

161 I.e., knowledge acquired outside a courthouse. *See Liteky*, 510 U.S. at 554-555.

162 "[W]hat matters is not the reality of bias or prejudice but its appearance" *Liteky*, 510 U.S. at 548. *See also* Liljeberg v. Health Services Acquisition Corp., 486 U.S. at 860 '[T]he goal of section 455(a) is to avoid even the appearance of partiality'.
See also Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980): [The requirement of judicial neutrality] preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *quoting* Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) (Frankfurter J. concurring).

163 Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000) (Rehnquist J. as a single justice.) *See Liljeberg*, 486 U.S. at 861.

formulations parallel similar tests in place in other common law jurisdictions and now it seems apply to members of the state judiciary by virtue of the Due Process clause of the 14th Amendment, [164] but as the *Caperton* dissent protested and the Fourth Circuit has observed, "[an] objective standard creates problems in implementation."[165]

Specifically, the requirements for an "informed" observer[166] and "a genuine question"[167] produce a recusal jurisprudence in which normative concerns with the appearance of justice compete with instrumental concerns to protect judges from "unsupported, irrational, or highly tenuous speculation" [168] or "judge-shopping" [169] or, where a judge uses experts or advisors for assistance in difficult or complex cases, to allow them to produce outcomes which are reliable and in which the litigants can have confidence.[170] The danger then is, as the Seventh Circuit has observed, that "the appearance of impropriety standard [...][collapses] into a demand for actual impropriety"[171] and a mismatch opens up between recusal decisions and the perceptions of the ordinary person in the street. Judges, said the Seventh Circuit, must bear in mind that the "reasonable well-informed observer of the judicial system" may be "less inclined [than themselves] to credit judges' impartiality and mental

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164 Caperton v. A.T. Massey Coal Co., Inc., _U.S._, 129 S.Ct. 2252, 2262 (quoting Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 822 (1986):The proper constitutional inquiry was not "whether in fact [the justice] was influenced" but "whether sitting on [that] case[...] 'would offer a possible temptation to the average [...] judge to [...] lead him not to hold the balance nice, clear and true'"(internal citations omitted));. See also In re Murchison, 349 U.S. 133, 136 (1955): "[T]o perform its high function in the best way justice must satisfy the appearance of justice"); Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968): "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

165 *Re* Mason, 916 F.2d 384, 386 (7th Cir.1990).

166 *See* e.g., U.S. v. DeTemple, 162 F.3d 279, 287 (4th Cir.)1998: "the hypothetical reasonable observer is not the judge himself or a judicial colleague but a person outside the judicial system." *Cf. Re* Mason, 916 F.2d 384, 386 (7th Cir. 1990). See generally Federal Judicial Center: Recusal, *supra* note 158 at 15-16.

167 *Liteky,* 510 U.S. at 1155.

168 *See* United States v. Greenough, 782 F.2d 1556 (11th Cir.1986) *noting*: "There are twin, and sometimes competing, policies that bear on the application of the § 455(a) standard. The first is that courts must not only be, but must seem to be, free of bias or prejudice [....]A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges." *Id.* at 1558.

169 *See Mason*, 916 F.2d at 386; *see also* Sullivan v. Conway, 157 F.3d 1092, 1096 (7th Cir. 1998), United State v. Owens, 902 F.2d 1154 (4th Cir. 1990), *In re* Mann, 229 F.3d 657, 658 (7th Cir.2000).

170 *See infra* Part E.

171 *Re* Mason, 916 F.2d at 386.

discipline".[172] This is one explanation for the indignant tone of Justice Scalia's refusal to recuse himself in a case involving his friend Vice President Cheney and his assertion that the decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported.[173] Recusal provisions, it now seems, do not cover the appearance of favoritism "as reflected in the nation's newspaper editorials" where the judge has stated that nothing untoward took place.[174] In this area of law as in others the apparent willingness of courts in appropriate cases to conflate matters of appearance with those of substance, and thereby erode the distinction between the two represents a "recurring trope"[175] in traditional common law formulations and I return to these issues later.[176]

III. The Technical Advisor as a Member of the Judge's Staff

A judge can claim privilege for internal deliberative processes[177] and Canon 3A(4) does not preclude consultations with "court personnel whose function is to aid the judge in carrying out adjudicative responsibilities"[178] but the precise application of this provision to the technical advisor remains unclear.

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172 *See Mason*, 916 F.2d at 386. The Supreme Court made a similar point in Liljeberg v. Health Services Acquisition Corp, 486 U.S. 847, 864 (1988): 'The problem is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.'

173 Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 914 (2004) *quoting* Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., respecting recusal). Justice Scalia refused to recuse himself in a case brought against National Energy Policy Development Group (NEPDG) and individual members, including the Vice President of the United States, where movant Sierra Club asserted "the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism,[and] any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned." 541 U.S. at 923 (citing Motion to Recuse 3-4) *See* Comment, *Duck, Duck, Goose: Hunting For Better Recusal Practices in the United States* 84 N.C. L. REV. 181, 190-193 (2005).

174 *See* Cheney, 541 U.S. 913 (discussed in Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005).

175 Note, *Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708, 2708 (2004).

176 *Infra* Section I Part IV. *See generally* ANDREW STARK, CONFLICTS OF INTEREST IN AMERICAN PUBLIC LIFE (2000) 213-217 (arguing that the "reasonable well-informed observer" may constitute too high a threshold and canvassing possible alternatives, eg an "unknowing and disrespectful public" or "the most suspicious and cynical members of society.").

177 Edgar v. K.L., 93 F.3d 256, 258 (7th Cir. 1996). *See generally* Kevin C. Milne, Note, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213, 213 (1987).

178 150 F.R.D. 307, 313.

In *In re Peterson*[179] , the "watershed case anent technical advisors"[180], the U.S. Supreme Court ruled that federal trial judges possess "inherent power to provide themselves with appropriate instruments required for the performance of their duties," including the power to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[181] In *Reed v. Cleveland Board of Education* the Sixth Circuit, recognizing that "[T]he adversary system as it has developed in this country precludes the court from receiving out-of-court advice on legal issues in a case", required a judge to "depend on his own resources, which include the work of his staff and the offerings of counsel".[182]

For Senior District Judge Pettine in *Reilly v. U.S.* [183] a non- testifying technical court advisor was clearly a member of the judge's staff. Becoming in effect "a specialized law clerk,"[184] the expert "sits throughout the trial or otherwise familiarizes himself with the relevant testimony and evidence and then advises the court in camera." [185] A five-fold range of legitimate functions was detailed:

> First, the technical advisor translates and interprets for the court the technical language used in the case. Second, he offers an exposition and delineation of the technical disagreement between the parties. Third, he relates this disagreement to the broader principles of the science or technical art involved. Fourth, he presents his own opinion on the technical facts and related matters at issue. Finally, he may conduct pertinent experiments, either on his own or in co-operation with others.[186]

This offers a basis for approaching the activities of the experts in the Boston case but provides no guidelines for determining questions of propriety concerning the conduct of the relationship. On appeal, the First Circuit expressed the view that the advisor acts "as a sounding board for the judge-helping the jurist to educate himself in the

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179 In re Peterson 253 U.S. 300, 312, 313 (1920).

180 Reilly v. United States, 863 F. 2d 149, 158 (1st Cir. 1988).

181 In re Peterson 253 U.S. 300, 312.

182 Reed v. Cleveland Board of Educ., 607 F.2d 737, 747-8 (6th Cir. 1979).

183 Reilly v. United States, 682 F. Supp. 150 (D.R.I.1988).

184 682 F. Supp. at 152. *See also* Reilly, 863 F.2d at 158: the technical advisor was 'someone with whom the judge could engage in "freewheeling discussion"'(citation omitted).

185 *Id.* at 152.

186 *Id.*

jargon and theory disclosed by the testimony and to think through the critical technical problems"[187] but the court warned that the advisor may not "'undertake an independent mission of finding facts" outside the record of the case'[188].

An opportunity for further consideration was passed over in *Ballard v. Commissioner of Internal Revenue*[189] when the U.S. Supreme Court was asked to rule on the propriety of excluding the report of a Special Trial Judge (STJ) from the final decision of the Tax Court. The Commissioner argued that the STJ's report formed merely a "step" in the court's internal "confidential decisional process" which could properly be withheld from the record.[190] Both petitioners and respondents apparently conceding that due process does not require disclosure of internal communications such as those between the judge and her clerk that take place within the judge's chambers, [191] the *Ballard* Court ruled that the STJ's report should form part of the record but confined its decision to interpretation of the Tax Court's own procedural rules and left the wider due process issues unresolved.[192]

The Tax Court is not of course an Article III court and the status of a court-appointed expert should not be compared with that of a STJ who is a constitutionally appointed "inferior officer"[193] with the authority to hear the cases assigned to him. The court-appointed expert makes no judicial findings of fact, like those of federal magistrate judges and court-appointed special masters. Nevertheless, as Circuit Judge Tashima has recognized, the analogy with the law clerk is imperfect.[194] The law clerk is at the beginning of her career and works under the supervision and direction of the district judge who is the expert in the law.[195] The judge is well-placed to "filter" out bad legal

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187 Reilly v. United States, 863 F. 2d 149, 158 (1st Cir.1988).

188 *Id. quoting* Johnson v. United States, 780 F.2d 902, 910 (11th Cir.1986).

189 Ballard v. Comm'r of Internal Revenue, 544 U.S. 40 (2005).

190 *Id.*, at 61.

191 *See specifically* Reply Brief for Petitioner, Estate of Burton W. Kanter et al. v. Comm'r of Internal Revenue, 2004 WL 735030 at 3, 9. The decision of the U.S. Supreme Court is reported at 544 US 40 sub nom. Ballard v. Comm'r of Internal Revenue.

192 *Ballard,* 544 U.S. at 1284.

193 Within the meaning of the Appointments Clause of the U.S. Constitution Art. II. *See* Freytag v. C.I.R., 501 U.S. 868, 880-882 (1991).

194 AMAE v. State of California, 231 F.3d 572, 613-614 (9th Cir. 2000) Tashima J (dissenting). *See also* Katherine Kmiec Turner, *No More Secrets: Under Ballard v. Cmmr., Special Trial Judge Reports Must Be Revealed,* J. NAT'L A. ADMIN. LAW JUDGES 247, 262 (2006).

195 *AMAE*, 231 F.3d 572, 613-614. See also Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference,* 77 OR. L. REV. 59, (1998) (canvassing the suggestion that appointment of an advisor as a law clerk might come within the scope of

advice or research.[196] Moreover, the clerk stays with the judge for only a year, two years at the most. By contrast, the court expert, by definition, is appointed for expertise and retained, in the case of protracted litigation over a period of years. In the Boston schools case, Judge Garrity had many law clerks some of whom have been credited with the design of significant desegregation measures.[197] The working relationship between Judge Garrity and expert Robert Dentler however spanned the best part of twenty years in the course of which their mutual professional regard developed into a personal friendship[198] and must be regarded as something qualitatively different. In such a case, an inference of, at the least, heavy reliance readily arises.

IV. Edgar Coziness: Appearance versus Substance

As Judge Tashima has pointed out, over-reliance by the judge on his expert advisor compromises not only his neutrality but also, where the extent of the expert's influence is not apparent from the record and the parties have no opportunity to respond to the advice received, the possibility of appellate review.[199]

Canon 3A(4), Commentary, 150 F.R.D. at 313 and rejecting the parallel). *Id.* at n. 378 and accompanying text.

196 *AMAE*, 231 F.3d 572, 613-614. The Sixth Circuit has taken the view that off-the-record briefings and reports received by a judge from her law clerk are not necessarily immune from requirements of disclosure. *See* Price Bros. Co. v. Philadelphia Gear Corp., 649 F.2d 416 (6th Cir. 1981) (holding that a law-clerk's report of an off-the record observation intended to assist the judge to understand the evidence attracted a presumption of prejudice but that this was overcome where there was no evidence that the judge had considered the report as evidence or that his fact-finding had been improperly influenced.). *Id.* at 420.

197 Of particular interest are Tom Hayes who designed the assignment guidelines, (*see* ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 41-42 (1981),) and Karen Green, née Falkender, whose interest in negotiation, Robert Dentler has claimed in interview, helped the Judge devise a strategy for disengagement. (Interview with author at his home in Lexington, MA, September 21, 2006 (hereinafter "Dentler 2006")).

198 Judge Garrity wrote numerous references for Dentler expressing his regard in the highest possible terms. The series also contain personal letters from Dentler alluding to visits and hospitality between the two families (correspondence on file with Archives & Special Collections, Healey Library, UMASS, Boston, MA, under reference 90 Garrity XXXVII Masters & Experts: Personnel 1975-97 f. 1).

199 *See* Tashima J (dissenting) AMAE, 231 F. 3d at 614:'[...] factual issues, no matter how technical, are committed to the factfinder and, to be reviewed properly, must be based on the record made in the trial court.' *Id.*

Before the decision of the Supreme Court in *Liteky*[200] neutrality issues in cases concerning technical advisors were seen as limited by an "extra-judicial source" requirement, i.e. ex parte communications and discussions were regarded as "judicial activities" and thus not within the scope of the statutory recusal provisions of 28 U.S.C. § 455(a).[201] Since that decision the argument no longer stands[202] but the Justices have yet to provide guidelines for appeal courts in these cases. In *Edgar v. K.L. et al*,[203]the Seventh Circuit considered that a judge overstepped the mark in a mental health case on the basis that his private meetings and ex parte communications with a panel of court-appointed experts had compromised his impartiality. The relationship had become "excessively cozy";[204] a reasonable observer would have had concerns about the court's ability to conduct the trial impartially.[205] Thus where the district judge had blocked discovery and declined to state on the record his own memories of what had happened, his claim of judicial privilege invited the inference of impropriety. [206]

Although the experts in this case were appointed under Fed. R. Evid. 706(a) as opposed to the inherent jurisdiction or Fed. R. Civ. P. 53(a), as in the Boston case, the parallels in terms of the nature of the task undertaken by the judge and the apparent closeness of the relationship make "*Edgar* coziness"[207] an attractive *indicium* or performance indicator for a narrative based on 28 U.S.C. § 455(a) "appearance" issues where the experts were known to be partisan and the judge made no secret of the confidence that he reposed in them.[208] Closer reading however indicates that what really seems to have troubled the Seventh Circuit in *Edgar* was the substantive issue

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200 Liteky v. United States, 510 U.S. 540 (1994).

201 *See* Bradley v. Millikin, 620 F.2d 1143, 1157 (6th Cir. 1980), discussed *infra* note 228 and accompanying text. *Accord* Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1052 (5th Cir. 1975) and Jackson v. Fort Stanton Hospital and Training School, 757 F. Supp. 1231, 1240-41 (D.N.M. 1990).

202 *Liteky*, 510 U.S. at 554-555. *See* note 161 *supra* and accompanying text. In relation to § 455(b) (1) however, "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case", United States v. Grinnell Corp., 384 U.S. 563, 583.

203 Edgar v. K.L. et al., 93 F.3d 256 (7th Cir. 1996), cert. denied sub nom. *Duff v. Governor of Illinois*, 519 U.S. 1111 (1997).

204 *Edgar*, 93 F.2d at 260.

205 *Id.*

206 *Edgar*, 93 F.2d at 258.

207 *Edgar*, 93 F.2d at 260.

208 *See Edgar*, 93 F.2d at 260.

that the judge had in fact and impermissibly accepted contestable conclusions which had not been tested in court.[209]

The private briefings to the judge in his chambers raised similar concerns. Whether the effect was to give the judge impermissible "personal knowledge" did not depend primarily upon whether the information was acquired inside or outside the courthouse. The determining factor was whether or not the information was available for testing and contesting via the adversarial process.[210] Thus:

> (o)ff-the-record briefings in chambers have no trace in the record - and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. This is "personal" knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated. Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned.[211]

Mandatory disqualification under § 455(b)(1)[212] followed. The Seventh Circuit took the view that not only should the judge be disqualified but so should the experts – they had been influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against the state. "Experts appointed and supervised by a court carry special weight because of their presumed neutrality."[213] The experts had assumed a partisan role.[214]

Two more recent Ninth Circuit decisions evidence a similar focus. In *A & M Records v. Napster Inc.*[215] the appellate court dismissed a challenge where the technical advisor did not "displace the district court's judicial role" nor "unilaterally issued

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209 *Id.*

210 The distinguishing feature between "personal knowledge" and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." *Edgar*, 93 F.2d at 259 (following Liteky v. United States 510 U.S. 540 (1994)).

211 *Edgar*, 93 F.3d at 259.

212 28 U.S.C § 455(b) (1).

213 *Edgar*, 93 F.3d at 262.

214 *Edgar*, 93 F.3d 256, 261: One expert 'has shed any pretense that he is playing a scientific role' when he urged the Judge to release the panel's report so that it could serve as a "flag for advocacy groups to rally around to assert political] pressure." *Id.*

215 A & M Records v. Napster Inc., 284 F.3d 1091 (9th Cir. 2002).

findings of fact or conclusions of law regarding [defendant Napster's] compliance".[216] In *Federal Trade Comm'n v. Entforma Natural Products, Inc.*[217] a similar challenge did however succeed where the court found that although the record was sparse, there was evidence of actual improper reliance.[218] In neither judgment is there concern that the fact of the relationship *per se* might raise § 455(a) appearance issues.

V. Justification and Prophylaxis

Case law discloses two other analytical tools to complete the critical matrix but as neither satisfactorily distinguishes between substantive and appearance issues they are not problem-free.

The first is the justificatory emphasis apparent in some appellate decisions notably where the court considers that the objections raised smack of "sandbagging"[219] or the district judge has encountered a degree of opposition. In *Reilly* itself, a medical negligence case, the First Circuit whilst confirming that appointments of non-testifying technical advisors should be the exception and not the rule[220] was supportive of the district judge in the absence of evidence to suggest that the district court had "allowed the boundaries to be overrun".[221] The fact that the advisor had

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216 *A & M Records*, 284 F.3d at 1097.

217 Federal Trade Comm'n v. Entforma Natural Products, Inc., 362 F.3d 1204 (9th Cir.2004).

218 *Entforma*, 362 F.3d at 1214, n 10: 'The district court judge indicated that "If the court-appointed expert agrees with the defendants, I suspect I'm going to agree with him. If he agrees with the plaintiffs, I suspect I'm going to agree with him".

219 Reilly v. United States, 863 F.2d 149, 160 (1st Cir. 1988): "The government, knowing of the court's plan to consult with a technical advisor, waited to see which way the wind blew. Only when the case turned out disastrously from the government's viewpoint did appellant decide to voice its litany of concerns about the circumstances of the appointment."

220 *Reilly*, 863 F.2d at 156: "We concur wholeheartedly that appointments of technical advisors should be exception and not rule, and should be reserved for truly extraordinary cases where introduction of outside skills and expertise, not possessed by district judge, will hasten just adjudication of dispute without dislodging delicate balance of juristic role; modality is, if not last, near-to-last resort, to be engaged only where district court is faced with problems of unusual difficulty, sophistication, and complexity, involving something well beyond regular questions of fact and law with which judges must routinely grapple". 863 F. 2d at 156.
The Court confirmed that Fed. R. Evid. 706 which requires expert witnesses to share findings with the parties and submit to depositions and cross-examination did not apply to non-testifying court advisers; 863 F. 2d at 155.

221 *Id.* at 158.

received no written instructions and submitted no written report was not to be regarded as fatal where the challenge to the judge was motivated by opportunism. [222]

More recently, the D.C. Circuit in what it described as a piece of "contentious and complicated litigation"[223] has ruled that disqualification of a district judge for ex parte communications with his agents, a special master and a special master-court monitor, was not warranted because a reasonable and informed observer would not have questioned the judge's impartiality.[224] Although during four years of litigation the judge met with his agents many times to oversee and coordinate their efforts, the appellate court accepted his unequivocal assurance that he knew of no substantive information that was provided during any of their consultations. [225] Petitioners' claim for discovery of the ex parte communications themselves was dismissed as "extraordinary" where the judge had expressly stated they regarded matters which were procedural and not substantive.[226]

Two decisions from the desegregation era, *U.S. v. Yonkers Board of Education*,[227] a housing case, and *Bradley v. Millikin*, a school case, [228] evidence a similar approach. In *Yonkers*, where the district court appointed an outside housing advisor to provide expert advice and assistance regarding the implementation of the court's orders and to coordinate the activity of various parties, including government agencies, the Second Circuit affirmed denial of a motion for recusal on the basis of judge's ex parte communications with his advisor where the information received did not relate to disputed evidentiary facts: [229]

> We conclude that ex parte contacts by the (outside advisor) are merely part of the performance of (the judge's) prescribed duty and did not create an appearance of partiality on the part of the district court judge.[230]

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222 *Id.* at 161.

223 In re Brooks, 383 F. 3d 1036, 1043 (C.A.D.C. 2004) (denying petition from a writ of mandamus requiring recusal of District Court Judge Lamberth).

224 In re Brooks, 383 F. 3d 1036, 1041-1043.

225 In re Brooks, 383 F. 2d at 1043.

226 Id., at 1043-44. *But see* the later decision of the Supreme Court in Ballard v. Comm'r., 544 U.S. 40 (2005) (Ginsburg J., Rehnquist and Thomas JJ. dissenting) *supra* note 189 and accompanying text.

227 U.S. v. Yonkers Bd. of Educ., 946 F.2d (2d Cir. 1991).

228 Bradley v. Millikin, 620 F.2d 1143(6th Cir. 1980).

229 U.S. v. Yonkers Bd. of Educ., 946 F.2d 180, 184 (2d Cir. 1991). *See also* discussion in Cobell v. Norton, 237 F. Supp. 2d 71, 90 (D.D.C. 2003).

230 *Id* at 184.

Similarly the Court affirmed the district judge's denial of a motion to compel discovery of communications between the advisor and the judge: "a degree of confidentiality is justifiable in light of attempts to block implementation of (the consent decree) by the City and other groups".[231]

In *Bradley* the Sixth Circuit upheld Judge DeMascio's refusal to recuse himself on the grounds that his ex parte contacts and discussions with court-appointed experts and community groups violated Canon 3A(4) where the remedial phase of the litigation had been protracted and arduous[232] the judge had conducted himself in an exemplary manner[233] and the court's authority to utilize experts was not in issue, the Sixth Circuit asserting simply: "We do not believe Judge DeMascio's use of experts, or his receipt through them of community and expert views, required recusal".[234] The court did however express its concern about the absence of a documentary record and required that all future expert assistance should be recorded in written reports, with copies to all parties.[235]

"Paucity of information in the record"[236] was an issue in *Association of Mexican-American Educators (AMAE) v. California*, when the Ninth Circuit, refused to fault a district judge on the grounds of improper interaction with his non-testifying technical advisor where there was no evidence that the judge had failed to do his job properly.[237] Circuit Judge Tashima in dissent protested the majority's "cursory and

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231 *Id* at 185.

232 *Bradley*, 620 F.2d 1143, 1158.

233 620 F. 2d at 1158. *See also* Jackson v. Fort Stanton Hosp. and Training School, 757 F. Supp. 1231, 1239-1240 (D.N.M. 1990) (District judge refused to recuse himself on the grounds of ex parte communications with his court-expert where the judge stated that he had not been influenced by nor relied on the expert's findings or opinions, a reasonable person would not have doubted the judge's impartiality and the challenge was an attempt to avoid the consequence of an anticipated adverse decision.). But *cf* U.S. v. Craven, 239 F.3d 91, 101-103 (1st Cir. 2001) (In a criminal case ex parte communications with court-appointed psychologist prior to sentencing constituted error; the sentence would be vacated and the case remanded to another judge for sentencing).

234 Bradley v. Millikin, 620 F.2d 1143, 1158 (6th Cir. 1980).

235 620 F. 2d at 1158. In relation to 28 U.S.C. § 455(a) the court ruled that the judge's activities were judicial and thus outside the scope of the statute (620 F. 2d at 1157). *Post* Liteky v. United States, 510 U.S. 540 (1994), these arguments no longer stand.

236 AMAE v. California, 231 F.3d 572, 591 (9th Cir. 2000).

237 *AMAE,* 231 F.3d at 591.

mistaken treatment of the technical advisor issue"[238] which failed to give proper account of the risks of over-reliance on the expert by the judge and potential partiality or absence of neutrality on the part of the advisor.[239] In this case, such a review was not possible for the simple reason that there was no appropriate documentary record.[240]

> If the content of the communications between the trial judge and the advisor is hidden from the parties (and appellate review), and where the parties have no opportunity to respond to the advisor's statements, [...][...] we are utterly unable, on this record, to review the propriety of [the advisor's] advice to the district court because we have no idea what role he played in the district court's fact-finding process.[241]

The risks can be minimized by attention to procedure. Thus "minimally" a district court appointing a technical advisor should:

> 1) utilize a fair and open [appointments] procedure [...], 2) address any allegations of bias, partiality or lack of qualification; 3) clearly define and limit the technical advisor's duties; 4) make clear to the technical advisor that any advice he gives to the court cannot be based on any extra-record information; and 5) make explicit, either through an expert's report or a record of ex parte communications, the nature and content of the technical advisor's advice.[242]

This attempt to formulate procedural guidelines had been anticipated by the First Circuit in *Reilly* and now appears to form part of Ninth Circuit law but the underlying purpose is far from clear. [243] The *Reilly* Court spoke of "prophylactic measures" and of "fundamental fairness" [244] but did not explain whether the prophylaxis was directed towards substance or appearance or both. Subsequent Ninth Circuit endorsement has

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238 *AMAE*, 231 F.3d at 609.

239 *AMAE*, 231 F.3d at 611.

240 *Id.*

241 *Id. citing* Note, *Improving Judicial Gatekeeping; Technical Advisors and Scientific Evidence,* 110 HARV. L. REV. 941 (1997).

242 *AMAE*, 231 F.3d at 611.

243 *AMAE*, 231 F.3d at 611 Judge Tashima dissenting; applied in Techsearch, L.L.C. v. Intel Corporation, 286 F.3d 1360, 1378-1379 (Fed. Cir. 2002) (predicting that these guidelines would now form part of Ninth Circuit law). See also Federal Trade Commission v. Enforma Natural Products, Inc., 362 F.3d 1204, 1215 (9th Cir.2004): "We take this opportunity to join a number of courts that have endorsed Judge Tashima's recommendations". In Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 31. n.3 (D.D.C.2002) the court noted that it had been guided "in large part by the extremely thoughtful and oft-cited dissent of Judge Tashima in [AMAE]".

244 Reilly v. United States, 863 F.2d 149, 159-160 (1988).

stressed the importance of procedure in facilitating appellate review suggesting that the target is substantive impropriety rather than appearances[245] but as the Third Circuit has pointed out fairness as appearance itself has two aims and the requirements of § 455 [246] address "not only fairness to the litigants but also the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted."[247] Procedural safeguards designed to prevent substantive impropriety or to facilitate correction on appellate review address the first of these aims but not the second.

Moreover it is difficult to understand how either prophylaxis or justification can have much of a role within an analytical matrix which purports to make no ontological distinction between appearance and substance. As has been pointed out, the fact that a process appears improper ought in principle to make it actually improper.[248] If as the cases suggest, appellate courts are willing to sanction occasional judicial forays outside the confines of adversarial process on the grounds of the particular circumstances of the case, the answer must be that they have done so pragmatically and because they recognize with Judge Tashima that the role played by a technical advisor is "unique".[249] The question is whether in so doing they have succumbed to the temptation to "look into the mirror"[250] of their own experience and understanding and in so doing moved too far from the perceptions of the ordinary members of the public upon which confidence in the administration of justice must ultimately depend.

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245 *Enforma Natural Products, Inc.*, 362 F.3d at 1215: 'On remand, the district court should consider safeguards implementing some or all of these safeguards [regarding the use of technical advisors] to assure the parties that the court is proceeding openly and fairly. Employment of these standards will aid in appellate review if such review becomes necessary'.

246 28 USCA § 455.

247 In re School Asbestos Litigation, 977 F.2d 764, 776 (3d Cir.1992) (quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-60).

248 Note, *supra* note 175 at 2710 and *see* ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE, 21-35 (2000) (*explaining* that 'appearance' standards, as opposed to 'conflict of interest' prohibitions should not be regarded as prophylactic).

249 AMAE v. California, F.3d 572, 614 n.18 (9th Cir. 2000).

250 R v. Secretary of State for the Environment ex parte Kirstall Valley Campaign, [1996] 3 All E.R. 304, 316 (Sedley J.) (*discussing* the test formulated by the UK House of Lords in R. v. Gough [1993] 2 All E. R. 724 at 737-738: "The House also eliminated from the process of adjudication the imaginary reasonable man, recognising that in imputing to him all that is eventually known to the court and asking him for his impression, the court is looking into a mirror.")

VI. Balancing Process and Outcomes: A Judicial Tightrope

If the reluctance of courts to conceptualize relations between judge and advisor in impropriety terms stems from pragmatic grounds, what is at issue is the relative priority to be accorded to the reliability of outcomes over the norms of adversarial process.[251] "Justice", asserts Judge Weinstein, who himself used experts for assistance in structural reform cases,[252] "is not blind, nor should it be."[253] A judge must take an informed approach to judging [254]and neutrality and passivity are not the same thing.[255] Supreme Court expert testimony jurisprudence now "tacitly" concedes to trial judges a more active participation in the information-gathering process but has yet to provide guidelines which will enable judges to identify the boundaries of acceptable judicial behavior vis-à-vis the experts upon whom they rely.[256]

Left largely to their own devices, appeal courts appear to have recognized the practical problems which judges have faced and have been prepared to accept some deviations from procedural norms in appropriate cases but the response has been pragmatic and the limits have not been clearly articulated. The effect is to leave judges feeling their way between conflicting imperatives guided by little more than the knowledge that if they avoid "coziness"[257] and don't "allow [...] the boundaries to be overrun"[258] appellate courts may or may not be supportive.

When, as in the schools cases, a judge uses expert advisors to assist in what may be, in effect, a managerial task she walks a tightrope of particular difficulty. She must

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251 *See* Adam J. Siegel, Note, *Setting Limits on Judicial, Scientific, Technical and Other Specialized Fact-finding in the New Millennium*, 86 CORNELL L. REV. 167, 196 (2002) (citing Bradley v. Millikin, 620 F.2d 1143 (6th Cir. 1980), Jackson v. Fort Stanton Hospital and Training School, 757 F. Supp. 1231 (D.N.M. 1990) and United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994). *See also* Kumho Tire Co., Ltd, v. Carmichael, 526 U.S. 137 (1999): "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152 and "The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert's relevant testimony is reliable". *Id.*, at 152.

252 *See* Hart v. Community School Board, 383 F. Supp. 699, 764 (E.D.N.Y. 1974) discussed *supra* note 140 and accompanying text.

253 Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. Rev. 469, 539 (1994).

254 Jack B. Weinstein, *Limits on Judges Learning Speaking and Acting – Part I -Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 541(1994).

255 *See* Fuller, *supra* note 147 at 41.

256 Siegel, *supra* note 251 at 214.

257 Edgar v. K.L. et al., 93 F.3d 256, 260 (7th Cir. 1996).

258 *Id.* at 158.

ensure compliance with the orders of the court in such a way as to give meaningful content to the rhetoric of the rule of law but at the same time must pay more than lip service to the requirements of judicial process because these represent the core of the court's claim to legitimacy.

In Boston, where Judge Garrity chose to face down opposition to his orders by assuming personal oversight of the desegregation process, his decision to appoint court advisers is not remarkable; this was not a task which he would otherwise have been able to undertake and there were established precedents.[259] However, Judge Garrity's relations with his experts were unusual even by school desegregation standards.[260] Deans Dentler and Scott attended weekly meetings in the judge's chambers. Dr Dentler alone wrote two hundred memos[261] but the judge treated the majority as privileged and only a handful were released to the parties.[262] That the judge was unaware of the dangerous ground he trod is inconceivable; on January 30 1975, before the experts had been appointed, Judge Garrity responded vigorously to a school committee motion challenging alleged in camera conferences with representatives of the Community Relations Service of the U.S. Justice Department[263]:

> [T]he Court has never in this case or any other case for that matter heard parties ex parte and without everyone being present. Everything that has been submitted in connection with any substantive issue in this case has been presented and considered in open court and only in open court and that will continue to be the practice, because the principle

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259 Part A *supra.*

260 Interviewed in September 2005, Dr Dentler contrasted Judge Garrity's approach with that of other desegregation judges with whom he had subsequently worked: "By contrast, the federal judge who retained me in St. Louis was so wary that he wouldn't meet with me and his other expert in his chambers. We felt isolated. I would fly to St. Louis, we'd go up into the courthouse – where we had an office – once in a while we would see him in the hall as we would cross. He'd say, 'Good morning.' And that was it – and I felt, how can we confer with this man?"
Interview with Dr Robert Dentler at University of Massachusetts, Boston campus, September 14, 2005 (hereinafter Dentler (2005)).

261 "I know I wrote 200 because he gave me the full set and told me to feel free to cull some before we got it ready for transmittal here. Out of the 200 – the attorneys wanted to see all of them" *Id.*

262 *Id.*

263 Transcript of Hearing of January 30 1975, 33, Morgan v. Kerrigan, No. 72 -911-G (D. Mass.) (on file with Archives & Special Collections, Healey Library University of Massachusetts, Boston, MA, under reference 84 Center for Law & Education.: Morgan v. Hennigan Case Records, 1964-1994 Series V, Transcripts (hereinafter 84 Center for Law & Educ.)).

> [...] is a very important one, [...] In fact, that is a guiding principle in every court and this one as well as any other.

As the case progressed he was in regular touch with District Judge Battisti[264] whose use of academic advisors in Cleveland had attracted the disapproval of the 6th Circuit[265] and he took evident steps to safeguard his position; the documentary record of his communications with his "team" is minimal only and Dr Dentler has confirmed that for the most part communications were oral. The Judge kept hand written agendas for the chambers conferences but the detail was communicated by telephone.[266]

Asked about his work for the judge, Robert Dentler remarked:

> Well, he could hide me when he wished. He could withhold my memos. I came to every hearing – there were many of them – but I could sit there in silence – or, on other occasions, he would put me to work at the hearing. Why he made those different choices, I don't know but he was wily and maneuvered - he was under constant attack.[267]

If, as has been suggested,[268] the Boston schools case was above all else an exercise in political maneuvering, the deployment of court experts was key to the judge's survival. From the point of view of legitimacy however, it represents an Achilles heel, a vulnerability to the charge of impropriety which the judge was able to see off in the short-term but which in the longer term remains troublesome and not easy to deflect.

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264 Dentler (2005), *supra* note 260.

265 *See* Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979).

266 Dentler (2005), *supra* note 260.

267 *Id.*

268 *See* J. BRIAN SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS, (1984) (analyzing the Boston schools case as an attempt by a political and business elite to restructure the educational system to suit its own purposes and thus as a "manifestation of the class conflicts arising out of the transformation of Boston into a service and financial center". *Id. at 8-9.*).

Chapter Two: Narratives of Impropriety

I. Conceptualizations of Legitimacy in Boston

> *I'll try to tell you how I feel about forced busing. Judge Garrity does not allow us into his court room. I never heard of Judge Garrity until he made his fateful decision. He seems to have more power than any dictator that ever crawled on the face of this earth.*[269]

> *[...] Dentler and I basically took over the School Department [...], we were running it day to day. And I had a big say in who did what. [...] We were there overseeing the day to day operations – everything that went on in the Schools. [...] [T]hey couldn't do anything without us. Without our looking at it and knowing what was going on.*[270]

Conceptions of legitimacy can be framed in different ways. For the people of Boston and the school committee officials whom they had elected, legitimacy meant the right of the community to control the education of its children. Judge Garrity's decision represented an interference with that right, and was widely seen and resented in terms of illegitimate excess of power. President Ford's announcement that "the court decision [...] was not the best solution to quality education in Boston",[271] lent support to that view and hardened the resolve of the school committee to fight the federal court.[272] As the chief architects of the court's reworking of the Masters' Plan, Deans Dentler and Scott had already attracted hostile attention. As prime movers of its implementation and the visible face of the court's reach outside of the federal court room, school committee attorneys attacked the judge via his representatives whose work thus came itself to shape the contours of the litigation.

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269 Mrs Lorraine Faith, mother of Michael Faith, a white student as South Boston High, who had been arrested on an assault and battery charge and was later in the day stabbed in the stomach by a black student while inside the school on December 11 1974. Mrs Faith's remarks were made on WBZ-TV and are cited in J. MICHAEL ROSS AND WILLIAM M. BERG, 'I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER': THE BOSTON SCHOOL DESEGREGATION CONTROVERSY (1981) at 330.

270 Professor Marvin Scott, interviewed at Butler University, Indianapolis, IN. 25th September 2007(on file with author) (hereinafter "Scott 2007").

271 Asked whether he had considered providing federal assistance to Boston, President Ford responded as follows: "At the outset, I wish to make it very, very direct. I deplore the violence that I have read about and seen on television. I think that is most unfortunate. I would like to add this however; the court decision in that case, in my judgment, was not the best solution to quality education in Boston. I have consistently opposed forced busing to achieve racial balance as a solution to quality education and, therefore, I respectfully disagree with the judge's order." Reported in the Boston Globe 9th October 1974 and cited in Ross & Berg *supra* note 269 at 241.

272 *Id.*

School committee arguments formulated in terms of excess of power were a response to the apparent de facto assumption of control of the school department which began when Scott on a direct order of the court hired thirty temporary secretaries and installed them at tables at 26 Court Street, the new school department headquarters.[273] From here Scott proceeded to take charge of student assignments[274] while Dentler assumed "a kind of overseer's role"[275] with senior administrative staff and head teachers who regarded him as a substitute for the judge.[276] School committee strategy was to get the judge to define the experts' role and thereby secure an admission that he was taking power away from elected officials and/or that Dentler and Scott were exceeding their powers. Attorneys Connolly and Sullivan for the school committee pressed their points hard and on at least three occasions forced Judge Garrity into an oral response. In the end they were outmatched by the political skills of the judge who evaded their attempts to pin him down. The written order they were seeking never materialized and the First Circuit was supportive of the Judge.[277]

II. The School Committee Narrative: Dentler and Scott Represent Excessive Judicial Power

Judge Garrity's appointments faced school committee challenge right from the start. At a hearing on February 5 1975 school committee attorneys objected to Masters Keppel and Willie on the grounds that they had indirect links with the Harvard Center for Law and Education whose attorneys were acting for the black plaintiffs[278]. On 4th March they moved for the removal of Dr Dentler and Master Edward J McCormack Jr. on the grounds that their membership of and financial contributions to the NAACP gave rise to a conflict of interest and that the proceedings before the masters should be expunged from the record.[279] Judge Garrity observed that the NAACP was not a party

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273 Dentler & Scott, *supra* note 197.

274 *Id.* at 59.

275 Dentler (2006), *supra* note 197.

276 *Id.* "Marvin Scott and I went to School Headquarters weekly to review compliance. They thought we were substitutes for Garrity and we didn't disillusion them."

277 Morgan v. Kerrigan, 530 F.2d 401(1st Cir. 1976).

278 Morgan v. Kerrigan, No. 72-911-G (D. Mass. March 14 1975) (Memorandum and Order on School Committee's Motions Regarding Expert and Masters) (90 Garrity, XXXVII b f.7).

279 *Id.*

to the action and dismissed the motion, but this was a preliminary skirmish.[280] As the following account, based largely on court transcripts, reveals, Judge Garrity's tactic was to deflect the narrative of excess of power by emphasizing the extent to which he remained in control of the experts; they were his assistants, implementing his guidelines and reporting to him. Their function was to enable him to discharge his constitutional responsibilities in the face of school committee default.

The immediate background to the attempt to build a case against the judge was the court's Phase 2 order handed down on May 10th 1975.[281] This required student assignments to be carried out "by a staff unit designated by the superintendent, under the supervision of court representatives"[282] and ordered the "School Department" to produce an Orientation and Application Booklet.[283] On May 12 1975 Dentler and Scott wrote to Superintendent Leary attaching a "timetable of the work we will supervise between May 12 and July 11", and requesting the immediate designation of a senior person "authorized to conduct assignment and related business under our supervision".[284] Two days later, Judge Garrity announced in court that they were to continue as court experts "to supervise all planning and implementation" of the court plan:

> The Court is going to rely upon Deans Dentler and Scott throughout the implementation course. This does not mean that the Court is delegating its authority to these gentlemen, but the Court will want their recommendations on every aspect of this matter.[285]

In a public statement, school committee Chairman John J. McDonough objected to the experts' "arrogance" in attempting to takeover the school department and stated

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280 *Id.* On appeal, the First Circuit found no merit in school committee arguments, observing that, since masters and experts are subject to the control of the court and since there was a need to hire individuals with expertise in particular subject matters, masters and experts should not be held to the strict standards of impartiality that are applied to judges. The First Circuit noted that as three of the four individuals challenged had benefited financially from their relationship with members of the school committee, appearances might just as readily be suggestive of bias in the school committee's favor. Morgan v. Kerrigan, 530 F.2d 401, 426, n. 41 (1st Cir. 1976).

281 Morgan v. Kerrigan 401 F. Supp. 216 (D. Mass. 1975).

282 *Id.* at 257.

283 *Kerrigan*, 401 F. Supp. 216.

284 Dentler & Scott, (May 12 1975) (90 Garrity XXXVII Masters & Experts Dentler & Scott Memos 1975 f18).

285 Transcript of Hearing of May 14 1975, 67,Morgan v. Kerrigan, No. 72-911-G (D. Mass) (84 Center for Law & Educ.).

that he wanted the judge to better define their jurisdiction.[286] A school committee motion for clarification of the experts' role filed on 16th May, asserted that the experts now "obviously consider(ed) the facilities and staff of the school department as [...] under their personal control." The gist of the complaint was that Judge Garrity had assured the defendants that the role of the experts was consultative only but that by

> [o]rdering the superintendent to designate a "staff unit" responsible for student assignment, the crux of the desegregation process, and by further mandating that (the unit) will be supervised by Messrs Dentler and Scott, the Court has clearly wrested from the defendant school committee its statutory authority to administer the school system.[287]

Under Massachusetts law, the complaint continued, the superintendent of schools was the executive officer of the school committee which had final responsibility for the management of all the public schools. If the effect of the court order was to make the superintendent "the master not the servant" and the experts' function was to direct or oversee the desegregation process, then this constituted a usurpation of the powers of the school committee. If, on the other hand, the experts' role was merely to observe and evaluate, with access to school department facilities and employees, then "the experts have overstepped the bounds on their authority".[288]

Judge Garrity's papers reveal a briefing note from his clerk dated May 23 1975 suggesting dodging the question:

> [...]A general principled statement of the experts' powers seems likely to restrict the experts uncomfortably as used by people who want to give the statement its most restrictive and troublesome effect. In fact the experts will make decisions; but one cannot state that the court delegates to them its power[289] [...] I would concentrate on the question

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286 Boston Globe (May 15 1975) (copy on file with Garrity Papers), 90 Garrity XXXVIIf. f18)). *See also* Ross & Berg *supra* note 271 at 488 quoting McDonough: "They're not going to come into the Boston School department and take over and brush aside the administration that has already been set up."

287 Morgan v. Kerrigan, No. 72-911-G (D. Mass. May 16 1975) (Defendant School Committee's Motion for Clarification of Experts' Role) (90 Garrity XXXVIIb f7)).

288 *Id.*

289 Tom (Hayes) to Judge Garrity, Terry, Messrs. Scott and Dentler. Thoughts on the Experts' Role for a Response to School Committee Motion Asking Clarification. May 23 1975 (90 Garrity XXXVIIb f. 7).

> of power over the assignment process and not generalize far beyond it.[290]

This was advice which effectively the judge took. The draft order which accompanied the memo stated that the school committee had lost none of its statutory responsibilities, but was merely required to make student assignments under the court's supervision. This did not mean that the court would supervise every aspect of school operation but the court would rule on specific situations only as and when they arose; [291] "Further specificity could only serve to unnecessarily restrict what must remain a flexible working relationship if it is to be effective."[292]

Whilst the judge continued to evade the issue, Mr. Connolly for the school defendants persevered, reminding him on June 6 1975 that he was still waiting for the order clarifying the power of the experts. Judge Garrity promised to "speak carefully and definitively" at a hearing or file a memo but would give a preliminary outline of their role The filing of the implementation plan, he said, represented a "shifting of the gears". "It really changes the role of the experts from advisors of the Court in drafting what they feel to be the best plan and which they have been in consultation with the Court on, of course, endless hours, but their planning role terminated on the 10th of May." They still had a planning function but this was now subsidiary to their collaborative function with the School Committee, in particular with Dr Leftwich, the officer in charge of implementation.[293]

On June 11 1975 Mr. Connolly explained that uncertainties relating to the powers of the Deans were inhibiting the appointment of a director of the Assignment Unit. Six of those working on implementation matters had refused the appointment. "Are they going to be second-guessed by Dr Scott and Dr Dentler? We have asked the Court on numerous occasions to clarify this order so we can begin to operate?"[294] Judge Garrity responded that the answer lay in the plan. Assignments had to be carried out subject to

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290 *Id.*

291 *Id.*

292 *Id.*

293 Transcript of Hearing of June 6 1975, 39-40, Morgan v. Kerrigan, No. 72-911-G (D. Mass. 1975) (84 Center for Law & Educ.).
Dr Charles Leftwich was the BPS system's only black Associate Superintendent. He was placed in overall charge of implementation. – *see* Dentler & Scott *supra* note 197 at 58.

294 Transcript of Hearing of June 6 1975 *supra* note 293 at 6.

the court's approval. This should not be regarded as second-guessing. "I simply look on this as a review which the Court is required to make under the law to be sure that the plan [...] is carried out". He had to have agents to do this but they reported directly to him:

> The agents of the Court who will be working with, in the sense of collaborating with and consulting with, the director and other members of this Assignment Unit are two deans of a college of education who are knowledgeable about these things. They report to me and on the basis of their reports and recommendations, I will either approve or disapprove what is done [...][295]

The judge continued to emphasize his constitutional responsibilities. He explained that whilst Phase I was supervised by the Massachusetts Supreme Court and was no concern of his, Phase 2 was different. The assignment guidelines were his:

> The assignment guidelines are mine. They are not Dean Dentler's or Dean Scott's. These I wrote after consulting with the Deans and on the basis of the masters' recommendations. I can tell you that these are as personal as anything in the plan. These are mine [...]'[296]

The Deans were to let Judge Garrity know whether the guidelines were complied with and to provide help to the Assignment Unit in construing them as they were "pretty technical".[297] Mr. Connolly persisted, explaining the chilling effect the presence of the Deans had on staff and candid debate in the Unit. Morale was lowered and professionalism undermined. He concluded: "[...]It is our feeling that we do not need Dean Dentler and Dean Scott to be interfering in our day-to-day decisions."[298]

The judge responded: "They are not there all the time. [...] [I]t was I who kept pushing Deans Dentler and Scott to get this information. It wasn't their coming to me with stories. I have been pursuing them, not the reverse". Moreover, questions from Educational Planning Unit (EPU) staff indicated an "incomplete and erroneous" misunderstanding of a key provision of the plan relating to assignments which the Deans had been able to clear up.

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295 *Id.*
296 *Id.* at 11.
297 *Id.*
298 *Id.* at 13.

> Now I agree, people don't like to work with someone standing over their shoulder. I don't. You don't. None of us does. [...] I do understand that and positively that is not what Deans Dentler and Scott are going to be doing,[...] They are there to do no more than what I tell them to do. They are not running this, the Court is running it [...][299]

On June 12, school committee attorneys filed another motion for clarification and asking for a written order. On June 20 Judge Garrity issued an order authorizing the court experts to resolve outstanding issues relating to facilities utilization, program allocation and enrolment units, their determination to be subject to review by the court "as soon as feasible".[300] At the hearing of June 23, counsel again reminded the judge that the school defendants were still waiting for clarification of the experts' powers. Judge Garrity noted that he had done this three times already but would make a further "clarifying comment" about the role of the experts and the relationship of the plan and the school committee. The desegregation plan had not and the Court would not impinge on areas of school committee authority but the school committee had no power to change the plan and to that extent the power of the school committee had been superseded.[301]

At this point counsel for the school committee appear to have given up on this particular line of attack. The issue of the experts' role resurfaced next in the Court of Appeals one year later as one plank amongst several of the school committee challenge to the desegregation plan[302]. Once again, objections to the experts were formulated in terms of excess of power. The specific targets were a) the requirement that student assignments be carried out "under supervision of representatives of the court"[303], b) the requirement that "(t)he nature of instruction given in the schools must also receive the attention of the court and its representatives",[304] and c) the order of June 20[305]. The First Circuit was unsympathetic and given the context this does not

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299 *Id.* at 15

300 Morgan v. Kerrigan, No. 72-911-G (D. Mass. June 20 1975) (Order on Boston School Committee Proposal for Facility Utilization, Program Allocation and Enrollment Limits) (90 Garrity XLd f68).

301 Transcript of Hearing of June 23 1975, 24-25, Morgan v. Kerrigan, No. 72-911-G (D. Mass.1975) (84 Center for Law & Education).

302 Morgan v. Kerrigan, 530 F.2d 401(1st Cir.1976).

303 Order of May 10 1975 - *see Kerrigan*, 530 F.2d 401, 430.

304 Memorandum of decision of June 4 1975. *See* Kerrigan, 530 F.2d 401, 430.

305 *Id.*

surprise. The first two orders, they said, were not unusual;[306] the third gave the experts "an unusual if brief amount of power" but was justified "by the school committee's actual violations of the court's substantive and procedural orders and its unwarranted delay in the face of the urgent necessity of finalizing these decisions."[307] The experts should "return to their university"[308] once a unitary school system had been established but the speed with which this goal could be accomplished rested largely in the hands of the committee itself.[309].

The school committee narrative, however, missed the point; examination of the chambers papers demonstrates the potential for an alternative narrative couched in terms of adversarialism and judicial neutrality. The fact that school committee attorneys concentrated on the excess of power issues deflected attention with the result that the adversarialism/neutrality case was never properly made. In the following section the alternative narratives are uncovered and the attempt to substantiate such a case more fully developed.

III. Dentler and Scott and the Judge's Ear: The Alternative Narrative

The school committee narrative of excess of power was a response to the visible presence of the experts within the school department. What the school committee did not see, but suspected, was the extent of the advice that the experts were providing to the judge in weekly meetings in his chambers and in memoranda written in response to the judge's request.[310] The judge kept these meetings confidential to himself, committed little to paper, and conveyed his instructions by phone:

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306 "We see nothing unusual in these orders. Experts are commonly used to assist the court in planning desegregation [...] and under the circumstances of this case were justifiably used to assure implementation as well. It is regrettable that there was a need to closely monitor the assignment process, but it is the Committee's own doing. To have neglected it, or to have failed to assure that instruction was non-discriminatory would have been irresponsible of the court." *Kerrigan*,530 F.2d 401, 430.

307 *Id.*

308 As the school committee urged, *See* Morgan v. Kerrigan, 530 F. 2d 401, 431.(1st Cir. 1976).

309 *Id.* at 431.

310 A third member of the Judge's team was Martin Walsh of the Community Relations Service of the U.S. Justice Department. The Judge drew on his services as appropriate. Dr Robert Dentler, 14th September 2005 *supra* note 260.

> [H]e would call and say, "Are you ready for a meeting next week? What kind of sandwich would you like me to order?" He would place those himself. I don't think he was even keen to have it known in the cafeteria that we were meeting. He would say, "I want to concentrate next time on the teachers."[311]

He likewise withheld the memos, at least in the early stages.[312] Dentler explained his thinking:

> There has to be something privileged to prevent disclosure. His position was; "These are not to you – they're to me. I'll decide if they include you or there are issues you have to deliberate – the others are just messages to me, like letters, my correspondence."[313]

The proximate cause for the appointment of Robert Dentler and Marvin Scott as court experts in the Boston schools case was the failure of the school committee to submit a constitutionally acceptable desegregation plan for implementation in September 1975 by the deadline of December 14 1974 as ordered to do so by the Court.[314] Although a plan had been drawn up by school officials, the refusal of three school committee members to authorize its submission on the grounds that they would not support "compulsory busing" prompted an immediate crisis.[315] Attorney John Mirick of Hale & Dorr submitted the unapproved plan without authorization and asked to be removed from the case; Judge Garrity began contempt hearings against the "Boston Three"[316] who stated in court that they would "take no initiative or affirmative action to

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311 *Id.* "We would come in and he had an old litigator's metaphor: 'All right – I'm getting in the tub of knowledge and you're going to fill it up with facts – and I'll be sitting there and I'll absorb what I need. So, what do you know about...?' He would act as though we were the fountain of knowledge."

312 Towards the closing stages of the case the Judge authorized disclosure of memos which contained helpful statistical information. See *infra* notes 410, 463, and accompanying text, and Section III Part III.

313 Dentler 2005, *supra* note 260.

314 Morgan v. Kerrigan, No. 72-911-G (D. Mass. October 31 1974) (Order Establishing Filing Date and General Contents of Student Desegregation Plan) (90 Garrity XLd Miscellaneous Postscript Orders 1974-75 f 68. 90).

315 Specifically, John Coakley of the Educational Planning Center. *See* Transcript of Hearing of December 18 1974, 30, Morgan v. Kerrigan, No. 72-911-G (D. Mass. 1974) (84 Center for Law & Educ.).

316 Ross & Berg, *supra* note 269 at 336 (1981).
Judge Garrity chose to treat the case against school committee members John Kerrigan, Paul Ellison and John McDonagh as one of civil contempt rather than criminal contempt and accepted a 'freedom of choice' plan filed on January 7 1975 as purging their contempt. He was to be criticized on the grounds that he had shown excessive leniency in this respect. *See also* R Smith in LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION 74-81(Howard I. Kalodner and James J.Fishman eds., 1978).

advocate or supplement a plan which in conscience and principle, they opposed", but would obey only the direct orders of the court.[317] The judge appointed masters to produce a court plan and experts to assist them but as school committee defiance crossed the boundaries between minimal compliance and intentional obstruction, the experts stayed on after the masters retired from the case to assist the judge with matters of implementation.[318]

The memos begin in February 1975 after the Order for Appointment of Experts[319] with a series of six written by Dentler to the Masters to assist them in evaluating the plans submitted by the Plaintiffs, the school department and the Boston Home and School Association.[320] The Masters retired from the case six weeks later, having presented their plan to the Court [321]and on April 4 1975 Dentler wrote to the judge recommending adoption of the plan with revisions.[322] In the event, as Dentler and Scott have written, "it took us, as the experts who continued to advise the court, four more weeks of work in order to accept the necessity for revision."[323] The statistical information upon which the Masters Plan was based and which had been supplied by the school department was fundamentally flawed. On a challenge by attorneys for the school committee, Judge Garrity resumed control over the planning process, required Dentler and Scott to undertake a review and the school department to provide a citywide master list of all enrollments, showing the home address, school attended,

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317 Morgan v. Kerrigan, No. 72-911-G (D. Mass. December 16 1975) (Supplementary Findings and Conclusions on Plaintiffs' Motion Concerning SBHS) (90 Garrity XLd f 68).

318 He issued orders to that effect on January 31 and February 7 1975.

319 Morgan v. Kerrigan, Order for Appointment of Experts, No. 72-911-G (D. Mass. Jan. 31,1975) (90 Garrity XVII f. 2).

320 February 4, 1975 Tentative Outline of Criteria for Gauging Effectiveness of Planning Proposals; February 4 1975 Application of Criteria to BHSA Plan of 1/20/75; February 5 1975 Critique of the Resource Center in the BSC Plan of 1/20/75; February 10 1975 Critique of Student Desegregation Plan of 12/16/74; February 24 1975 Commentary on Busing and Student Transport.; February 24 1975 Economizing on School Plant. 90 Garrity XXXVIIf. f.17.

321 On March 31 1975.

322 Dentler, (April 4 1975),Recommend Adoption of Final Report of Masters, (90 Garrity XXXVIIf. f. 17).

323 Dentler & Scott *supra* note 197 at 50. NAACP lawyers filed a brief objecting to the Masters Plan on the grounds that it would leave parts of the city substantially untouched by desegregation and would place too much of the desegregation burden on black students. They wanted district lines to be redrawn to achieve a composition of no more than 60/55% of one race and racial guidelines to ensure that no school should be more than 65% white or black. The State Board subsequently added its objection to the nine neighborhood districts. See J. BRIAN SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS (1984) at 109.

current grade and ethnicity for each student in the system.[324] The printout showing 85,913 students formed the basis for the court revisions but as Dentler and Scott later wrote, the printout proved to be "bogus" and the school department unforthcoming.[325] In an attempt to obtain accurate data from the school department, Dentler wrote to Judge Garrity on April 23 1975 recommending that he "cut an order" as soon as possible, directing senior personnel[326] to confer immediately with the two court experts to develop a definitive list of school facilities and capacity whereupon he and Scott could produce more or less straight away a definitive list. In Dentler's view this would not be possible without a direct order from the judge.[327]

The order which came two days later,[328]and was followed on April 28 by a similar order for the delivery of data regarding the examination schools, gave rise to the challenge to the court's authority discussed above and became the pattern for what was to follow.

IV. A Justificatory Framework

Unusual case or no, it is the assumption of this section that the closeness of the relationship which developed between the judge and his advisors together with the receipt by him of briefing memoranda which became part of his decision-making base but were withheld from the adversarial process requires a response, but that this can be shaped in terms of justification and degree: did the judge's constitutional goals justify the means he employed to achieve them?

Thus the narratives which now follow are constructed around three themes: civic opposition, structural inadequacy, and uncompromising litigiousness which together provide a framework of justificatory parameters. The civic opposition which was the

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324 Morgan v. Kerrigan No. 72-911-G (D. Mass.April 9 1975) (Supplemental Order Regarding Master List of Students) (90 Garrity XLd. f 68).

325 Dentler & Scott *supra* note 197 at 27.

326 State Commissioner of Education Anrig, Dr Charles Glenn, Director of the Public Facilities Department and the two Educational Planning Center (EPC) Associate Directors Coakley and Murray.

327 Dentler,(April 23 1975) Planning Priorities, (90 Garrity XXXVIIf. f.17).

328 Morgan v. Kerrigan, No. 72-911-G (D. Mass. April 25 1975 (Order as to Planning and University Support) (90 Garrity XLd Miscellaneous: Postscript: Orders 1974-75 f 68). At the hearing on Aug. 21 1975 Judge Garrity read directly from the report.

immediate background to the appointment of Drs Dentler and Scott is the context for a narrative relating to what Kirp has described as "the most dramatic example of unilateral judicial action": the receivership of South Boston High School (SBHS).[329] The absence of effective bureaucratic operational structures within the Boston public school system grounds a narrative of the experts' involvement in restructuring the school department which culminated in the establishment of the Department of Implementation with primary responsibility for carrying out the court plan. The third narrative, the special master proposal as a tool of court disengagement, takes its context from the inability or unwillingness of the litigation parties to agree the terms of an acceptable consent decree to terminate federal court supervision, requiring the judge to take the lead in devising a disengagement strategy that would preserve the legacy of the court's desegregative aims and achievements.

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329 David L Kirp, *The Bounded Politics of School Desegregation Litigation,* 51 HARV. EDUC. REV. 395, 401 (1981).

Chapter Three: Civic Opposition, Structural Inadequacies and Uncompromising Litigiousness

I. Civic Opposition: South Boston High School

The Boston case has been described as "one of the most confrontational school desegregation cases in modern American history".[330] Civic opposition not seen since the early aftermath of *Brown*[331] required a judicial response on an unprecedented scale, reaching a high point in the suspension of the powers of an elected school committee and the federal receivership of the city's most troublesome high school, South Boston High (SBHS).[332]

In June 1975 the U.S. Civil Rights Commission held two weeks of hearings in Boston following which it recommended that the court consider taking the school system as a whole into federal receivership.[333] In the event Judge Garrity acted only in relation to South Boston High School, his receivership order "an extraordinary measure reluctantly undertaken by an embattled judge who had no choice".[334]

Trouble at the school had not been unexpected. Located in the heart of the predominantly working class white Irish enclave of South Boston, run-down and poorly equipped,[335] SBHS had became a symbol of the racial strife which erupted in the city in the months which followed the implementation of the Phase I Racial

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330 Michael A. Rebell in JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION, 70 (B. Flicker ed. 1990).

331 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Brown I); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (Brown II).

332 For accounts of the violent response to court-ordered busing and of the role of local politicians in providing leadership and rhetoric to resistant communities, *see* RONALD P FORMISANO, BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 1960S AND 1970S (1991), J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985), and THOMAS H O'CONNOR, THE BOSTON IRISH: A POLITICAL HISTORY (1995).
See also Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975) discussing violent outbursts including stoning of buses and blocking of roads and J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES, (1985) 253 (the Pulitzer prize-winning account describing the impact of presence on streets of state troopers and local riot police).

333 At the hearing on August 21 1975 Judge Garrity read directly from the report. *See* Transcript of Hearing of August 21 1975, Morgan v. Kerrigan, No 72-911-G (D. Mass. 1975) (84 Center for Law & Educ.).

334 Ralph R Smith, *Two Centuries and Twenty-Four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools in* Kalodner & Fishman, eds. *supra* note 316.

335 Formisano *supra* note 332 at 115.

Imbalance Plan.[336] In the fall of 1974, buses carrying black children were met by missiles and racial abuse; police attempts to clear the streets provoked violent confrontation.[337] Following the fatal stabbing of a seventeen-year old white student inside the school building,[338] Judge Garrity observed that the violence and disorder outmatched that of Little Rock but resisted the mayor's call for the school to be closed on the grounds that to do so would be to give way to intimidation.[339] The following year however, when implementation of the Court's Phase II Plan brought renewed scenes of violence and confrontation at the school gates and anarchy within, action could no longer be deferred.

In their account of their involvement Dentler and Scott state that whilst the situation at the school was being monitored by staff from the Community Relations Service of the U.S. Justice Department, throughout September and October 1975 their commitment was elsewhere.[340] Their direct involvement began in November 1975 against a background of a pending Plaintiffs' motion for further relief[341] with a request from the judge to visit the school and report back "as educators."[342] The judge whose determination to face down the Irish political leadership which was opposing the court was undiminished,[343] set down five days of court hearings.[344] On the first day, he explained that the purpose of the hearing was to consider whether the Court's desegregation plan was being implemented at SBHS.[345] Dentler and Scott were in

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336 *See* Morgan v. Hennigan, 379 F. Supp. 410, 483 (D. Mass. 1974).

337 For accounts *see* Ross & Berg, *supra* note 269 at 195, 197, Formisano, *supra* note 332 at 78, 82.

338 Ross & Berg, *supra* note 269 at 330.

339 Transcript of Hearing of Jan. 2 1975, 38, Morgan v. Hennigan, No. 72-911-G (D. Mass. 1975) (on file at National Archives and Records Administration, Northeast Region, Waltham, MA under reference: Case Files, 1972-1991, Accession No: 021-98-0101, Box 36) (hereafter NARA).

340 Dentler &. Scott *supra* note 197 at 176.

341 Filed on Nov. 18th 1975.

342 Dentler & Scott (1981) *supra* note 197 at 176.

343 "South Boston was the political locus of strife [...]To come from South Boston is to be part of the Irish political elite that has run the city for a century and a half. [...] When the plaintiffs moved to have Judge Garrity close South Boston High School – which was hostile to minority students – we knew closing it would be to martyr those who had organized opposition. The plaintiffs' proposed remedy was simply unworkable. It didn't interest Judge Garrity at all – for him closing was giving up. Closure would be a victory for the Irish political leadership – and Judge Garrity knew this. The legal elite of the city was dominated by Irish attorneys – Garrity knew these lawyers well and was himself part of them. But [...] the Irish tradition is that the Irish don't give up. [...]The judge saw no utility in closing it." Dentler (2006), *supra* note 197.

344 The hearings were scheduled for 21, 22, 24, 26, 28 November 1975.

345 Transcript of Hearing of Nov. 21 1975,2, Morgan v. Kerrigan, No 72-911-G (D. Mass. 1975)

court every day.[346] They attended conferences with the judge in his chambers at his request, they accompanied him on the two visits that he made to SBHS, [347] and made recommendations concerning appropriate relief. On December 9 1975, Judge Garrity ordered that the principal be removed and that the school be placed in the temporary receivership of Assistant Superintendent Joseph M. McDonagh.[348]

A. The SBH Memos: Framing the Remedy

Interviewed in 2006, Dentler stated that the receivership solution for SBHS came from the experts:

> Marvin Scott and I visited South Boston High School to get a feel for the place. We began to explain to Judge Garrity that under his receivership he could appoint those in charge and a headmaster who could reorganize the curriculum and equip students to go to college. We felt that the headmaster had to be someone from outside Boston. Marvin and I recommended receivership. [349]

A claim that the receivership solution did not originate from the parties but originated from a source extraneous to the courtroom, in this case the experts, is prima facie a claim of influence, engaging the fourth of Judge Tashima's guidelines.[350] This narrative now examines that claim by reference to the court transcripts, the experts' advice as evidenced in the memos they wrote for the judge and finally by reference to the receivership order of December 9 and supplementary memorandum of December 16.[351]

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346 Dentler (2005) *supra* note 260; Scott, (2007) *supra* note 270.

347 The visits took place on November 26 and December 2 1975. For Judge Garrity's account *see* Morgan v. Kerrigan, 409 F. Supp. 1141, 1143 (D. Mass. 1975).

348 Morgan v. Kerrigan, No. 72-911-G (D. Mass. Dec. 9, 1975) (Order Concerning South Boston High School) (90 Garrity XLd f.69).
See Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. Dec. 16 1975) (Supplementary Findings and Conclusions on Plaintiffs' Motion Concerning South Boston High School).
The choice was unusual. Assistant Superintendent McDonough was the brother of School Committeeman John McDonough – one of the "Boston Three" and widely expected to be hostile to desegregation. In fact, as Dentler explained "like a few other of the Irish leadership, he internalized the order (to take affirmative action) and it's 'I will now be a good soldier on this' [...] We were surprised. He did what he was supposed to do. "(Dentler (2006) *supra* note 197).

349 Dentler (2006), *supra* note 197.

350 Association of Mexican American Educators (AMAE) v. California, 231 F.3d 572 (9th Cir. 2000): "a district court minimally must: [...] (4) make clear to the technical advisor that any advice he gives to the court cannot be based on any extra-record information." *Id.* at 611.

351 Morgan v. Kerrigan, No. 72-911-G (D. Mass. Dec. 9, 1975) (Order Concerning South Boston High School) (90 Garrity XLd. F.69); Morgan v. Kerrigan, 409 F.Supp. 1141 (D. Mass. 1975).

B. The Transcripts

Three points of significance emerge: i) Judge Garrity was determined to act, ii) he was considering receivership and iii) the plaintiffs did not ask for receivership.

The plaintiffs' motion asked for "further relief".[352] At the hearing on November 21 Judge Garrity explained that the purpose of the hearing was to find whether the Court's desegregation plan was being implemented at SBHS. [353] The Court would solicit proposals by the parties as to what action should be taken but would be taking the receivership suggestion of the Civil Rights Commission filed with the court the previous day seriously.[354] Counsel for the plaintiffs stated that he had considered asking for the appointment of someone with "absolute authority to simply go in and call the shots and be in charge"[355] but in the event asked for a threefold order: 1) that the school be closed or alternatively either moved "lock, stock and barrel" to other premises, or the staff and students be dispersed to other high schools throughout the city; 2) that the people promoting school boycotts be identified and (3) a declaration that two named teachers were in violation of the court order barring discriminatory conduct.[356] He did not ask for the school to be taken into receivership.

C. The Experts' Recommendations

The chambers papers include four written communications (one letter, three memos) sent by the experts to Judge Garrity in connection with the situation at SBHS. The following points emerge: 1) Dentler and Scott were firmly opposed to closing the school. 2) They believed that the school could be "turned round" and recommended "tested and validated" methods. 3) Dentler and Scott were directly involved in formulation of strategy. 4) Dentler's involvement extended to undertaking preliminary drafting for the judge. 5) The experts did indeed recommend temporary receivership for SBHS.

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352 *Supra* note 341.

353 Transcript of Hearing of Nov 21 1975, 2, Morgan v. Kerrigan, No 72-911-G (D. Mass. 1975) (84 Center for Law & Educ.).

354 *Id.* at 74, 77.

355 *Id.* at 33-34.

356 *Id.* 35.

The first communication was written on November 16 before the evidentiary hearings began and expressed Dentler's firm personal conviction that closure should be resisted and that the school could be turned round:

> To have the court sanction the closing of South Boston High would be to have the court participate in defining the exact degree of public clamor required of citizens in a Boston neighborhood before the ultimate arbiter of the rule of law capitulates. [...]To consider closing South Boston High School at this juncture would be to deny the availability of tested and validated methods of making a public school facility secure for habitation, teaching and learning. These methods include introducing new administrative leadership; introducing new and more effective staff; identifying and disciplining students who cannot abide by an appropriate code of conduct; utilizing conflict-mediation teams and human relations training; and so forth.[357]

Were the court to entertain the plaintiff's motion, he continued, the effect would be to focus public attention on "conflict and clamor" rather than finding a solution to the problem. "A better source of action can and should be found."[358]

The second communication was dated November 24, before the evidentiary hearings had been concluded. In this memo, Dentler set out for the judge a range of remedial options which included receivership and reflected three assumptions he described as "basic", viz. that a complete turnover of teaching staff was required, new political conflicts should be avoided and the lead time should be brief.[359] At this stage, Dentler's preference was for a change of staff falling short of outright receivership.[360]

In the next memo, written on November 30 after the close of the evidentiary hearings, Dentler set out to "frame recommendations" for the judge in what he described as "a more directly usable form." [361] The recommendations set out in seven numbered paragraphs represent the basis of a draft order giving education and security responsibilities to the school department implementation office monitoring

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357 Dentler, (Nov. 16 1975) (90 Garrity XXXVIIf. f.19.)

358 *Id.*

359 Dentler, (Nov. 24 1975) Re Administrative Options for South Boston High. (90 Garrity XXXVIIf f. 19.)

360 *Id.*

361 Dentler, (Nov. 30 1975), A Third Message on Remedies (90 Garrity LII. f.1).

responsibilities to the CDAC (Community District Advisory Council) and personnel replacement and redeployment responsibilities to Associate Superintendent Paul Kennedy.[362] The memo concludes with the final recommendation:

> In order to carry out these numerous changes in educational and security conditions at SBHS, new administrative leadership is essential. Therefore, the superintendent is directed to become the receiver for SBHS and its L Street Annex. As receiver, effective December 6, 1975, she shall, without reference or consultation to the school committee, nominate a new headmaster for court review and transfer the present headmaster to a new assignment in the system without loss of or change in rate of salary.[363]

The last memo, headed simply "South Boston High School", was written on December 10, the day after Judge Garrity announced the receivership order from the bench but before the publication of the complete memorandum of decision which followed on December 16.[364] In this last memo Scott and Dentler set out sixteen suggestions for the improvement of educational outcomes at SBHS including a "workable grievance procedure" to be "in the hands of each student", "human relation training" for all staff with specific proviso that teachers should not be used to search students and recommendations concerning curriculum development "to fit the needs and interest of the student body" with specific proposals for extra-curricula activity and year-round Community Education Programs.[365]

D. The Receivership Order

On December 9 1975 the judge's order was issued from the bench, confirmed the same day in writing[366] and supplemented on December 16 with a written statement of the court's findings and conclusions.[367] The order placed the school in the temporary receivership of the court, and appointed not the superintendent but instead the assistant superintendent, Joseph M McDonagh, as temporary receiver with directions to review and where necessary replace the entire administrative staff and faculty.[368]

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362 *Id.*

363 *Id.*at para 7.

364 Scott & Dentler,(Dec. 10 1975), South Boston High School ((90 Garrity LII. f.1).

365 *Id.*

366 Morgan v. Kerrigan, No. 72-911-G (D. Mass. Dec. 9 1975) (90 Garrity XLd. f.69).

367 *Id. See also* Morgan v. Kerrigan, 409 F. Supp. 1141, (D. Mass. 1975).

368 Dentler and Scott have stated that the appointment of the Associate Superintendent was on their recommendation because, in the command hierarchy built into the 1975 court plan, this

In the supplemental memorandum of December 16, after setting out more fully the findings and conclusions upon which the receivership order was based, Judge Garrity concluded with a statement that changes at SBHS could be accomplished within the current school year and specific suggestions for educational enhancements clearly influenced by the Dentler and Scott memos.[369]

E. Afterword: A Smoking Gun and a Note on Methodology.

Attached to Dentler's memorandum of November 30 is an undated memo to the judge with some annotations in Garrity's handwriting and headed "Possible Questions to Ask Headmaster Reid".[370] The memo contains a list of twelve questions but no commentary. The court transcripts for the period of the SBHS receivership hearings are complete, making it possible to track the behavior of the judge in court. The assumption was that if the transcripts indicated that the judge was taking an active role in initiating questioning on the lines indicated by Robert Dentler, his courtroom behavior might be said to have been affected by information or influence which he had received outside of the courtroom and which had been kept out of the adversarial process. This would constitute prima facie evidence of what Judge Tashima's guidelines would now regard as judicial impropriety, or in other words a documentary "smoking gun".[371]

The results of the exercise are set out as an appendix to this chapter. They indicate that, in the first place, most of the questions were in fact raised directly by counsel for the parties. However, on November 26 after Dr. Reid's evidence in chief and cross-examinations the judge engaged in colloquy with him in the course of which he asked questions which were either specifically directed at missing areas of the testimony or which were directed to making sure that all aspects of Dentler's question areas were adequately covered. Examination of the transcripts reveals four question areas

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officer was the administrator immediately above the offices of principal and headmaster. Dentler & Scott *supra* note 197 at 178.

369 *Kerrigan*, 409 F. Supp. at 1150. Suggestions included: modified clustering guidance counseling, program scheduling, extra-curricular activities, and grievance procedures *Id.*

370 Dentler, November 30 1975, A Third Message on Remedies, (90 Garrity LII f.1)

371 *See* Association of Mexican American Educators v. California 231 F.3d 572, 611 (9th Cir. 2000) (Tashima J. dissenting),(applied in Techsearch, L.L.C. v. Intel Corporation 286 F.3d 1360,1378-1379 (Fed. Cir. 2002)).

(questions 7, 8, 11, and 12) in respect of which there was no evidence that the parties had previously questioned Dr Reid or that he had made sua sponte comments that would have forestalled questions. The transcripts clearly reveal the judge directly responding to these lacunae in the course of his colloquy with Reid of November 26.

Generally however, the incomplete nature of the court record means that this kind of reductive link between the Dentler/Scott memos and the judge's behavior is difficult and in many cases impossible to establish and is in any event not necessary if the test of "judicial impropriety" as outlined in Chapter 1 is one of appearance rather than substance. This is the assumption upon which the narratives of this Part now continue.

II. Structural Inadequacy: Reform of the School Department

In their published account Dentler and Scott have explained how school administration deficiencies combined with endemic corruption and mismanagement to frustrate the desegregation endeavor.[372] From the judge's point of view, the opposition of elected school officials was just one aspect of a wider problem, namely the need to secure effective administrative and management structures for the public school system without which desegregation could not be accomplished in the short term or maintained in the long term. The court plan required student assignments to be made by a staff unit designated by the superintendent, under the supervision of court representatives.[373] It imposed specific requirements for some matters[374] upon "the school department" [375] yet as Dentler reminded the judge, the "school department" was a fiction of the court's imagination.[376] Although funding came from city hall and the state, the chief administrators were appointed directly by the five

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372 Dentler &.Scott, *supra* note 197. Deficiencies ranged from inaccurate student enrolment data, failures to repair and maintain buildings, construct new ones, and grasp the nettle of excess capacity, to outright evasion of court orders regarding teacher and administrator hires. *Id.*

373 Morgan v. Kerrigan, 401 F. Supp. 216, 261 (D. Mass. 1975).

374 Including the preparation, under the Court's supervision, preparation, of an "Orientation and Application Booklet" *Id* at 257. Other matters related to kindergarten assignments, the provision of bilingual instruction, the setting of entrance criteria for the Examination Schools. *Id.*251, 252, 258.

375 *See* Morgan v. Kerrigan, 401 F. Supp. 216, 251 n.18: the words are defined to 'refer collectively and individually to the members of the Boston school committee and superintendent and their agents, servants, employees and attorneys and all other persons under their control.'

376 Dentler, (Nov 27 1975), Tentative Ideas about Orders for Current Phase of Case, 90 Garrity XXXVIIf. f19.

member elected school committee as a matter of personal patronage. Each officer dealt directly with the committee and there was no unified chain of command. [377]

Moreover, desegregation planning and implementation required expertise and, in Dentler's view: "(n)o-one in the Boston area had any reason to believe that the Boston school committee could plan its way out of a portable classroom, let alone make plans for every school in the system."[378] Neither the school committee members nor its "top echelon"[379] of administrators had educational planning experience. There was an Educational Planning Center with a "small untested staff,"[380] which had produced the school defendants' plan. Certain individuals demonstrated personal commitment to the implementation process but their efforts were hindered by a lack of infrastructure and institutional support. The concern to put in place and secure appropriate administrative structures with which to implement and then preserve the integrity of the court's desegregation plan became the key to court withdrawal from the case and represents a defining theme to the work of the court experts.

With the benefit of hindsight, Dentler and Scott commented that the failure to make specific provision for a machinery of implementation was a weakness of the court plan.[381] From July 1974 to August 1975, an ad hoc "Implementation Team" consisting of teachers and administrators already employed within the Boston public schools had worked on the implementation of the Phase I plan.[382] Encouraged by the court, the school committee proposed in June 1975 and Superintendent Fahey's organizational plan established in September 1975 an Implementation Office headed by a Director reporting to an Associate Superintendent[383] but from the start this Office became, in Judge Garrity's words, "the department orphan [...] treated generally as an unwelcome guest for the duration of the court's intervention."[384] It had no control over its budget, no clear organizational structure, was staffed with personnel on

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377 Dentler and Scott *supra* note 197 at 21.

378 *Id.*

379 *Id.*

380 *Id.*

381 Dentler & Scott *supra* note 197 at 45.

382 Sheila R. Spalding: Boston City Archives: Desegregation Era Records Collection available at http://www.cityofboston.gov/archivesandrecords/di_records.xml (last visited August 6 2009).

383 Spalding, *supra* 382.

384 Morgan v. McDonough No. 72-911-G (D. Mass. May 6 1977) (Memorandum and Orders Modifying Desegregation Plan) (90 Garrity XLd. f69).

temporary assignment from elsewhere and coexisted with separate Transportation and Assignment Units.[385]

A. The Experts Urge Reform of the School Department – Judge Garrity's Court Behavior Evidences their Influence

In the months following announcement of the Phase II Plan[386] Dentler and Scott supervised the implementation process and provided the judge with weekly briefings concerning progress. On June 3 following a meeting with Desegregation Coordinator Charles Leftwich they sent a special report advising their belief that "virtually no progress" was being made under his leadership which was being deliberately subverted by the school committee.[387] With no command structure, staff and record-keeping capability, Dr Leftwich was without the "means - authority and resources - to discharge his responsibilities."[388] The impasse threatened the desegregation endeavor. On June 16 Dentler reported that the Assignment Unit at last had a Director[389] but his progress report of June 23[390] advised that: "[t]he diligence of the Assignment Unit members and their co-workers cannot compensate for the fact that they are neither equipped, trained nor prepared to undertake a task of this scale and complexity." [391]

Judge Garrity's implementation schedule required student assignments to be completed by June 20 but the deadline could not be met. They finally went out on July 4, implementation staff supervised by the court experts working round the clock to "render sensible the proposed assignment of 80,000 students".[392] Over the summer Dentler and Scott continued to supervise plans for transportation, facilities use and student discipline. By the fall they were convinced that radical action was required. On November 27 1975, in the midst of discussions concerning SBHS and before the final hearing, Dentler wrote to the judge to express his view that single issue remedies

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385 *Id.*

386 The plan was announced on May 10 1975. The memorandum of decision followed on June 5 1975: Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975).

387 Dentler, (June 3 1975) (90 Garrity XLVIIIa f1).

388 *Id.*

389 Dentler, (June 16 1975), (90 Garrity XLVIIIa. f1).

390 Dentler & Scott, (June 23 1975) (90 Garrity XLVIIIa. f1).

391 *Id.*

392 Dentler & Scott, *supra* note 197 at 62.

were doomed to fail. SBHS was but one of "dozens just like it".[393] The underlying problem was the way in which the Boston public school system as a whole was administered. The present occasion should be used to strengthen the authority of the Office of Implementation (OI).[394]

At the hearing on December 9 1975, in addition to making the receivership order Judge Garrity acted to strengthen the position of Superintendent Fahey with an order transferring to her the appointive power of the school committee in relation to implementation and school safety and security matters. His language reflecting the experts' briefing material, the judge then addressed the status of the OI. That office, he said, must be separated from the school committee "if this desegregation plan is to be implemented and if there is to be desegregation of the schools."[395]

In the following extracts the wording of Dentler's memorandum of November 27 1975 is juxtaposed with the words used by Judge Garrity in court on December 9. The similarity between the two passages is clear.

Dentler was expressing his view that what was needed was radical action to change the way in which the Boston public school system as a whole was administered. The Office of Implementation continued into its seventh month "without a mandate, a budget, or a personnel appointment roster."[396] Superintendent Fahey's plan would relegate the OI "to a third echelon of insignificance".[397] Then comes this passage:

> The School Department is a fiction of the court. There is no such entity listed in the city charter or in the telephone book. At the other extreme, individual school staffs such as that at South Boston High continue isolated and ignorant of the imperatives of the court. Their chain of command moves from District Superintendent to Deputy. They do not

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393 Dentler to Judge Garrity, (Nov. 27 1975), Tentative Ideas About Order for Current Phase of Case. (90 Garrity XXXVIIf. f19).

394 *Id.*

395 Transcript of Hearing of Dec 9 1975, 94, Morgan v. Kerrigan, No.72-911-G (D. Mass. 1975) (NARA).

396 Dentler,(Nov. 27 1975) *supra* note 393.

397 *Id.*

> report to a School Department, nor do they have any identifiable business to take up with the Office of Implementation.[398]

If the office is to be effective, Dentler continued, it must be able to appoint qualified personnel:

> These will not be found amongst the rank and file of the Boston School system for every function. That system lacks statisticians, human relations experts, research and development and faculty training specialists, security experts, and other consulting and full time staff essential to implementation. These cannot be appointments made by the school committee or the Superintendent, who is their agent. They must be made by the Associate Superintendent for Implementation.[399]

The following words of Judge Garrity in court at the hearing on December 9 1975 demonstrate the influence of Dentler's briefing:

> One of the difficulties in implementing this desegregation plan that has sort of grown in my realization with the passage of the weeks and months is that the Court's order has been directed to the School Department, and there really is no such thing as the School Department. You know, you look in the telephone book, and you cannot find anything under the School Department. It is people. And the Court, perhaps mistakenly, relied upon the school committee to aid its agents, principally [Schools Superintendent] Fahey, but a lot of other people working with her and under her, to carry out that plan of implementation, but it has not been done, and one of the fruits of this policy pursued by school committee in my opinion has been the situation down in South Boston High School. It could have been avoided, and it can be corrected and it will be.[400]

Judge Garrity continued:

> The Office or Department of Implementation is by court order going to have funds at its disposal, funds with which to do things, such as to employ statisticians or other types of – I mention statisticians. There are so many other types of specialists who are needed to carry out a desegregation plan. It will have authority to appoint personnel necessary to carry out the provisions of the plan. I am not talking now about teachers, I am talking about special persons and things needed.[401]

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398 *Id.*

399 *Id.*

400 Transcript of Hearing of Dec. 9 1975 *supra* note 395 at 92.

401 *Id.*

B. The Inadequacies of the School Department Impinge on Assignments: Judge Garrity Distributes the Experts' Report

Spring 1976 brought projections of a $16 million deficit in the school budget by the end of the school year and a motion by Mayor White that the school committee submit plans to reduce expenditure.[402] On 13 February, Scott raised with Judge Garrity his concerns about school committee proposals to appoint implementation personnel on a temporary basis. The court, he advised, should look into the matter further lest the "squeeze" impact negatively on the assignment process for the coming year. On March 11 1976, after what he later described as "months of urging the school committee to take the initiative in staffing and funding the OI",[403] Judge Garrity ordered the school committee to establish a budget for the OI and to freeze in place 21 professional personnel in the office until October 1976.[404]

Despite the court's stated determination to ensure that the Office of Implementation would be given a full-time staff and the necessary funding to enable it to carry out the court plan, the OI continued to struggle without the mandate and the infrastructure which the annual student assignment exercise required. The resulting confusion was compounded by the large number of student withdrawals and applications for transfer as parents sought to manipulate the system for their children's advantage. In October 1976 Dentler and Scott wrote to Judge Garrity explaining that the effect of these tactics was to subvert the assignment guidelines; of the 75,443 students enrolled in the public school system as of September 1, 1976, approximately 8,000 or 10.5 percent were assigned after the final date of court review and approval.[405] Of these 3,000 were classified as new entrants, and 5,000 as corrective reassignments.[406] Information provided by the OI being inadequate, Dentler and Scott had sequestered the records

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402 For an account *see* Sheehan, *supra* note 268 at 166-167: In January the school committee was projecting a $20 million deficit by June 30. Mayor White claimed that the school department had hired 800 more teachers and 300 more transitional aides than were required to implement the plan and filed a motion with Judge Garrity that the school committee be forced to propose immediate budget cuts. On a showing of Boston Municipal Research Bureau figures of a surplus of 400 to 500 teachers and additional administrators and transitional aides whose loss would not adversely impact on the quality of education in the BPS. Judge Garrity ordered the School Department to submit a plan for reduction of the budget deficit, expected to reach $16million by the end of the school year.

403 Morgan v. McDonough, No. 72-911-G (D. Mass. May 6 1976) (Memorandum and Orders Modifying Desegregation Plan) (90 Garrity XLd. f70).

404 Transcript of Hearing of Mar. 11 1976, 56-57, Morgan v. McDonough, No. 72-911-G (D. Mass. 1976) (84 Center for Law & Educ.).

405 Dentler & Scott, (Oct. 3 1976) Review of Student Assignments,, 90 Garrity XXXVIIf. f 20.

406 *Id.*

and now concluded that 14 percent of the students assigned subsequent to court approval had probably been assigned in ways that violated the court plan and its rules governing assignment of students.[407]

In their view the major cause of the problem was a "fundamentally defective Office of Implementation, too weak in authority to control the assignment process, too poorly staffed to operate effectively [...] and too fragmented in structure to eliminate errors which compound from day to day and week to week."[408] To secure the future of the plan the court should order the establishment of a Department of Implementation, "effective December 1 1976".[409] On October 7 1976 Judge Garrity distributed the experts' report and enjoined the Boston School Department and Committee from processing any more "new entrants" or "corrective assignment" applications without the prior approval of Dean Dentler and Dean Scott.[410] One of their first tasks would be to develop forms which would provide them with the information they required to implement the court plan.[411]

C. Judge Garrity Establishes the Department of Implementation - Superintendent Fahey Attempts a Coup - The Court is Over a Barrel

For six months Judge Garrity continued to express the hope that an effective Department of Implementation could be established without a court order.[412] Under pressure from the School Committee to maximize efficiency, Superintendent Fahey submitted proposals for reorganization[413] but these amounted to little more than filling vacancies, incorporating the assignment unit, adding two assignment specialists for special needs and bilingual students, and appointing temporary personnel.[414] On February 1 1977 Dentler reported that OI staffing was now down to seven people,

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407 *Id.*

408 Dentler & Scott, (Oct. 3 1976) *supra* note 405.

409 *Id.*

410 Transcript of Hearing of Oct. 7 1976, Morgan v. McDonough, No. 72-911-G (D. Mass.1976). *See also* CCC Court Summary October 7 1976 (90 Garrity X Citywide Coordinating Council 1974-84 Subseries Xk CCC: Summaries of Court Actions, 1976-78) and Transcript of Hearing of Mar. 9 1978, 43, Morgan v. McDonough, No. 72-911-G (D. Mass. 1978) (84 Center for Law & Educ.).

411 Morgan v. McDonough, No.72-911-G (D. Mass. May 6, 1977) (Memorandum and Orders Modifying Desegregation Plan) (90 Garrity XLd. f70).

412 Transcript of Hearing of Sept. 9 1976, 22, Morgan v. Kerrigan, No. 72-911-G (D. Mass.1976) (Center for Law & Educ.).

413 Submitted to the school committee on Jan. 12 1977.

414 *See* Garrity J., Morgan v. McDonough, No.72-911-G (D. Mass. May 6, 1977) (Memorandum and Orders Modifying Desegregation Plan,) (90 Garrity XLd. f70).

only a few of whom were knowledgeable about the details of court orders and the particulars of geocode units, assignment procedures, application booklets etc. "Rebuilding of staff adequacy" he stated "will take time and practice. It should occur well before spring or we will all pay the price of randomly accumulated ignorance translated into motions and arguments in court".[415]

On February 22 the school committee accepted Superintendent Fahey's plan[416] but reduced the proposed salaries for 12 implementation specialists by an average of $10,000 dollars each. Two months later they confirmed the appointments of OI personnel but for six months only.[417]

On May 6, 1977 as the annual student assignment exercise approached, the court acted. Its annual Memorandum and Orders Modifying the Desegregation Plan noted that the OI "has had and continues to receive only minimal support from the school committee".[418] Of the initial staff of 21 only six remained, the other 15 having left without being replaced and the qualifications of some of the remaining six "are at least open to question".[419] The Order established a Department of Implementation as a permanent unit with four divisions[420] under the supervision of the associate superintendent for support services, a position then held by Charles Leftwich. The DI was to have a "clear mandate to assume responsibility for all aspects of the court's desegregation plan, and [...] the authority to carry out that mandate".[421]

The immediate effect however was to provoke a political crisis. "In a rare show of solidarity",[422] the school committee and Superintendent Fahey joined forces to oppose the court order. On May 11, the school committee gave her authority to assign and reassign personnel and resources without reference to them and Miss Fahey ousted Associate Superintendent Leftwich, nominated John Coakley as his successor and placed herself in overall charge of the new DI. [423]

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415 Dentler,(Feb. 1 1977) The Price of Delay, Series #, (90 Garrity XXXVIIf. f21).

416 *Id.*

417 Morgan v. McDonough, No.72-911-G (D. Mass. May 6, 1977), (Memorandum and Orders Modifying Desegregation Plan) (90 Garrity XLd. f70).

418 *Id.*

419 *Id.*

420 External Liaison Unit; Records Management Unit; Student Services Unit; Transportation Unit. For a description of their functions see Spalding, *supra* note 382.

421 *Id.*

422 Sheehan, *supra* note 268 at 176.

423 The chronology is set out by Garrity J. in Morgan v. McDonough, No. 72-911-G (D. Mass. May 24 1977) (Supplemental Order Regarding Office of Implementation and Department of Implementation).

On May 12 1976 Dr Leftwich filed with the court his operating budget and staffing plan for the new DI as the May 6 order required him to do. Miss Fahey filed alternative proposals on May 19. On May 17 plaintiffs moved for immediate implementation of the orders of May 6.

On May 20 Judge Garrity ordered Dr Leftwich's reinstatement,[424] but on May 24 in effect he was forced to climb down; the order of May 20 was vacated and the May 6 order amended confirming Ms Fahey's overall authority over the new DI and leaving the school committee and the Superintendent in control of "one of the largest employment agencies in town."[425]

Dentler and Scott were backing Dr. Leftwich. On May 16 Dentler had briefed the judge that the Committee was using the Superintendent to obstruct the formation of the DI:

> Miss Fahey believed she was a captive of penultimate cross-pressures: (1) The Committee was threatening to use the order as the pretext for terminating her in 1978 [...]; (2) They were offering her a first chance to coalesce with them; (3) The court had criticized her OI proposal and had rejected it, placing new strength in a DI she feared she would be unable to control; and (4) Her office was filled with hangers-on who had been awaiting renewal of their appointments to headquarters positions, justified on the personnel printouts as assigned to "desegregation activities" and these individuals called for her protection.[426]

Dr Leftwich, encouraged by the experts, had "swung into action" in order to meet the court's tight deadlines.[427] "For the first year since the court intervened" Dentler wrote, "the court experts witnessed effective planning and implementation" but these efforts were being blocked within school headquarters, hence the submittal of his budget and staffing plan directly to the court.[428] When challenged by Dentler and Scott on the costings which were high, he explained that this was because school department officials were threatening to refuse to provide adequate space or equipment, to facilitate moving equipment such as the computer and, in effect, "to prevent the

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424 Morgan v. McDonough, No. 72-911-G (D. Mass. May 24 1977) (Supplemental Order re Office of Implementation and Department of Implementation) (90 Garrity XLd. f71).

425 Sheehan, *supra* note 268 at 177. Judge Garrity's explanation was that of expediency: Morgan v. McDonough, No. 72-911-G (D. Mass. May 24 1977) (Supplemental Order Regarding Office of Implementation and Department of Implementation).

426 Dentler, (16 May 1977) Analysis of Conflict over Department of Implementation: Its Dangers and Alternative Resolution, (90 Garrity XXXVIIf. f21).

427 *Id.*

428 *Id.*

development of the DI". This refusal of cooperation stemmed from job insecurity; about 25 personnel stood to lose their jobs. Ultimately however, the fault lay with the school committee and the patronage power available to it:[429]

> The school committee has obstructed formation of the DI, in defiance of the May 6 order; [i]t has achieved this by pressurizing the superintendent to go out on the point between the DI and the court, in the belief that the court would abandon its objectives before it would move against the superintendent. [...] The superintendent, as captive, is incapable of developing or leading an alternative version of the DI. She will be obliged to staff it with personnel who are agents of individual school committee members and who are opposed to the purposes of the court.[430]

Dentler then warned the judge of the dangers for the court: as a result of the crisis court deliberation had been put back to May 20 and Phase III assignment deadlines could not now be met. Miss Fahey and committee members blamed the experts for the crisis with the result that their liaison function was now at risk and with it the court's authority:

> All five members of the school committee will soon conclude that it is possible to impede the will of the court without incurring direct costs legally. This will stimulate a revived quest for innovative maneuvers and obstructionist tactics. Many of these will expand upon Miss Fahey's new role as a committee captive.[431]

Dentler urged the judge to use his personal influence to secure the cooperation of Superintendent Fahey and Dr Leftwich[432] but in the event, on Judge Garrity's direction[433], the meeting which Superintendent Fahey attended later that afternoon in the courthouse was with Dentler and Scott. Dentler reported back that Dr Leftwich had mishandled the situation, Miss Fahey was resolved to exercise personal control over the DI and would "go to any length" to protect her action in removing him, leaving the court in difficulty.[434] To accept the removal of Dr Leftwich would

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429 *Id.*

430 *Id.*

431 *Id.*

432 *Id.*

433 Dentler, (May 17 1977) Implications of Courthouse Conference with Marion Fahey, (90 Garrity XXXVIIf. f21).

434 *Id.*

jeopardize its authority; to do otherwise would be to attack the superintendent. The court was "over a barrel - one that is not filled with rainwater."[435]

In a briefing memo for the hearing on May 20 Dentler recommended holding firm: the court should establish the DI with the structure and functions already specified in its Phase III order, a budget and staffing plan to be produced by the experts within 24 hours of request.[436] Dr Leftwich should be confirmed as Associate Superintendent with overall "direct and daily supervision" of the DI until October 1 1977 in preference to John Coakley on the basis of his familiarity with "deep and numerous problems experienced during Phase IIB" and his greater competence to perform the leadership tasks necessary to establish the new department. In this instance, he stressed, the advice of the court experts should be given exceptionally careful weight:

> The attorneys in the case have not monitored the operations of the Office of Implementation, as they have. The state board and its agents have not worked directly with John Coakley since 1974 and 1975. The experts have done so.[437]

The specific issue for the hearings of May 20 and 23 was the wording of the May 6 order, specifically Section 7(g)(1) which as originally promulgated gave power to the associate superintendent to nominate appointments to the DI.[438] Judge Garrity's oral order of May 20 had reinstated Dr Leftwich for the limited purpose of carrying out the court's orders respecting formulation of the prospective DI, and had directed Superintendent Fahey and Associate Superintendent Leftwich "to develop jointly and by agreement a list of potential nominees from which the superintendent would fill positions in the department of implementation."[439] Dentler's memo which differentiated between leadership and assignment tasks now gave the judge his compromise. The supplemental order of May 24 identified "two major urgent tasks" confronting school department personnel: student assignments for the 1977-78 school year and the establishment of a department of implementation.[440]

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435 *Id.*

436 Dentler, (May 20 1977) Advice about the Department of Implementation,,(90 Garrity XXXVIIf. f21).

437 *Id.*

438 Morgan v. McDonough, No. 72-911-G (D. Mass. May 6 1977) (Memorandum and Orders Modifying Desegregation Plan, May 6 1977) at 35.

439 Morgan v. McDonough, No. 72-911-G (D. Mass. May 24 1977) (Supplemental Order Regarding Office of Implementation and Department of Implementation).

440 *Id.*at 3.

The oral order of May 20 was vacated. A new clause inserted into the May 6 order confirmed the power of the superintendent to appoint DI personnel. Dr Leftwich, was reinstated under her overall command but his role was confined to student assignment purposes only. All members of the school department were ordered to cooperate with him in this task.[441] Superintendent Fahey's amendments to the court's draft proposals for organization and budget which had been distributed on May 23 were to be prepared only after conferring with the court-appointed experts.

Under the terms of the compromise arrangement, Dr Leftwich's responsibility for assignments continued until October 1 1977. The Office of Implementation went out of existence on July 1 1977 and was replaced by the Department of Implementation with John Coakley as Associate Superintendent for Support Services and Catherine Ellison as DI Director.[442] Dr Leftwich was subsequently appointed as deputy superintendent for desegregation implementation in Cleveland.[443] John Coakley remained in office until 1987 by which time the court had retired from active supervision of the BPS and returned responsibility to the elected officials of the school committee.[444]

D. The 1977 Assignment Crisis: The Experts' Memorandum is Docketed – Judge Garrity Orders the City Defendants to Comply with the Experts' Recommendations

In the event, the May orders failed to avert a student assignment crisis which blew up in August of the same year. The crisis was predictable. Writing to Judge Garrity on 31 July[445] Dentler had expressed concern at the lack of progress. The deadline for corrective assignments for the coming year was August 1. Dr. Scott had discovered that although only 86 cases had been approved and 300 had been rejected, of the 86

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441 Morgan v. McDonough, No. 72-911-G (D. Mass. May 24 1977) (Supplemental Order Regarding Office of Implementation and Department of Implementation).

442 Coakley's title was subsequently changed to that of Senior Officer. Catherine Ellison continued as his deputy.

443 Dentler & Scott, *supra*, note 197.

444 Spalding, *supra* note 382. Coakley was succeeded as Senior Officer by Catherine Ellison who remained in office until 1990. *Id.*

445 Dentler, (July 31 1977) Department of Implementation (DI) (90 Garrity XXXVIIf. f22).

only five were "prima facie acceptable and others were presented without evidence of case analysis or substantiation."[446] Dentler did not pull his punches:

> [DI officer Mr. Canty's preparations] "could not be more casual and less reviewable in quality, and they fall below the standards achieved by the old Office of Implementation, low as they were. Mr. Coakley twice lamented his belief that the DI 'is not as well organized as we want it to be.' Our impression continues to be that he and the persons chosen could not, in concert, organize - let alone administer - a neighborhood lemonade stand. They lack the temperament, experience, and even the motivation to do their work effectively."[447]

Dentler's misgivings were well-founded. In August 1977 the court-established Citywide Parents Advisory Council (CPAC)[448] reported "massive chaos in the city due to the current state of assignments"[449]. A letter to the judge set out the scale of the confusion - so great that serious consideration had been given to advising parents to disregard the new assignments and to send their children instead to the schools attended the previous year,[450] and called into question both the competence of the experts, and the wisdom of the court itself. [451] On August 17 Dentler wrote to the judge that some method of correcting the impression of violation was "sorely needed", and offered assistance but expressed the view that "surely the burden of proof rests with the DI."[452]

On 22 August a joint CPAC and CDAC[453]statement asserted that the student assignments for the coming school year had been incorrectly carried out, that the rules and guidelines for corrective assignments were "arbitrary, capricious and insensitive to the needs of both parents and students" and demanded immediate action to review and correct the entire assignment process even at the cost of delaying the start of the school year.[454] The same day Dentler and Scott wrote to Judge Garrity responding factually to the specific allegations made in the Joint Statement. The judge ordered

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446 *Id.*

447 *Id.*

448 Established in 1974 to coordinate the Biracial Parents Councils established for each school and later redesignated Racial/Ethnic Parents Councils (REPCs).

449 CPAC to Judge Garrity, August 10 1977 (90 Garrity XXXVIIf. f22).

450 *Id.*

451 *See* November Report of the Citywide Coordinating Council to the United States District Court, (Nov. 1977) (90 Garrity XXXVIIf. f23).

452 Dentler, August 17 1977 (90 Garrity XXXVIIf. f22).

453 Community District Advisory Councils elected by REPCs in each of the nine districts.

454 *Id.*

copies to be released to the parties and to the news media.[455] On 29 August 1977 Dentler wrote the judge a lengthy report setting out for the record the history of student assignment disputes since 1974 when parents received as many as five letters from the Boston school department, each one canceling a previous assignment and announcing a new one.[456] "Violative implementation" on the part of the school authorities was "so rampant" that the court experts had been drawn into "direct daily administration of the system" [457] but some of the causes lay in the dynamic character of student enrolment in the Boston public school system which were not easily amenable to court resolution. The problem now threatened public confidence in the "fairness and competence" of the court.[458]

The memo then set out the "short-term remedies" which included some steps already taken and others which would be simple to take with court approval and could be concluded by September 1 of that year. Disputes remained concerning the 622 high school seniors (out of a possible 3,703) who were not assigned to their high schools of May 1977. Of that number, 127 at their request had been assigned to different schools reducing the total to 495. An additional 70 had obtained corrective assignments, reducing the total to 425. Of these:

> [s]ome 288 of the 622 did not file applications. More importantly 154 who did file were assigned to their second or third preference, in accordance with the rules. In other words, they are like the 127 who applied to get out of their previous high schools except that they did not get their first preference and now, after the fact, some of them think they prefer return to their old school to enrolment in their second or third choice.[459]

Dentler's memo then made specific recommendations:

> My recommendation is that we immediately ask the DI, through the court experts, to contact the residual 425 – except those who applied and received their second or third preference – and ask if they wish to

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455 Judge Garrity's instructions were endorsed in manuscript on the Dentler & Scott memorandum.

456 Dentler (August 29 1977), On Reducing Assignment Conflicts (90 Garrity XXXVIIf. f22).

457 *Id.*

458 *Id.*

459 *Id.*

> be continued at their previous high school. If their first preference was their previous school, this should be allowed, of course. [460]

The effect on desegregation totals would be "minimal" except at three sites which would experience an increased black ratio but by no more than 2%.

> According to the DI, approximately 170 students altogether applied for a first preference to continue at their previous school and received assignments to second or third preference schools. These students, I think should be reassigned without delay by the DI, except in the case of kindergarten students seeking to continue in first grade. [461]
>
> There are approximately 1,400 late applications stored in the DI, which were not considered. The DI should, I believe, be allowed to go through these and reassign students whose applications reflect a first preference to continue at their previous school, except for kindergarteners. Other preferences should be denied. [462]

Judge Garrity's manuscript instructions ordered copies of the memorandum to be sent to the parties and the press, approved these "short-term remedies" and ordered them to be carried into effect "forthwith".[463]

E. The Judge as Political Operator

What emerges from the above narratives is a picture of a judge with experts "whispering in his ear." The judge permitted his experts an enviable degree of power and they enjoyed what seems to have been unrestricted access to him in the discharge of their functions. It is probably true to say that had they not done so, the judge's project to outface the school committee could not have been undertaken. The judge was clearly prepared to moderate the conventions of judicial behavior in an unprecedented situation. The narratives reveal the freedom permitted to the experts; moreover the judge was receiving confidential briefings concerning the motivation and behavior of parties subject to his jurisdiction which in general he chose not to disclose. On occasions, as in August 1977, the judge ordered the experts'

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460 *Id.* at para 3 (e).

461 *Id.* at para 3(f).

462 *Id.* at para 3(g).

463 *Id.* The memorandum is endorsed with Judge Garrity's handwritten instructions: "8/29/77 Clerk: please send copies of this memorandum and order to the parties and news media. WAG" and in margin: "8/29/77 The short-term remedies recommended in paragraphs 3(e), (f) and (g) are hereby approved and it is ORDERED that the city defendants through the DI carry them out forthwith. Garrity, J."

recommendations into direct effect as a matter of short-tem expediency.[464] To that extent his conduct exceeded the ambit of what would be considered to be appropriate in normal adversarial proceedings today. The question then must be: how did he "get away with it?" Why did he not face challenge at the time? A partial answer may be found in the justificatory themes of civic disobedience and structural inadequacy which underpin the above narratives and which probably did much to insulate the judge from First Circuit challenge.

Another picture however emerges from these narratives: a picture of the judge as a political operator. Thus following the May 6 1977 order, when the judge and his team found themselves outmaneuvered or at least partially so, what is significant is the nature of the judge's response. He defused Miss Fahey's "coup" and brokered a compromise by publishing his own draft proposals for DI organization and budget, produced of course with material provided by the experts, and setting dates for hearing objections and counter-proposals.[465] He defused the assignment crisis which followed by publishing the experts' memo which both set the record straight factually and made short-term recommendations. In other words he manipulated the conduct of the litigation by the strategic use of the experts' material which he selectively brought into the adversarial process. The Order as to Department of Implementation which Judge Garrity published for discussion on May 23 1977[466] was not the first draft that he had published in this way but was typical of what came to represent his exit strategy for court disengagement and characteristic of his developing political style. It is this process which is examined in the next narrative.

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464 *Supra* note 463. In the later stages of the litigation the judge ordered Dentler's memos to be released in the interests of moving the proceedings along. On April 28 1982 he scheduled for consideration Robert Dentler's memorandum of 26 April 1982 entitled School Desegregation and the Tobin K-8 Proposal. *See* docket entry 3731. See also Morgan v. Nucci, No. 72-911-G22 n.12 (D. Mass. Sept. 3 1985) (Memorandum and Orders on UFP). (90 Garrity XLV f11): "The court's finding with respect to the needs of District 5 as well as those of Burke High is predicated in part on a memorandum prepared by court expert Dr. Robert A. Dentler dated January 16 1985 which was distributed to the parties on January 18 1985. It describes a jeopardy shared by students in Districts 4 and 5. Relevant excerpts are set forth in Appendix B".

465 Morgan v. McDonough, 72-911-G (D. Mass. May 23 1977) (90 Garrity XLd. f70).

466 *Id.*

III. Uncompromising Litigiousness: A Strategy of Disengagement

With implementation structures securely in place, the focus of the experts' work shifted to issues of disengagement. Dr Scott retired prematurely from the case in 1981[467] at a point when the litigants' inability to resolve the issue of school closings presented an insuperable obstacle to the development of a consent decree which would permit court withdrawal. The "uncompromising litigiousness"[468] which characterized the Boston schools case was in many ways a function of the number of parties involved. The original three parties of the liability stage (the black plaintiffs, the school committee and Superintendent, known collectively as "the school defendants" and the State Board of Education and State Commissioner, "the state defendants") had been joined at the remedial stage by the Mayor of Boston, the Boston Public Facilities Commissioners and the Director of the Public Facilities Department ("the city defendants"), the Boston Teachers Union (BTU), the Administrators Union(Boston Association of School Administrators and Supervisors-BASAS), and the Home and School Association (BHSA), in each case as defendant-intervenors, a Hispanic parents group, El Comite De Padres Pro Defensa De la Education Bilingue (El Comite)[469], as plaintiff-intervenors and, at a later stage when a desegregation-related financial crisis caused teacher lay-offs which impacted more severely on blacks than on whites, a black educators group, Concerned Black Educators of Boston (CBEB).[470]

It has been suggested that, when judges attempt to reform public institutions, the result can be the emergence of a "controlling group" to whom judges seek to shift responsibility for the policy choices that this kind of litigation requires.[471] In Boston, whilst the termination of the receivership of South Boston High was achieved by

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467 By letter of resignation dated July 26 1981. *See* Letter Garrity to Scott Aug. 21 1981 (90 Garrity LVXII f11).

468 The term is Dentler's. *See* Dentler, (Aug. 6 1986) (90 Garrity XXXVII f36): "In view of the uncompromising litigiousness of all parties other than the State, the prospect for disengagement seems very dismal."

469 Judge Garrity permitted El Comite to intervene as a party plaintiff on January 23 1975. Plaintiff-intervenors sought to "protect the rights of Hispanic children to receive a bilingual education under Mass. G.L. c.21A and under the federal Civil Rights Act of 1964, 42 U.S.C. s2000d, as set forth in Lau v. Nichols, 1974, 414 U.S. 563." Morgan v. McDonough, 511 F. Supp. 408, 411 (D. Mass. 1981).

470 *See* Morgan v. McDonough, 554 F. Supp.169, 173 (D. Mass. 1982).

471 R. SANDLER AND D. SCHOENBROD, DEMOCRACY BY DECREE 118 (2003).

consensus,[472] consent decree negotiations initiated in June 1981 by State Education Commissioner Anrig with Judge Garrity's approval and aimed at permitting federal court withdrawal from active supervision of the public school system, were less successful. Given the range of competing interests, the failure of the parties to reach agreement is hardly surprising. The nearest they came to the formation of a "controlling group" was in April 1980 when a financial crisis produced a polarization between the apparently conflicting aims of "desegregation as racial percentages" and "desegregation as educational quality".[473] A coalition of interests emerged to oppose the court's orders for school closings and revised geocodings and attorneys Johnson for the black plaintiffs and Playter for El Comite[474] joined school defendant attorney Simonds in calling for a stay pending appeal. The qualified support of the First Circuit saw the Judge through the immediate crisis and thereafter it can be said that one of his main aims was to prevent the emergence of a controlling group which would subvert the court's view of what the desegregation process required.[475] The assistance of the court experts was central to this task and I return to this aspect of their work in Part II of this thesis.

Whatever the merits of the paradigm, Judge Garrity's role in the Boston case cannot be described as passive. Indeed, the prospect of indefinite court supervision of the Boston public schools receded only when the judge lost faith in the willingness of the parties to reach a negotiated settlement and in effect took control of the process of disengagement. The court, he said, was no longer prepared to wait "with its fingers crossed" for the parties to submit a consent decree. "This is a case that started in 1972", he announced, "and it is going to end in 1982".[476] The court had a responsibility to bring the case to a close. To that end, he embarked upon a "parallel planning process" which was, in effect a return to the model he had adopted in relation to the Masters' Plan and had resorted to subsequently as a mechanism for

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472 Morgan v. McDonough, 456 F. Supp. 1113 (D. Mass. 1978).

473 For an account *see* Dentler & Scott, *supra* note 197 at 93. *See generally* Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law,* 14 Mich. J. Race & L. 61, 96-105 (2008) (examining the tension between demands for 'integration' and 'education' in Boston MA).

474 The organization representing Hispanic parents whom Judge Garrity had permitted to be joined as plaintiff-intervenors. *Supra* note 469.

475 Morgan v. McDonough, 689 F.2d 265 (1st Cir. 1982).

476 Transcript of Hearing of June 23 1982, Morgan v. McDonough, No. 72-911-G (D. Mass.) (84 Center for Law & Educ.).

resolving apparent impasse. [477] On August 3 he issued a draft order and timetable, setting deadlines of August 24 and September 2 1982 for filing comments and objections with a hearing date of September 8 1982. [478] The final order published on December 23 1982 set up what the judge described as a transitional course of disengagement [479] whereby the court handed back direct responsibility for implementation of the court plan and compliance monitoring to the school authorities, retaining fall-back jurisdiction to resolve disagreements "with the assistance of the court expert as in previous years".[480]

Whilst even in 1985 Judge Garrity continued to hope for a resumption of the consent decree negotiations, it is nevertheless clear that court disengagement from the Boston public schools case was driven by federal court strategy with Dr Dentler as court advisor at its heart. [481] As early as 1977 Dentler was advising the judge that he should withdraw from the case by December 1978, and setting out a strategy by which this might be accomplished. Presciently he warned of the dangers of prolonged court intervention:

> When a few remaining tasks have been completed to the best of our ability, the role of the court will have become superfluous. The mistakes and mischief wrought by others will continue to pile up at the door of the court, only to detract from five years of wise and honorable administration of justice, unless we disengage.[482]

From 1982 onwards, he provided the judge with the statistical and other factual information without which decisions concerning compliance with court orders could not be taken. He prepared advisory opinions on specific issues preparatory to court hearings and advised the judge on the politics of the school department, in particular, the relationship between officials responsible for implementation and elected

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477 *Id.*

478 Morgan v. McDonough No. 72-911-G (D. Mass. August 3 1982) (Memorandum and Draft Orders Toward Closing the Case) (90 Garrity XLd..f72).

479 Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

480 *Id.* at 174 n. 4.

481 Morgan v. Nucci, 620 F. Supp. 214, 229 n.22: "it is not beyond the realm of possibility that the final orders of September 3 1985 might trigger resumption of consent decree negotiations whereby all or portions of the final orders would become the final judgment in the case".

482 Dentler (January 24 1977), Notes on Disengaging from the Schools Case. (90 Garrity XXXVIIf. f39).

members of the school committee. He proposed himself as special master with responsibility for oversight of court disengagement, provoking another "rare show" of agreement as state and school defendants, plaintiffs and plaintiff intervenors united to oppose the plan.[483] Above all, he was central to the process of disengagement by draft order, providing drafts, comments and suggestions many of which were adopted with only minor amendment.[484]

In interview with the author, Dr Dentler was modest about his own role in the disengagement process and stressed the contribution of the judge's then law clerk, Karen Green.[485] The success of court strategy owed much to the skill and determination of the judge, but as the memoranda make clear that strategy was heavily dependent upon the work of Dr Dentler and for that reason merits special treatment.

A. Special Master Proposal

Judge Garrity's August 3 draft order contained a number of controversial provisions but none more so than its provisions for the appointment of a special master. The draft, adopting a tripartite division of functions, relinquished court jurisdiction in areas in which compliance had been achieved but divided responsibility for monitoring compliance in other areas between the State Board and a special master to be appointed for 1982-84 primarily to monitor student assignments and to resolve disputes.[486]

The use of a special master is permitted by Federal Rules of Procedure in exceptional cases[487] and in the years following *Keyes*[488] had become a recognized part of the

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483 Sheehan *supra* note 268 at 176.

484 *Infra* notes 502-524 and accompanying text.

485 Ms Green had completed a Masters dissertation which had drawn on the ideas of Fisher and Ury in 'Getting to Yes' (1981) Century Business. Dentler (2006) *supra* note 197.

486 Morgan v. McDonough, No. 72-911-G (D. Mass. Aug.3 1982) (Memorandum and Draft Orders Toward Closing Case) Part VIII, Part XI (90 Garrity XLd. f72).
Another major issue of controversy was the limitation of the parties to the litigation to plaintiffs, city and school defendants and State Board of Education; *Id.* Part II.

487 Fed. R. Civ. P. 53(a) and (b).
The power to appoint a special master derives from the practice of the English Courts of Chancery. *See* Irving R. Kaufman. *Masters in the Federal Courts: Rule 53,* 58 COLUM. L. REV. 452 (1958).

488 Keyes v. School District No. 1, 413 U.S. 189 (1973).

desegregation toolkit where judges faced uncooperative school authorities[489] In Boston Judge Garrity had already used special masters to produce a desegregation plan[490] and was in regular contact with Judge Battisti in Cleveland whose appointments of a special master and experts had faced extensive litigation.[491] The suggestion that a special master with "authority to resolve disputes, interpret orders and approve modifications justified by changing conditions" might supervise court disengagement in Boston [492] came initially from Commissioner Anrig.[493] In the event the parties accepted Robert Bohn as "consent conductor" and the idea temporarily lapsed only to re-emerge as the judge and his team, by this time minus Marvin Scott but including law clerk Karen Green, addressed the task of negotiated agreement. [494]

The point of interest is this: by 1982 the judge and his expert had worked together on this case for a period of eight years; their working relationship rested upon mutual esteem and respect. Dentler's generous tribute to the team nature of the exercise notwithstanding, what emerges from the documentation is a picture of the expert acting certainly as the judge's sounding board but more significantly as the architect of his exit strategy. The terms of the draft order reflect Dentler's recommendations concerning the tripartite division of functions. The proposal for the appointment of a special master, if it did not originate with Dentler, was one to which he gave his clear

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489 *See* the comments of the 6th Circuit in Reed v. Cleveland Bd. of Educ., 607 F. 2d 737, 743 (6th Cir. 1979).
For a discussion of the use of masters in schools desegregation see David L. Kirp & Gary Babcock, *Judge & Company: Court-Appointed Masters, School Desegregation and Institutional Reform*, 32 ALA. L. REV. 313, 315 (1981). See also David Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reform of Public Institutions Through Litigation*, 7 HASTINGS CONST. L. Q. 739 (1980).
There is extensive discussion of the use of masters in institutional reform litigation generally. For a selection of the literature *see*: Robert E. Buckholz et al., *Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341 (1998); Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 TOLEDO L. REV. 419 (1979); Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394 (1986); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Institutional Reform Litigation: The History Reconsidered*, 17 U.C.D. L. REV. 753 (1984).

490 Morgan v. Kerrigan, No. 72-911-G (D. Mass. Feb 7 1975) (Order of Appointment and Reference to Masters).

491 Dentler (2005) *supra* note 260.

492 Commissioner Gregory R. Anrig, cited by MARSHA MURNINGHAN, COURT DISENGAGEMENT IN THE BOSTON PUBLIC SCHOOLS: TOWARDS A THEORY OF RESTORATIVE LAW (unpublished Ed. D. thesis, Harvard University 1983 on file with Kenrick Library, Birmingham City University) at 108.

493 In a letter to Judge Garrity dated July 6 1981. *Id.*

494 *Id.* at 107.

support and a considerable degree of personal enthusiasm for the role. Nevertheless, the proposal was abandoned. In the final order handed down on December 23 1982,[495] responsibility for planning and implementation was given to the DI but compliance monitoring went to the State Board. The order established negotiation inter partes as the primary mechanism for dispute resolution rather than adjudication by the court. Thus whilst disagreement between the school defendants and the State Board on planning and implementation matters would continue to be resolved by the court "with the assistance of the court experts as in prior years,"[496] for all other issues, a dispute resolution procedure was established with applications to the court to be entertained only as a last resort once the procedure had been exhausted and then only subject to specific conditions. [497]

The reason for the change is clear; the special master proposal attracted almost universal opposition, some of which was general – as counsel for the school committee observed:

> To rework a Groucho Marx witticism, the school defendants would have serious reservations about the appointment of any person as special master who would be interested in the job[498]

Some was undoubtedly ad hominem; Robert Dentler had become associated with the proposal and he was a controversial figure. Powerful opponents were lobbying against him. Ultimately however, it is clear and the documentary record confirms that the judge was his own man. If politics is the art of the possible then Judge Garrity's political skills moderated Dentler's influence; the court had the wisdom and the flexibility to give way and confrontation was averted.[499] To use Murninghan's terminology, the August 3 draft order was a "trial balloon" and Dentler was its chief designer.[500] In producing a "usable alternative" it was a political success and the judge achieved a positive outcome, albeit not the one the design team initially proposed.[501]

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495 Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

496 *Id.* at 174, n. 4.

497 *Id.* at 177.

498 Morgan v. McKeigue, No.72-911-G (D. Mass. 23 Aug. 1982) (School Defendants Comments and Objections to Draft Final Orders) cited in Murninghan, *supra* note 492 at 126.

499 Remark attributed to R.A. Butler 'The Art of the Possible' (1971) but now thought to have originated with Otto von Bismarck, August 11 1867.

500 Murninghan *supra* note 492 at 131.

501 Dentler, (Sept. 3 1982), Draft Order Filings: An Advisory Opinion, With Recommendations (90 Garrity XXXVIIf. f33).

B. The Special Master Proposal and the Dentler Memos

Dentler's memoranda on this topic begin in July 1982 with a memo to law clerk Karen Green regarding the content of the draft order.[502] This memo proposed a tripartite classification for compliance monitoring (matters in respect of which compliance had been achieved, matters to be monitored by the State Board and other matters to be monitored by a special master) which was eventually incorporated into the draft order although the specific areas were modified. At this stage Dentler's nominee for special master was former senior planning officer James Breeden[503] supported by the court expert in a liaison role. In a second memo dated the same day, however, Dentler queried Breeden's suitability on the basis of his former employment relationship with the school defendants and suggested himself instead, setting out his availability and possible terms of appointment.[504] He would need to have "adequate delegated authority, perhaps defining you as appellate for major disputes over my judgments on implementation and adjustment issues".[505]

On July 21 Dentler wrote to Judge Garrity advising that Superintendent Spillane's appointment procedures raised "grave questions about compliance" with court orders, calling for "very tough oversight".[506] Spillane, he wrote "must experience supervision, [...], in a way that leads him to conclude that court orders exist to be followed".[507] Five days later Dentler suggested the appointment of himself as special master with authority to coordinate supervision of the three categories of implementation.[508] There were potential drawbacks: a) many issues would still need to be dealt with by the judge and b) special masters usually have "lawyerly qualifications".[509] The need for continuing jurisdiction rendered the first problem moot but in any event "you and I" he wrote "would want to confer periodically whatever the rules suggested. Our strength derives from eight years of close

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502 Dentler to Karen (Green), 2 July 1982, Selected Final Order Issues (90 Garrity XXXVIIf. f32).

503 A black educator and civil rights leader who had directed the Citywide Coordinating Council in 1977 and 1978 Dentler & Scott, *supra* note 197.

504 Dentler, (July 2 1982) (90 Garrity XXXVIIf. f33).

505 *Id.*

506 Dentler, (July 21 1982) Spillane's Administrative Appointments (90 Garrity XXXVIIf. f33).

507 *Id.*

508 Dentler (July 26 1982)(90 Garrity XXXVIIf. f33).

509 *Id.*

cooperation on this case". The second point could be treated "by behaving like the administrator I am. I have conducted many hearings since 1965 and have implemented many due process requirements. I even carried out such duties for the panel of masters in this case."[510] The title had the advantage of precedent; even the superintendent had asked for it,[511] but the crucial point was the necessary authority: "I should be charged with coordinating and, where appropriate, with reconciling the actions of the DI and the State, in order to prevent the advent of contradictory or unilateral decisions".[512]

In his final memo on the subject, written on July 30, Dentler repeated his interest in the role, which he would take on in preference to his other commitments and raised again the issue of the title:[513]

> I do not like "Disengagement Administrator" because it will be deemed frothy by the media and because it lacks parsimony. "Administrator" is acceptable, if rather bloodless. My preference is for "Special Master". This has continuity with the case which appeals to me and may ramify for those I must supervise. The rules about special masters do not contain anything I can see which makes the title inappropriate, particularly when the order will spell out duties and authority. If I am missing a nuance, the role could be entitled "Administrative Master," perhaps. Only the first of the above seems objectionable, and I will abide by your preference. [514]

C. Opposition Mounts

Judge Garrity published his Draft Final Order on August 3 1982.[515] The same day Dentler briefed him that Superintendent Spillane's "bifurcation strategy" was aimed at

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510 *Id.*

511 The New York Times quoted Dr Spillane: "Maybe it's time for us to say that maybe we should have no part of it. Let's put all the responsibility on the School Department. Appoint me special master to the court directly responsible to the Judge". "Boston School Superintendent Asks that City Scrap Desegregation Plan", New York Times, June 6 1982, at 22 cited in Murninghan, *supra* note 492 at 114.

512 *Id.* (emphasis in original).

513 Dentler,(July 30 1982) (90 Garrity XXXVIIf. f33).

514 *Id.*

515 Morgan v. McDonough, No. 72-911-G (D. Mass. August 3 1982) (Memorandum & Draft Orders Toward Closing the Case) (90 Garrity XLd. f72).

eliminating the possibility of appointment of a special master and warned that the court would have to assert its authority:[516]

> [...] Spillane does not share [school committee counsel's] aim of closing the case. He is heavily preoccupied with consolidating his hegemony over the system. The court's role is in anticlimax. Its concerns can be ignored or gotten around, and on all other occasions it can serve as a useful diversion of blame. If a consent decree would commit him to comply with standing policies, it would reduce his freedom of action, not enlarge it. A toothless tiger of a final court order - one in which a weak if well intentioned commissioner with only a year or two remaining in office shared responsibility with him for monitoring compliance is preferable. [...]
>
> [...] the court will have to choose early in September between Spillane's bifurcation strategy and its own draft order. Only something like the latter would offer a chance to consolidate the desegregative gains of the last eight years. Its issuance would begin to convince Spillane that the constitution is much more than a quaint source of managerial inconvenience.[517]

Dr Spillane was not the only opponent of the special master proposal. In a file note Judge Garrity recorded a visit from Dr Silber, President of Boston University, the real purpose of which was to block the appointment of Dr. Dentler as special master.[518] By this time, however, the judge had already concluded that the scale of the opposition was too great to fight, and had communicated this to Dentler a week before Dr Silber's visit:

> [A]pproximately a week ago at a meeting with Dr. Dentler I told Dentler that I did not want him to decline or defer acceptance of other professional engagements and consultations, which he told me were in the offing, in order to remain available for appointment as special master in the Boston schools case. The prospects of Dr. Dentler's serving as special master are very remote independently of Dr. Silber's statements to me yesterday.[519]

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516 Dentler, (August 3 1982), Notes Toward Closing the Case (90 Garrity XLd. f72).

517 *Id.*

518 Memo to File (August 20 1982) (90 Garrity LXVII f13). Robert Dentler details some of the background to Dr Silber's enmity towards him and Dr Scott in his privately published personal memoir, ROBERT A. DENTLER, THE LOOKING GLASS SELF (2002) 243-250 (on file with Archives and Special Collections, Healey Library, U. Mass, Boston, MA).

519 Memo to File, *supra* note 518

When the State Board offered to assume all external monitoring responsibilities[520] Dentler recommended acceptance and withdrawal of the draft order which it was clear none of the parties supported:[521]

> Every attorney communicates a strong vested interest in continuing one or more parts of the status quo ante. [...]. No party reports any enthusiasm for relinquishing jurisdiction in the proposed small areas of the case and several object strenuously, neglecting the fact that the areas proposed have been concluded in terms of real policy action for now. No party supports in any way the proposal to firm up and make permanent the role of the department of implementation. No party wants a special master. Several parties continue to posit movement toward a draft consent decree and depict the court as having impeded its development.[522]

At the hearing on September 8, Judge Garrity announced in court that he was abandoning the special master proposal: "[E]veryone in the case has opposed the creation of the special master, and the Court simply yields to that unanimous opposition",[523] but as Dentler pointed out, with the emergence of a usable alternative in the form of the State Board proposal a "precious" objective had been achieved.[524]

IV. Da Capo: Legitimacy and the Court Expert

In the course of a hearing on April 15 1975, Judge Garrity expressed concern about suspected obstruction of his orders:

> [D]oes the Court anticipate that there will be sand thrown in the wheels and obstacles erected to the formulation and implementation of this plan? Of course I do. There are people who will do everything in their power to frustrate this court order [...] I have no illusions about getting the cooperation of some people but that does not mean that I am going to be here contesting with those who would obstruct the Court's order

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520 State Board Filing: (Aug. 27 1982). Cited in Dentler, Sept. 3 1982: Draft Order Filings: An Advisory Opinion With Recommendations (90 Garrity XXXVIIf. f33).

521 *Id.*

522 *Id.*

523 Transcript of Hearing of Sept 8 1982, Morgan v.McDonough, No. 72-911-G (D. Mass.1982) (84 Center for Law and Educ.).

524 Dentler, (Sept.3 1982), *supra* note 520.

> on a daily basis, if need be. This thing is going through despite obstacles.[525]

For the judge, what was at stake in Boston was respect for the rule of law and meaningful compliance with the orders of the federal court. With the support of the Court of Appeals he brushed aside what were in effect strategies of opposition couched in terms of legitimacy.[526] Legitimacy, however, goes to the heart of the rule of law and from the point of view of legitimacy, a schools desegregation suit itself rested on a knife-edge. The criticism that the role given to the federal judiciary by *Brown v. Board of Education*[527] fostered an illegitimate judicial activism has been much heard.[528] Conservative attempts to 'rein-in' the Supreme Court are commonly justified by the premise that too ready an assumption of an activist role exposes the judiciary to charges of impropriety which themselves do much to bring the rule of law into disrepute.[529] The paradox then is, that when a judge actuated by considerations of "legitimacy" employs means which take her outside of the scope of accepted adjudicative procedure in order to secure what she considers to be legitimate goals, the process upon which she has embarked may itself be vulnerable to similar accusations of illegitimacy. [530]

Did Judge Garrity's relations with his experts compromise his neutrality? Whether Judge Garrity was unduly reliant on his experts cannot of course now be established. The judge covered his tracks well and the paper trail is one-sided only. Some factual points can be made with confidence but the conclusions to be drawn are less clear.

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525 Transcript of Hearing of April 15 1975, 80, Morgan v. Kerrigan, 401 F.Supp. 216 (D.Mass. 1975)(No. 72-911-G).

526 Section II *supra*.

527 Brown v. Bd. of Educ., 349 U.S.294 (1955) (Brown II).

528 For recent formulations of the case against judicial activism *see generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 15 YALE L. J. 1346 (2002). Other recent contributions to the literature include RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003); R BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003).

529 See ROBERT F. NAGEL, UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER, 1-19, 48-51 (2008) (suggesting that the reasons the Court remains an 'activist institution' despite thirty-five years of Republican appointments can be located in the shared values and methodology of the legal community).

530 See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (exploring the normative value of legitimacy in securing compliance with the law and arguing that 'the basis of legitimacy is the justice of the procedures used by legal authorities'). *Id.* 272.

The judge received extensive and numerous private briefings. He acquired and indeed positively sought out knowledge which was not disclosed to the parties or made available for contesting via the adversarial process but 28 U.S.C. § 455(b)(1) applies to "disputed evidentiary facts" and the judge took the view that this did not apply at the remedy stage.[531] He refused to define his experts' role and then compounded the refusal by failing to make transparent the extent of their influence upon his decision-making, at least until the final stages of the case,[532] but Judge Tashima's guidelines do not represent First Circuit law.[533] *Reilly v. United States*, which now does, supports a similar "panoply of procedural safeguards" where a court uses a technical advisor but both decisions post-date the Garrity era, and are driven primarily by the adversarial ethic.[534] In any event, it seems that appellate courts have been prepared to accept deviations from procedural norms where the circumstances are unusual and the judge "did nothing wrong".[535]

How the First Circuit would have responded can now only be a matter of conjecture but the difficulty then as now is the application of appearance of bias tests where a federal judge uses experts as technical advisors. How exactly should the court treat ex parte communications and the potential appearance of "coziness" when the relationship is permitted by law and indeed encouraged in difficult or complex cases? Public confidence in the judicial system depends as much upon perceptions of the efficiency of its procedures and the reliability of its outcomes as upon perceptions of judicial neutrality but the hypothetical informed and reasonable observer of "appearance standard" jurisprudence[536] may be more receptive to these arguments than the ordinary men or women who lived through the Boston events, sent their

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531 Dentler (2006), *supra* note 197.

532 In relation to the final orders the judge did begin to explain his methodology. *See* Morgan v. Nucci, 620 F. Supp. 214, 229 (D. Mass. 1985).

533 231 F.3d. 572 (9th Cir. 2000) (Judge Tashima dissenting); applied in TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360 (C.A. Fed.Cir.2002).

534 Reilly v. U.S., 863 F.2d 149, 156-160 (1st Cir.1988) (parties should be given an opportunity to object to appointment of technical advisor on grounds of bias or inexperience, technical advisor should be given a written 'job-description' and should file an affidavit attesting to his compliance but should not necessarily be required to write a report.).

535 *See* discussion *supra* note 238 and accompanying text.

536 *See* discussion *supra* note 166 and accompanying text.

children on the buses and saw Dentler and Scott on their televisions as the representatives of the court with an alien and unwelcome agenda.[537]

Here then lies the problem. As Justice Kennedy reminds us, the federal courtroom commands respect as a place where justice is underpinned by a strict ethical code.[538] The requirements of judicial independence are at the center of that code and it is axiomatic that mere absence of bias is not enough. Federal courts along with the rest of the common law community have struggled to find a formula which both "reflects the reaction of the ordinary members of the public to the irregularity in question" yet at the same time screens out claims which are groundless and can themselves threaten the court's independence.[539] The *Reilly* court referred to the need to ensure "just adjudication of a dispute without dislodging the delicate balance of the juristic role."[540] When a judge uses a technical advisor and the problems are exacerbated by the issue of efficiency, the task may become simply too difficult.

One of the answers is to bring the advisor into the adversarial process. Judge Tashima's procedural requirements represent a step in this direction but the question is whether they go far enough.[541] The United Kingdom Court of Appeals, grappling with these issues, has now directed that even in admiralty and patent cases in which technical assessors have traditionally been used, "the principle needs to be adapted to the procedure" and requires not only disclosure of the advice received but also that the parties be afforded an opportunity to contend that it should or should not be followed.[542]

The judicial neutrality issues however still remain and jurisprudence of the European Court of Human Rights (ECtHR) which now binds UK domestic courts casts doubts

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537 Judge Garrity authorized Dentler & Scott to give interviews and "people knew who we were". (Dentler (2006)).

538 See Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L. J. 1067 (1996).

539 Webb v. The Queen (1994) 181 CLR 41 at 51 (a decision of the High Court of Australia).

540 Reilly v. U.S., 863 F.2d 149, 156 (1st Cir.1988).

541 AMAE v. State of California, F.3d 572, 611(9th Cir. 2000) (discussed *supra* note 242 and accompanying text).

542 "The Bow Spring" and "The Manzanillo II", [2004] EWCA Civ. 1007 (followed in "The Global Mariner" and "Atlantic Crusader" [2005] EWHC 380 (Admlty). The English Court of Appeals took the view that such changes were necessary to bring UK procedure into line with the jurisprudence of the European Court of Human Rights. *See* Deirdre Dwyer, *The Future of Assessors under the CPR* [2006] C.J.Q. 219, 225-229 (hereinafter 'Assessors').

on the extent to which the practice of receiving advice from an assessor or expert who does not form part of the tribunal and has no say in the final decision satisfies the requirement of a fair trial guaranteed by Article 6(1) of the European Convention.[543] For this reason and despite an initial enthusiasm U.K. courts have been reluctant to implement a provision in the Civil Procedure Rules intended to extend the use of technical advisors in civil proceedings.[544]

Another solution is not to give judges things to do with which the adversarial process struggles and in this connection, a schools desegregation suit is the "polycentric"[545] conflict which Lon Fuller regarded as outside the limits of adjudication.[546] Fuller may have underestimated the capacity of legal process to respond to social change but as Professor Molot suggests, his description of the traditional judicial role retains a paradigmatic value:

> When we view contemporary litigation using Fuller's framework, we see that some of the most important controversies in civil procedure today arise where judges stray from their traditional role and cease to rely on affected parties to frame disputes or to look to an identifiable body of law in resolving those disputes.[547]

If the way in which judges respond to new situations is as important as the decision to respond in the first place and federal courts are to adapt to the age of the expert, the

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543 *See* Borgers v. Belgium (1993) 15 E.H.R.R. 92; Kress v. France [2001] E.Ct.H.R.382 (discussed in Dwyer, *supra* note 542 at 228).

544 CPR r.35.15(3) An assessor shall take such part in the proceedings as the court may direct and in particular the court may (a) direct the assessor to prepare a report for the court on any matter at issue in the proceedings; and (b) direct the assessor to attend the whole or any part of the trial to advise the court on any such matter.
See generally Dwyer (Assessors) *supra* note 542.

545 i.e involving 'a multiplicity of variable and interlocking factors, decisions on each of which presuppose decisions on all the others' and thus unsuitable for adjudicative process'. *See* MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 1379 (7th ed. 2001) (noting that the term is Michael Polyani's – THE LOGIC OF LIBERTY 170 (1951) and quoting STONE, SOCIAL DIMENSIONS OF LAW & JUSTICE 653-654 (1966)).

546 *See* Lon Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 393-403 (1978). This paper was first presented to Harvard Law School's Legal Philosophy Discussion Group in 1957 but not published until 1978 by which time it had been overshadowed by Professor Chayes' reconceptualization of the nature of judicial process to accommodate the civil rights class actions of the 1960s and 1970s as new 'public law' actions. *See* Abram Chayes. *The Role of the Judge in Public law Litigation*, 89 HARV. L. REV.1281 (1976). As Professor Molot suggests, with the rise of modern mass tort litigation Chayes' model is itself now outdated, presenting new challenges to the academy to develop new models that will help judges discharge their responsibilities in accordance with traditional values. *See* Jonathan T. Molot, *An Old Judicial Role For a New Litigation Era,* 113 YALE L.J. 27, 29 (2003).

547 *See* Molot, *supra* note 546 at 118.

challenge is on to devise a model of process that can accommodate the role of the technical advisor within the framework of traditional adjudicative values.[548]

The Boston case was undoubtedly an extreme case and desperate times call for desperate measures. Judge Garrity's decision to assume personal oversight of the desegregation of the Boston public schools was a courageous response to a failure of civic leadership on the part of a judge who was determined to give meaning to his judicial mandate to uphold the Constitution of the United States. He needed help in so doing and in a very real sense in that context the ends that he sought must be the measure of his means. If the tightrope that he walked as he tried to reconcile imposing the will of the court with the demands of due process threatened at times to undermine the legitimacy of his authority, it is testament to his political skills that he avoided challenge on due process grounds.[549] If politics is the art of the possible, then Judge Garrity was or became perforce a politician but politicians as much as lawyers recognize the legitimating force of procedure.[550] Political operator or no, it is doubtful whether the judge could have succeeded as he did had he not himself been able to inspire in his courtroom a profound respect for the commitment to fair procedures in terms of both substance and appearance which lies at the heart of legal ideology in a liberal society.

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548 For some suggestions, *see* Robert L. Hess, Note, *Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547, 586 (2001) ("[G]reater checks and limits are needed to guide the development of technical advisor jurisprudence"). *See also* Siegel, *supra* note 251 at 209-214 (recommending modifications to the Code of Conduct for United States Judges and Rule 104(a) Fed. R. Evid.); Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998)141-155 (making recommendations for selection and appointment of and communications with expert witnesses) and Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence* 110 HARV. L. REV. 941, 953-957 (1997).

549 I am of course using the term "due process" in its widest sense.

550 *See* eg ROBERT H. BORK, THE TEMPTING OF AMERICA 2 (1990): 'The democratic integrity of law... depends entirely upon the degree to which its processes are legitimate.' and general discussion in Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997). For a recent contribution to the literature *see* Tyler, *supra* note 530 at 272 (exploring the normative value of legitimacy in securing compliance with the law and arguing that 'the basis of legitimacy is the justice of the procedures used by legal authorities'. *Id.* 272.

Appendix: Research Exercise - South Boston High School: Questions for Dr. Reid.

This research exercise was undertaken in the hope that it would be possible to identify a direct link between the experts' advice and Judge Garrity's courtroom behavior. The exercise focuses on the examination in court of South Boston High School (SBHS) principal, Dr Reid.

The excerpts below are from the court transcripts for the hearings which took place on 22, 24, 25 and 26 November but are organized by reference to Dentler's list of questions. Each question is followed by extracts from the relevant testimony.

1. Have you or others in your office prepared (written) guidelines for the conduct of teachers and staff within SBHS this year?

Dr Reid giving evidence was asked to identify and enter as group exhibit 20 a packet of "headmaster's bulletins". Led by counsel for the school committee, he referred specifically to Bulletin No. 3, entitled Policy on Discipline, which dealt with the teacher's role; Bulletin No. 4, Procedure on Discipline, also dealing with the teacher's role; Bulletin No. 14, dealing with matters of general security; and Bulletin No. 4, dealing with suspension of students[551]

2. What plans have you developed since August for use in preventing or reducing racial tensions between students?

On the same day the following exchange took place:

> *Mr Tierney (for school defendants)*: Now, Doctor, at [an] administrators' workshop, was there discussed the developing of programs for teachers' workshops that were to follow at individual schools?
>
> *Dr Reid*: There was discussion of preparation for Phase 2 as of September, yes.

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[551] Transcript of Hearing of Nov. 24 1975, 22-23, Morgan v. Kerrigan No. 72-911-G (D.Mass. 1975) (Center for Law & Educ.)

Mr Tierney: And furthermore, were there meetings dealing with safety and security planning?

Dr. Reid: There were.

Mr Tierney: Did you attend those meetings?

Dr. Reid: I did."[552]

Two days later on November 26 1975 in Judge Garrity's colloquy with Dr Reid and following immediately after Dr Reid's answer to Q12 below the judge picked up the point for amplification:

Judge Garrity: With respect to your administration, or your superiors in the department generally, what assistance have you sought from your superiors in the administration with respect to the reducing of racial tensions or the easing of racial problems at South Boston High School?

Dr. Reid: We have talked about removing youngsters who tend to foment trouble. We have followed the due process procedure. Some have been referred to the community superintendent, and we assume that unless conditions improve, these youngsters will be recommended for separation from South Boston High School and some different process for their education.

Judge Garrity: I am thinking now along a broader topic, not just the suspension or disciplinary problem, but have you sought assistance from your superiors in the School Department with respect to the easing or reduction of racial tensions at South Boston High School as demonstrated by these suspensions and fistfights and racial epithets, etc?

Dr. Reid: We have talked within the faculty and with members of the higher administration about alternative programs with the high school, what can be done to improve the situation, and curriculum-wise, in regard to youngsters, in regard to physical improvements within the building, in regard to education materials of one type or another. We have discussed all of these things at one time or another with persons.[553]

3. Have you made use of any training, program development assistance, or other expert consultation since August for help to your administration,

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552 *Id* at 24

553 Transcript of Hearing of Nov. 26 1975, 59-60, Morgan v. Kerrigan No. 72-911-G (D.Mass. 1975) (Center for Law & Educ.).

faculty, staff, and student leaders in preventing or reducing conflict within your school?

On November 22 Judge Garrity picked up these points:

> *Judge Garrity*: In this testimony and affidavit from Mr. Brociner about the CCC Mediating Board, [554] his affidavit states that you were at a meeting at which this was discussed and it says that at this meeting you, Dr. Reid, asked for the faculty's thoughts on the use of the CCC as a mediator in trying to resolve the racial difficulties at the school. Did you make a recommendation to the faculty with respect to this matter?
>
> *Dr. Reid*: I did, sir.
>
> *Judge Garrity*: What was the recommendation?
>
> *Dr. Reid*: The recommendation was that they should seriously consider talking it over with the Faculty Senate and coming to some decision, and my personal opinion was that we should go along with the Triple C.
>
> *Judge Garrity*: You recommended they do this, that they have the Mediating Board in?
>
> *Dr. Reid*: That is right, sir, but I think the decision should be partially the faculty's decision."[555]

The matter was returned to on November 26

Counsel asked Dr Reid what use had been made of human relationships workshops.

Dr Reid replied:

> My faculty has been involved in human relationships workshops, I think, since January of 1974, voluntary, some compensated for in time, some in money, some in credits, many of them on their own, at their own expense and their own time. I think they have had a surfeit of human relations. I think if somebody could come in and persuade them that they have somebody who really could provide some good solid human relations training, whatever that may be, that they might

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554 The CCC (Citywide Coordinating Committee) had responsibility for monitoring compliance with the court plan

555 Transcript of Hearing of Nov. 22 1975, 205-206, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

be somewhat receptive, but I don't think any routine human relations plan is going to appeal to the faculty.[556]

4. Have you requested assistance in conflict resolution or intergroup relations from Gillet(sic), the First National Bank, UMass Boston, or other outside institutions since August, 1975?[557]

In his opening statement on November 22 Dr Reid *sua sponte* mentioned reading and math programs developed with the University of Massachusetts "over the summer". He continued:

> We have an active program with the Gillette Company, with the Federal Reserve Bank, and I think they feel that they are doing everything that is reasonably possible within the time available and within their mental and emotional capacity to do these things, and I feel that people are trying to force other things upon them which, perhaps, they cannot absorb at this time, with the other things that they have going. [558]

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556 Transcript of Hearing of Nov. 26 1975,11 Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

557 The University of Massachusetts had been paired with SBHS under the college-public school pairings plan set up by Dentler as a mechanism of enrichment for magnet programs. *See* ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE,34 (1981). The Gillette Company Safety Razor Division and Federal Reserve bank were paired with SBH under a similar scheme designed to secure the involvement of the Boston business and financial community in the reform of the Boston public school system. Morgan v. Kerrigan, No.72-911-G (D.Mass. 1975) Order Concerning South Boston High School Dec 9 1975 (90 Garrity XLd Misc. Postscript Orders 1975-76 f69). This had been facilitated by the formation in January 1975of the Trilateral Council in January 1975 by the Greater Boston Chamber of Commerce, the School Department, and the national Alliance of Businessmen, but its origins precede the court order. *See* J. BRIAN SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS, 127 (1984). The 'pairing systems' were encouraged by Judge Garrity but not, as Sheehan states, *(id)* 'incorporated' in the 1975 Remedy Order which was handed down in June of that year. *See* Morgan v. Kerrigan 401 F.Supp. 216,247- 248 (D. Mass. 1975): " In the court's view it is important to the success of these efforts that the agreements between individual colleges or universities and the school department be the result of negotiations by both parties and be tailored to the particular roles settled on by the parties in each instance. Therefore the court has refrained from mandating any form of agreement or terms that a contract must include. The importance of this effort to the success of the court's plan for desegregation of the schools and particularly to the voluntary component of this plan, however, leads the court to reserve jurisdiction to make further orders in this area should they become necessary.
The commitments of businesses primarily through the Boston Trilateral Task Force to continue and enlarge programs of support to the schools through similar pairings, and of the Metropolitan Cultural Alliance to continue its innovative and enriching programs and focus them of aiding in the peaceful desegregation of the schools are also major contributions."

558 Transcript of Hearing of Nov. 22 1975, 197-198, Morgan v. Kerrigan No. 72-911-G (D.Mass. 1975) (Center for Law & Education).

No further details of this are given.[559]

5. What communications system operates between you, others in your office, and faculty, staff, and student leaders, and police, as devised to prevent or reduce conflict and to increase safety within both of the buildings under your charge?

On the opening day Judge Garrity posed the question: "What led to the decision to have the police inside the school this year?"

> *Dr Reid*: I think you could say, very definitely, it was the faculty insistence that the school would open with police or they would not -- I got the impression – they would not work.
>
> *Judge Garrity*: Was this something that [...] was voted upon or presented to you informally or formally or how?
> [...]

There followed a lengthy exchange between the judge and Dr. Reid as to the numbers of police officers in the school (90 officers at any one time), how they were deployed, what they did. Finally Judge Garrity asked the specific question: "Do you have an assistant or liaison between you and the police? Is that any particular person?" to which Dr Reid replied:

> "Yes, sir, I have Sergeant Donovan who is the Boston Police liaison. He is in communication with both the Boston and the State Police. We usually have a plainclothesman, a Lieutenant-Detective, who comes in on a two-week assignment and who is the technical liaison. I know both the commanding officers well enough so that there is no problem in communication."[560]

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559 *Id.*

560 Transcript of Hearing of Nov. 26 1975, 199-202 Morgan v. Kerrigan No. 72-911-G (D.Mass. 1975) (Center for Law & Education).

6. How frequently have you met since September, 1975, to plan with the Parent Racial/Ethnic Council for SBHS and L Street Annex[561]? Do you make agenda entries for these meetings?

On November 25 Mr Van Loon (counsel for the black plaintiffs) was examining Dr Reid

> *Mr Van Loon*: Dr Reid, directing your attention, then, to an item just referred to by the Court, the election of the racial-ethnic parent councils, was such a council elected for South Boston High last year?
>
> *Dr Reid*: 1974? 1975, rather? Phase 1 year?
>
> *Mr. Van Loon*: Yes.
>
> *Dr. Reid:* No, there was no such council elected.
>
> *Mr. Van Loon*: Did black parents elect representatives?
>
> *Dr. Reid*: There was an ad hoc biracial group.
>
> *Mr Van Loon:* [...] [...]Was the reason that a racial-ethnic council was not formed at least at South Boston that the white parents refused to elect representatives to it?
>
> *Dr. Reid:* [...] I would have to check the record. I think we had insufficient black representation and no representation – no official representation from the white community.
> [...] [...]
>
> *Mr. Van Loon:* Thank you, Doctor. Is there a multi-ethnic racial council in operation at the school this year?
>
> *Dr. Reid:* There is.[562]

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561 *See* Morgan v. Kerrigan, 409 F.Supp. 1141,1144 (D. Mass. 1975)The annexe was "a remodelled wing of a municipal bathhouse to which about two-thirds of the ninth graders have been assigned."

562 Transcript of Hearing of Nov. 25 1975, 63-66, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

7. **Have (you) asked to meet with, or have you been asked to meet with, the Community District Advisory Council for District 6 concerning safety within South Boston High School?**

At the end of examination of Dr Reid, Judge Garrity put additional questions to him, including this:

> *Judge Garrity*: Right. Changing the subject again, I have reference to the parent councils and the community district advisory council. Are you familiar with the community district advisory council structure?
>
> *Dr. Reid*: Relatively so. I think I have only been to one meeting of that group.
>
> *Judge Garrity*: Do you know who the president or chairman is?
>
> *Dr Reid*: No, I do not.
>
> *Judge Garrity*: [...] When was the meeting with the community district advisory council, approximately?
>
> *Dr. Reid*: Approximately a month ago.
>
> *Judge Garrity*: And is there another meeting scheduled? If you know.
>
> *Dr Reid*: I don't know about the community. We have a meeting scheduled for Monday night, I believe. Mr Dunn would be able to answer those questions, I believe.
>
> *Judge Garrity*: And when you speak about Monday a meeting with whom?
>
> *Dr. Reid*: With the South Boston School biracial parent group[563]

8. **Have the problems in the schools under your charge been discussed by the Principals Council of District 6 since September, 1975? Describe, if yes.**

The following colloquy between the judge and Dr Reid on November 26 followed on immediately after the last line in the colloquy quoted in illustration of Q7 above:

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563 Transcript of Hearing of Nov. 26 1975, 39-40, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

Judge Garrity: Is there a council of principals in Community District 6?

Dr. Reid: There is.

Judge Garrity: And has it met?

Dr. Reid: It has.

Judge Garrity: Have you attended the meeting?

Dr. Reid: I have.

Judge Garrity: And how often has it met, if you know?

Dr. Reid: We are regularly scheduled once a month, but Mr McDonough perhaps could be more informative on that. [564]

Judge Garrity: At what time once a month? The first Tuesday or Thursday or something? Is there a particular regular day? If you know. I will agree with you, Mr. McDonough is the one that could better speak, but I wondered if you [...]

Dr. Reid: As I recall, I think it is on the calendar for the last Friday in the month, from 1:15 on.

Judge Garrity: What was roughly the agenda or subject matter of discussion with the council of principals when it met?

Dr. Reid: I am sorry, I can't recall.

Judge Garrity: Well, let me change the subject, because I was going to say that is probably more for him.[565]

9. Describe the chain of command under you within the two buildings under your charge and the chain as it moves out from you, including all parties within your office, faculty, district office, and headquarters.

On November 24 Dr Reid was still giving evidence in relation to the "headmaster's bulletins". Mr Tierney referred Dr Reid to Headmaster's Bulletin No. 4 dated 2 Sep 75 and the words "Each teacher is expected to handle his own problems insofar as it is

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564 South Boston District Community Superintendent Joseph McDonough, brother of school committee chairman John McDonough.

565 Transcript of Hearing of Nov. 26 1975, 40-41, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

possible before seeking help." Dr Reid then explained the chain of command in detail.[566]

10. What alternative programs have you developed for receiving and assisting fearful or conflict-prone students this year?

Cross-examining Dr Reid, Mr McMahon, counsel for the Boston Teachers Union (BTU), introduced as an exhibit a report and recommendation from the SBHS summer planning team in collaboration with the University of Massachusetts. The following exchange took place.

> *Mr McMahon:* The introduction portion contains a so-called checklist for the identification of disruptive students on page 16?
>
> *Dr Reid*: Yes, there is such a thing.
>
> *Mr. McMahon*: It also contains a checklist of so-called examples of disruptive behavior.
>
> *Dr. Reid*: There is such.
> [...]
>
> *Mr. McMahon*: Now on page 17 there are a series of general recommendations. Could you tell us what general recommendations have been implemented?
>
> *Dr. Reid*: There has been some testing done by the University of Massachusetts and in a few cases by the 766 coordinator. The tutorial services are available through the volunteer program and through teachers' individual efforts.
> [...]
>
> *Mr McMahon*: Would you turn to page 19, Doctor, and in the second item, entitled Psychological Services, I note that there are six sub-items: Testing, Recommendations, Student Counseling, Family Counseling, Group Counseling, Internships, and Psychological Services. Can you tell me if any student counselling in terms of psychological services is offered at the school?
>
> *Dr. Reid*: It is available.

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566 Transcript of Hearing of Nov. 24 1975, 20-22, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

Mr. McMahon then proceeded to question Dr Reid about each of the recommendations in detail. Some, he said, were available, some not directly, others had not proved effective. He then continued:

> *Mr. McMahon* [...] if you would look at page 18, and again at Subparagraph B-6 beginning, "There are certain categories o£ students who would not benefit from our proposal. For these students, we suggest the following alternatives." Then there follow five alternatives. Now first, would you characterize those students that we have been describing in court as the disruptive core groups as being students who would not benefit from the proposal that is contained in Exhibit 24?
>
> *Dr. Reid*: Who would not benefit? No. I think they would be benefited and other students would benefit.
>
> *Mr. McMahon*: You think there are some students who are presently in school and are chronic troublemakers who would not benefit?
>
> *Dr. Reid*: I think that would have to await the outcome of the program [...]
>
> *Mr. McMahon:* Was there a proposal by several teachers, and again transmitted to you by the faculty senate, to develop a procedure for the identification of the so-called chronic troublemaker?
>
> *Dr. Reid:* There was.
>
> *Mr. McMahon*: Was that proposal implemented?
>
> *Dr. Reid*: I have implemented it to the extent that I feel I can justify and document the implementation.
>
> *Mr. McMahon*: And in fact has a list identifying chronic troublemakers of both races been developed?
>
> *Dr. Reid*: I wouldn't say that. I have sent a list of 25 students who have been suspended three or more times to the community superintendent.[567]

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[567] Transcript of Hearing of Nov. 24 1975, 74-86 Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

11. What have you developed as a code of discipline and how do you administer it, in lieu of a citywide code? Do you have copies of regulations for your students?

On November 26 at the end of Dr Reid's examination in chief and cross-examination by the parties, Judge Garrity put a series of questions to Dr. Reid. He did not directly ask "what do you have by way of a code of discipline?" but the answer emerged in response to another question:

> *Judge Garrity*: There was reference in your testimony about immediate suspension for the possession of weapons, I think. What is covered by the term weapon? Someone said that he was suspended for having a fingernail file, and I wondered [...]
>
> *Dr. Reid:* That would be classified as a weapon, sir.
>
> *Judge Garrity:* Well, can you give an additional definition of the word weapon?
>
> [...]
>
> *Dr. Reid:* This is printed in the student handbook. It is also posted in the main lobby. I quote: "All persons entering the main building or L Street must pass through the metal detectors as a condition to entering the building. Students and others must surrender items listed in the Laws of Massachusetts, Chapter 269 (Annotated) Paragraph 10 and 12, plus but not exclusive of the following: firearms of any kind,; any knives, razors, or other objects sharpened into blades; clubs; athletic equipment, such as baseball bats, hockey sticks; umbrellas; karate sticks; moon chucks, or rods of any kind; pipes, brass knuckles, and other metal objects; screwdrivers, wrenches, hammers, or other metal tools; chains; whips; ropes, or any combination or objects fashioned into such, combs and picks with metal teeth; rattaills, scissors; metal nail files; hat pins; mace and other chemicals such as spray paint and deodorant; bottles and cans; alcohol, illegal drugs, fireworks. Possession of any of the above may result in suspension."
>
> *Judge Garrity:* Well thank you. And is that definition disseminated to students and teachers?
>
> *Dr. Reid*: It is, Sir.
>
> *Judge Garrity:* And in what way?

Dr. Reid: Through the handbook, a copy of which is given to each student, and a copy is given to each family. It is posted in the lobby. [568]

12. Have you attempted to get action toward expelling any students this year? If not, why not?

Robert Dentler's memo used the word "expelling". That word was not used directly in questions put to Dr Reid by the parties or by Judge Garrity or in Dr Reid's replies. The issue of discipline was raised on a number of occasions with frequent mention of "suspension". In particular, it was established that fighting attracted a mandatory five-day suspension. After the lunch recess, Garrity resumed his colloquy and began asking Reid about suspension:

Judge Garrity: Turning now briefly to the suspension procedure, if you know offhand, have there been any suspensions for the use of racial epithets?

Dr. Reid: There have.

Judge Garrity: And they would be shown in these records, I assume.

Dr. Reid: Yes, your Honor.

Judge Garrity: With respect to the suspension procedure, do I understand that you personally determine the period of suspension?

Dr. Reid: On review I do. Mr. Gorovitch initially says, "You are out for three to five days or until we talk with your parents," or "until your parent comes up," I should say.

Judge Garrity then went on to ensure that students received due process before suspension and Dr Reid reassured him on this[569]

This did not deal directly with Dentler's proposed question but finally, after a long discussion with Attorney Fremont-Smith about the Home and School Association, Garrity returned to Dr Reid:

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568 Transcript of Hearing of Nov. 26 1975, 35, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

569 Transcript of Hearing of Nov. 26 1975, 45, Morgan v. Kerrigan No. 72-911-G (D. Mass. 1975) (Center for Law & Educ.).

Judge Garrity: Now, I am almost through here. Have you, Doctor, or any other person in your administration, taken action to expel a student this year as distinguished from suspending them?

Dr. Reid: We have not taken action to expel a student.

Judge Garrity: And should I conclude from that that in your opinion there are no students whose conduct warrants expulsion as distinguished from suspension?

Dr. Reid: I believe there are students whose conduct may warrant an alternative site for education. Expulsion, which is the prerogative of the School Committee, removes the youngster from education completely. I think there should be some intermediate step between suspension and expulsion, and that is what we have talked with the administration at some length about.[570]

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570 *Id.*, at 58-59.

Part Two: Race and Education in Boston

I. Introduction

In his remedial order of June 5 1975 Judge Garrity announced that he intended to do more for the schools of Boston than the elimination of segregation and the effects of discrimination.[571] His plan would show "a common concern with equality and excellence throughout all institutions and groups in the entire greater Boston area and lay a basis for improving the quality of education for the total city."[572] In acknowledging the link between discrimination and educational quality and specifically in identifying the importance of educational enhancement in a desegregation remedy, Judge Garrity went further than any of his predecessors in federal desegregation suits.[573] His plan became the prototype for a new type of desegregation planning in which educational concerns were ostensibly as important as issues of student assignment.[574] To assist him in his project he secured the appointment as court experts of two educational sociologists, Drs. Robert Dentler and Marvin Scott, respectively Dean and Associate Dean of Education at Boston University.[575] As educators with experience in desegregation planning, the two sociologists shaped the focus of his plan and became key to its implementation. Ultimately however, the educational component was a failure. In the judge's terminology, the case was first and foremost, a "race case" and not an "education case."[576]

He identified the problem at an early stage. On April 10 1975 speaking from the bench, Judge Garrity sought counsel's help in relation to the Court's power to make "educational orders" as opposed to "race orders" i.e. orders "whose connection with racial discrimination and racial desegregation is less direct and clear than the Court's power to direct that certain racial mixes be achieved in the particular schools."[577] At issue was the question of sex discrimination in the selection process for admission to

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571 Morgan v. Kerrigan 401 F. Supp. 216, 223-4 (D. Mass.1975).
572 *Id.*
573 *See infra* note 632and accompanying text.
574 *Id.*
575 *See* 401 F.Supp. at 227.
576 *See* Transcript of Hearing of April 10 1975 Morgan v. Kerrigan, 401 F.Supp. 216 (1975)(No. 72-911-G).
577 *Id.*

the prestigious Latin Schools. The court had been asked to enter an order requiring a single pool of qualified applicants followed by assignment at random to either the Latin School or the Latin Academy. Observing that "this is a race case, not a school case primarily" the judge stated the issue that was going to give him the most difficulty in formulating an order: Supreme Court jurisprudence protects equality not education. [578] In other words, although *Brown* was about education and education is "the very foundation of good citizenship", the federal constitution confers no right to education per se but only the right to equal education which, in this context meant education without discrimination.[579] Judge Garrity explained: "[...] once the state undertakes to supply education, [...] then it must be available without discrimination among the races. There is a constitutional right to equal protection. That is what this case is all about."[580]

Implementation of the court order in the face of the direct opposition of local officials forced the Judge to engage directly with the intricacies of school administration in Boston and ultimately to require its complete restructuring. As the period of court supervision became protracted and the likelihood of judicial withdrawal appeared increasingly remote, the judge became vulnerable to accusations of interfering in matters of educational policy with which he was ill-equipped to deal.[581] Initially, the wide discretion entrusted to federal district judges in connection with schools desegregation by the *Brown* decision insulated Judge Garrity from reversal by the superior courts. Seven years after the remedy decision, however, the First Circuit Court of Appeals which had hitherto consistently supported the judge's determination to outface the defiance of elected school officials, for the first time fired a warning shot.[582] Matters of educational policy were primarily the responsibility of the local officials charged with administering the school system. In straying into the field of general educational policy, the district court would run the risk of exceeding its

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578 *Id* (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

579 *Id.* (quoting Brown v. Board of Educ. (*Brown I*), 347 U.S.483, 493 (1954).

580 Transcript of Hearing of April 10 1975 supra note 576.

581 *See* Donald J. Jensen, Desegregation in Boston: The Federal Court as School Administrator (1981) Paper presented to the 1981 annual meeting of the American Political Science Association in New York City (copy on file with the author).

582 Morgan v. Mc Donough, 689 F.2d 265, 277 (1st Cir.1982).

legitimate role. "Desegregation" said the First Circuit, "is not a mandate to equalize schools except insofar as inequality reflects racial bias." [583]

By the early 1980s the attempt to bring about structural change in the Boston public schools was in trouble; a coalition of plaintiffs, school defendants, teachers and parents combined to frustrate court orders for school closings.[584] Support for racial mixing ebbed, undermined by growing disillusionment with the ability of the desegregation process to bring about lasting improvements to the quality of education experienced by black children. Influenced by the radical ideas of Derrick Bell and Ronald Edmonds[585], plaintiffs' counsel Larry Johnson began actively to question the nature of the desegregation process and to advocate a "freedom of choice" plan focusing on educational equity as opposed to "desegregation." In so doing, he fragmented the plaintiffs' case and frustrated the consent decree negotiations begun by State Commissioner Anrig as a way of terminating court jurisdiction, but largely to no avail.[586] By this time, the law of the case was firmly established. The case was a race case and not an education case. The consequence was that, however sincere the judge's concern with educational improvement might initially have been, the requirements of desegregation as mandated by the Supreme Court set limits to the extent that this concern could be realized.

In the fall of 1975, Robert Dentler had explained the purpose of federal court supervision: "(C)ourt jurisdiction will continue indefinitely until the judge decides that equal protection, which in education must mean conditions for learning, has been accomplished and is self-maintaining,"[587] but in constitutional terms this was an equal protection case. A remedy for constitutional violation depended upon the finding and elimination of the historical bases of unequal treatment. As Jensen points out, a statement that conditions must be improved is not the same as saying that education must be improved.[588] The ability of the judge to bring about educational improvement

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583 *Id.*

584 *See infra* Part II Chapter 3.

585 *See* eg. Ronald R. Edmonds *Desegregation Planning and Educational Equity* 17 THEORY INTO PRACTICE 12(1978); Derrick J.Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

586 *See supra* Part I Chapter 2.

587 Robert Dentler, *Improving Public Education: The Boston School Desegregation Case*, 7 SUFFOLK U. L. J. 4, (1975).

588 Jensen *supra* note 581 at 6.

was circumscribed by the overriding imperative of legal process which was to provide a remedy for constitutional violation within the ambit of the principles formulated by a Supreme Court increasingly concerned to encourage judicial disengagement.[589] Thus to criticize the judge as some have done for his failure to bring about long-lasting educational reform is to misunderstand the nature of the task upon which Judge Garrity was engaged and the legal matrices within which he had to operate.[590]

Dentler himself came fairly quickly to understand the limits of what was going to be permissible. Reflecting on what he had been able to achieve in Boston, Dentler's regret was that he had not been able to accomplish more to enhance the quality of the educational experience of children in Boston's public schools. Judge Garrity, he said, adopted the phrase "show a deep concern." "I learned later what that phrase meant to lawyers – it does not mean improvements to teaching and learning."[591]

II. Structure

Part Two of this work explores the relationship between race and education in the Boston schools' desegregation case. It notes that whilst the intention of the judge was to bring the two together in his desegregation plan, the goal of educational enhancement was subordinate and ultimately abandoned because the case was a race case and not an education case.

The first chapter focuses on the Boston Plan, specifically the relationship which those who devised it sought to achieve between educational enhancement and desegregation. It identifies those aspects of the plan which were intended to have an "educational enhancement" component and considers to what extent achievement of those aspects could be said to have been thwarted or frustrated.

The second chapter focuses on caselaw, specifically the jurisprudence of the Supreme Court in the key decisions following *Green*[592] which attempted to provide the detailed

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589 *See infra* Ch. 2.

590 *See infra* note 613 and accompanying text.

591 Robert Dentler, Interview with author Lexington, MA, Sept 21 2006 (hereinafter "Dentler 2006").

592 Green v. County Sch. Bd., 391 U.S. 430 (1968).

assistance which the federal judiciary required if they were to give meaningful effect to the broad imperatives of *Brown I & Brown II.*[593] It argues that the key to understanding the relationship between these two conceptualizations ("race" and "education") lies in shifting understandings of the purpose of desegregation and a tension between conflicting underlying imperatives, namely those of remedial legal process and the so-called "harm-benefit thesis" of social science.[594]

In *Millikin v Bradley* (*Millikin II*) the Court ruling that compensatory programs designed to remedy the consequences of intentional discrimination were permissible, seemed to lend approval to the new type of desegregation planning which had begun in Boston and which would prioritize educational enhancement as a desegregative goal.[595] At the heart of desegregation jurisprudence however, was a commitment to the centrality of "fault"; in other words, educational enhancement was permissible only to the extent that this could be said to be necessary to remedy deliberate discrimination on the part of state agencies. From this point of view, educational enhancement necessarily had both an in-built life span (limited by reference to the school lifetime of students in the education system at the time that the intentional discrimination was ordered to cease) and determinable boundaries to be identified by reference to issues of causation. This latter raised difficult questions such as to what extent could it be said that, for example, the educational underperformance of African-American children could be attributable to the lingering vestiges of intentional discrimination within the public school system.[596]

Judge Garrity's plan was formulated in 1975 at a time when the changing political profile of the US Supreme Court bench had yet to find its expression in schools' desegregation jurisprudence. As his involvement with the Boston public schools continued into the 1980s and the appointment of Chief Justice William Rehnquist gave control of the Supreme Court to its conservative wing, the ability of the judge to

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593 Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).
594 *See* Chapter 2.
595 Millikin v. Bradley, 433 U.S. 267 (1977)(*Millikin I*).
596 *See* infra Ch. 2.

require the inclusion of educational enhancement as a key element of desegregation planning diminished to the point of extinction.[597]

In 1985, Judge Garrity returned control of much of the Boston public school system to the school committee.[598] He retained supervision over student assignments and faculty hiring but relinquished jurisdiction over the former after the First Circuit vacated his injunctive orders in 1987.[599] In 1994, two years after the *Morgan* case was finally closed and with a school committee now committed to preserving a unitary non-segregated public school system, the relationship between race and education was again litigated. [600] The Controlled Choice student assignment plan adopted in 1989 preserved racial quotas for the examination schools on affirmative action grounds and faced equal protection challenge from a white pupil denied access to the Latin School which reserved 35% of its seats for black and Hispanic applicants. Judge Garrity avoided ruling on the constitutionality per se of race-conscious assignment policies but the First Circuit, two years later, held that "noble ends cannot justify the deployment of constitutionally impermissible means" and struck the Latin School's admission's policy as too broadly drawn.[601] Boston school committee abandoned the use of race as an assignment factor in 1999 but has continued to defend its assignment policies in federal courts, most recently against plaintiffs asserting that facially race-neutral policies concealed invidious discriminatory intent.[602]

The relationship between race and education in Boston is explored contextually in chapter 3 of this section by reference to the specific issue of school closings and is picked up and developed in relation to the Latin schools in the final section of this work where it forms the basis for concluding reflections concerning the implications for debates concerning the so-called "limits" of rights discourse.

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597 A President Nixon appointment to the Supreme Court, William Rehnquist was nominated to the position of Chief Justice by President Reagan following the retirement of Chief Justice Warren Burger and took office on September 26 1986

598 *See* Morgan v. Nucci, 620 F. Supp. 214, 217-218 (D. Mass. 1985).

599 *See* Morgan v. Nucci, 831 F. 2d 313, 315-17 (1st Cir. 1987). The process of court withdrawal was incremental.

600 McLaughlin v. Boston School Committee, 938 F. Supp. 1001,(D. Mass 1996); 952 F. Supp. 33 (D. Mass 1996).

601 Wessmann v. Gittens, 160 F.3d 790, (809 (1st Cir. 1998).

602 Anderson v. City of Boston, 375 F.3d 71 1st Cir. 2004).

III. School Closings: The Problem of "White Flight'"

With the benefit of hindsight, it is possible to identify the *Milliken* decisions as poised on the fault line between education and race that was to open up in schools desegregation jurisprudence. In *Milliken I* the Supreme Court had refused to recognize the constitutionality of an interdistrict plan for the desegregation of city schools where there was no evidence that white suburbs were implicated in the intentional discrimination that constituted the constitutional violation.[603] The ensuing difficulty of effecting a racial mix of black and white students in a city such as Detroit where absence of white students from inner-city schools made racial balance impossible to achieve, encouraged desegregation planning which focused on educational enhancement, in the form of magnet school and compensatory education programs, rather than physical integration of black and white students. The problems of Detroit repeated themselves in many of the urban centers of the north, Boston included, as white flight to the suburbs coupled with the declining birth rate amongst the white population (the so-called "white pill") reinforced residential separation between suburb and city. [604] For Judge Garrity and Robert Dentler in Boston, school closings became a key part of the answer.

Anticipating the decision in *Millikin v. Bradley*, the judge had expressly ruled out a metropolitan solution, limiting his plans for racial redistribution to the city of Boston alone.[605] Thus in accordance with established precedent, the court plan was essentially a racial balance plan; the racial composition of each school was to reflect that of the district within which it was located, subject to a permissible variation of plus or minus ten percent.[606] Whereas blacks and other minorities represented 36 percent of total enrolment in 1970, by 1975, this figure had increased to 53 percent and by 1980 had reached 65 percent.[607] The declining numbers of white children became a major obstacle to the success of the plan; there simply were not enough white students in the

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603 Milliken v. Bradley, 418 U.S. 717 (1974) (*Millikin I*).

604 *See infra* Ch.3 .

605 Millikin I, 418 U.S. 717; Morgan v. Kerrigan, 401 F.Supp.216 (D. Mass. 1975) *See* ADAM NELSON, THE ELUSIVE IDEAL: EQUAL EDUCATIONAL OPPORTUNITY AND THE FEDERAL ROLE IN BOSTON'S PUBLIC SCHOOLS, 1950-1985, 200 (2005).

606 *Id.*

607 Boston Municipal Research Bureau, The State of the Boston Public Schools: A Pessimistic Diagnosis by the Numbers, (September 17 1981) (cited in Nelson, *supra* note 605 at 200 n.59).

public school system. Analysis of the Boston desegregation process as of September 1979 undertaken by the Boston Municipal Research Bureau showed that "only 35 percent of the 149 city schools [...] complied with the court's desegregation standards for all races in their respective districts. Only 22 percent of all schools met the court's criteria for two of the three racial groups, 37 percent met the criteria for just one race, and 17 percent did not meet the standards for any race."[608]

For Judge Garrity and court-expert Dentler the appropriate response was to eliminate spare capacity by closing or consolidating under-used schools. The 1975 court plan called for the closing of twenty school facilities mainly at elementary level. Judge Garrity explained the significance for desegregation as follows:

> A major reason for closing schools is that desegregation is more easily and economically achieved through the consolidation of student bodies. Many of the city's elementary schools in black areas have in the past been overcrowded; many elementary schools in white areas have been underutilized, e.g., when a new school was constructed to replace an old one in a predominantly white neighborhood, the school committee accommodated parents protesting the closing of the old one by keeping them both open. Should school facilities be uniformly used to capacity, an excess of several thousand available seats at the elementary school level would remain. Thus a number of the older elementary schools can be closed, with accompanying savings of the costs of operating and heating those schools. Elementary schools will be kept open whose locations enable busing to be minimized overall, and which permit the more efficient assignment of students by geocodes, accomplishing desegregation and minimizing the need to split geocodes. Uniform utilization of facilities throughout the city will also tend to equalize the availability of the system's resources to all students.[609]

The issues of school closings and facilities use became major obstacles to the withdrawal of Court supervision, bringing together a coalition between plaintiffs and defendants who conceptualized their opposition on educational grounds and argued the relevance of student achievement as a measure of desegregation success.[610] By 1982, the withdrawal of support for court-ordered desegregation by Larry Johnson, counsel for the black plaintiffs, was popular with many black parents who had become disillusioned with the court emphasis on issues of student assignment and

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608 *Id.*

609 *Kerrigan* 401 F. Supp. at 245.

610 *See infra* Ch. 3.

school closings with little to measure in terms of improvement in quality to off-set the consequent disruption and instability.[611] The court plan which had achieved neither integration nor improvements in quality was widely deemed a failure; the aims of lawyers and their clients had apparently diverged and the Court seemed deaf to the argument that the purpose of desegregation was to enhance the educational opportunities of minority children. In relation to these issues, the requirements of desegregation seemed not only unrelated to educational objectives but actually inimical thereto. The search for a United Facilities Plan preoccupied the Court for over ten years in the course of which the rejection by Garrity on Dentler's advice of the School Superintendent's plan for "linkage" and "beacon" schools illustrates the distance that had opened up between the two different conceptions of the purpose of desegregation.[612] For Judge Garrity, accuses Metcalf, the "sine qua non was integration. If the results boosted the system's scholastic achievement, fine; he sincerely hoped they would, but his primary interest was elsewhere."[613]

IV. The Latin Schools: Elitism and Educational Disadvantage

The presence within the public school system of elite examination schools which recruited students by competitive examination raised difficult questions concerning race, privilege, educational advantage and indirect discrimination.[614] Technically public schools, their reputations for academic excellence meant that, as the Judge later remarked, they were "much more than that."[615] The Boston Latin School was and still is the oldest public school in the United States;[616] its foundation predates that of Harvard College by one year, and it lists amongst its alumni an impressive number of America's great and good including the names of Benjamin Franklin, Cotton Mather,

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611 *Id.*

612 *Id.*

613 GEORGE R. METCALF, FROM LITTLE ROCK TO ARKANSAS 216 (1983).

614 The third examination school, Boston Technical High, did not present the same problems as the Latin Schools. It achieved "rapid compliance" with court desegregation requirements, the entrance examination operating primarily to safeguard the requirement of numeracy necessary for students hoping to benefit from a scientific and technical education. *See* ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 129, (1981).

615 *See* Garrity J., McLaughlin v. Boston School Committee, 938 F. Supp. 1001, 1004 (D. Mass. 1996) (referring specifically to Boston Latin School, but the same is true of the Latin Academy.).

616 The Latin School was established in 1635.

Samuel Adams, Charles Sumner and John Hancock. The origins of Boston Latin Academy are more recent; the school was founded in 1877 as Girls' Latin School. in response to citizen and parent pressure for the establishment of preparatory college training for girls.Both schools became co-educational in response to state legislation in the early 1970s; as Judge Garrity recognized, their reputation ensures their graduates access to power and influence within the city and controversy over selection criteria and procedures which continues to this day.[617]

At the time of the Boston liability order, both schools were predominantly white in terms both of enrolments and faculty.[618] Although the judge accepted that there was no evidence of specific discriminatory acts, the Latin schools were not exempted from the requirement to desegregate. As the First Circuit affirmed, they were an integral part of the Boston public school system and presumed tainted by the constitutional violations affecting the rest of the system.[619] Successful students were likely to have attended elementary schools which ran "advanced work classes" and which were over 80 percent white.[620]

Because the case was a race case and not an education case, the principle of selection itself was not in issue. As the First Circuit observed, "it is not unconstitutional per se for a city school system to operate an elite school even though low income or minority children may be under-represented in the student body."[621] However, the Constitution does prohibit methods of selection which are overtly discriminatory or

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617 *See* McLaughlin v. Boston School Committee, 938 F. Supp. 1001 (D. Mass. 1996), Wessmann v. Gittens, 996 F. Supp. 120 (D.Mass. 1998) *rev'd* 160 F.3d 790 (1st Cir. 1998); Boston's Children First v. City of Boston, 62 F. Supp.2d 247 (D. Mass. 1999) *aff'd* 375 F.3d 71(1st Cir. 2004); Boston's Children First v. City of Boston, 98 F. Supp. 2d 111 (D.Mass.2000), appeal dismissed 244 F.3d. 236 (1st Cir. 2004), judgment aff'd. 375 F.3d. 71 (1st Cir. 2004 Boston's Children First v. Boston School Committee, 183 F. Supp. 2d 382 (D. Mass.2002) *aff'd* 375 F.3d 71 (1st Cir. 2004); Boston's Children First v. Boston School Committee, 260 F. Supp. 2d 318 (D. Mass. 2003) *aff'd* 375 F.3d 71 (1st Cir. 2004).

618 Morgan v. Hennigan, 379 F.Supp. 410,468 (D. Mass. 1974). Dentler & Scott's figures for 1975 were: Boston Latin Academy: 82% white; Boston Latin School: 88% white. *See* Dentler & Scott April 23 1975, *A Fresh Look at Desegregating Boston's Public High Schools* 90 Garrity XXXVIIf. f18..

619 Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976) (citing Keyes v. School District No. 1, 521 F.2d 465 (10th Cir, 1975).

620 Morgan v. Kerrigan, 509 F.2d 580, 594 (1st Cir. 1975).

621 *Kerrigan*, 530 F.2d 401, 424 (citing Berkelman v. San Francisco Unified School District, 501 F. 2d. 1264, 1267 (9th Cir. 1974)).

apparently neutral but operate with intentional discriminatory effect.[622] The difficulty in Boston then was to devise selection criteria which would maintain the elite character of the school as the First Circuit instructed,[623] yet achieve the desegregation enrolment targets for minority students who, as a class had been deliberately assigned by race to schools with facilities, programs, curricula and materials that were inferior to those offered by white schools and who were "failed, suspended, expelled and remanded into classes for the mentally retarded and the socially maladjusted at rates three times higher than the rates for whites."[624]

Dentler's perspective was that of a social scientist who saw desegregation in educational terms; for him a race case was necessarily an education case. For Judge Garrity, the case was primarily a race case. This study explores their relationship in terms of a dialogue between the discourses of law and social science. The relationship between the two and the consequences for the actions of the judge and the development of the Boston public schools are issues which are raised again in the final section of this work.

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622 *See* Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

623 *See Kerrigan*, 530 F.2d at 425: "We are convinced that the district court will monitor the progress of desegregation in the examination schools and will adjust its future orders to ensure the continued vitality of these schools as elite institutions."

624 *See* Robert Dentler *School Desegregation in Boston: A Successful Attack on Racial Exclusion or a Bungle?* in READINGS ON EQUAL EDUCATION VOL 12 CIVIL RIGHTS IN SCHOOLS, 26 (Steven S. Goldberg, and Kathleen K. Lynch, eds. 1995).

Chapter One: The Boston Plan

I. A New Type of Plan

The desegregation plan ordered by Judge Garrity on May 10 1975 for implementation in the Boston public school system for the coming school year with its emphasis on "educational quality" represented what Dentler has termed the "third generation" of desegregation plans.[625] The first phase of desegregation planning which took place in the South in the aftermath of *Brown II* was a period of gradualism.[626] The federal judiciary were feeling their way; desegregation in the non-residentially segregated South was seen as largely a matter of freedom of choice; desegregation planning was amateurish by reference to what was to follow.[627] Gradualism ended in 1965, the Supreme Court famously declaring that the "time for 'deliberate speed' had run out"[628] and requiring affirmative action to eliminate dual systems "root and branch."[629]

Desegregation planning became more sophisticated in urban school districts such as Charlotte-Mecklenburg, N. C. where segregation in schooling was as much a reflection of housing policies and patterns of residence as of intentional action on the part of school authorities. Judge McMillan's response which received Supreme Court sanction in 1971 became a precedent for northern school desegregation and inaugurated a second generation of planning in which district courts turned to professional educators and sociologists for assistance as court experts and advisers.[630] *Morgan v Kerrigan*[631] represented a third generation of desegregation planning in which Dentler claimed a concern with 'quality' would characterize the "offspring of *Brown v. Board of Education of Topeka*" in a positive way.[632] After *Morgan*, he wrote, "every federal case concerning school desegregation will be more than what some lawyers call a 'race case'." [633]

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625 Dentler, *supra* note 587 at 3.
626 *See infra* Ch. 2.
627 Dentler, *supra* note 587 at 3.
628 Griffin v. County School Board of Prince Edward County, 377 U.S. 218,234 (1964).
629 Green v. County School Board of New Kent County Va., 391 U.S. 430,437-438 (1968).
630 *See* Swann v, Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) (aff'g Swann v, Charlotte-Mecklenburg Bd. of Education 311 F.Supp. 265 (W.D. N.C. 1970)),
631 Morgan v. Kerrigan 401 F. Supp. 216 (D.Mass. 1975).
632 Dentler, *supra* note 587 at 3.
633 *Id.*

A key passage written in 1975 sets out his view of the role of educational planning in schools desegregation: "Every case will be a case involving detailed educational planning to insure equal protection under law." Equal protection, he continued, must involve improvement in the quality of public instruction and that improvement must be measured in terms of conditions appropriate to the learning needs of all children.[634] "School segregation is after all a symptom of failure to serve the whole public and failure to serve all children, white, black and other minorities effectively."[635] The Boston case, he said, was not alone in recognizing the interdependence of desegregation and improvement of learning. Denver and Minneapolis had set the new trend.[636] The Boston order, however, which went further in improving conditions for learning than any previous order, represented the pattern which future desegregation planning would follow.[637]

This chapter examines the educational philosophy of the Boston plan, and outlines its major features, specifically those which were intended to enhance the quality of the educational experience of students in Boston's public schools. It begins by explaining the overall educational philosophy of the plan and attempts to uncover the extent of the contribution of Robert Dentler to the development of the Judge's thinking in this area by reference to the archival record, with particular reference to the Dentler/Scott memos.

Interviewed in 1994 right at the end of the Boston schools' case, Judge W Arthur Garrity Jr. explained that *Morgan v. Hennigan*[638] and the subsequent twenty years of court supervision of the Boston public schools sought to do three things: i) correct the racial imbalance in school populations for the purpose of establishing equity of educational opportunities for all students; ii) mandate the improvement of the climate of the schools and iii) order conditions that might result in an increase of student

634 *Id.*

635 *Id.*

636 *See* Keyes v. School District No.1, Denver Colorado, 380 F.Supp. 673 (D. Colo.1974); Special School District No.1 Minneapolis, Minn., 351 F.Supp. 799 (D. Minn. 1972).

637 *See* Dentler, *supra* note 587 at 3.

638 Morgan v. Hennigan, 379 F.Supp.410 (1974).

achievement in the public schools.[639] It was his concern with the last of these three objectives which made the Boston plan unique.

As O'Donnell in his study of the effects of desegregation upon the Boston public schools emphasizes, the judge's concern with issues of educational equity and excellence was genuine.[640] Whilst public opposition crystallized round the issue of "forced busing", as the judge emphasized at the time and repeated in his interviews with O'Donnell after the case was closed, the justification lay in educational enhancement; what was important was what the student would find at the end of the bus ride.[641] Speaking from the bench during a hearing on February 7 1975 Judge Garrity observed that "a desegregation plan (must) not simply be a physical reshuffling of students [...] [There must be a] deep concern for the educational dimensions of all these proposals [and] the necessity of [...] considering [...] the quality of education."[642]

II. Robert Dentler and School Desegregation Planning: A Lifelong Speciality

The judge had learnt the connection between desegregation and educational enhancement from Robert Dentler who had agreed to act as court expert because of his "life-assignment" to educational enhancement.[643]

Dentler's experience in desegregation planning began in 1963 when, as an associate professor of sociology and education, teaching in the Teachers College Department of Social Foundations at Columbia University, New York, he became involved in the development and direction of an Institute of Urban Studies with a mission to restore

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639 *See generally* Mark D. O'Donnell, The Effects of Court-ordered School Desegregation on the Public School System of Boston Massachusetts. Unpublished Ph.D Thesis, University of Connecticut (1996) (on file with author).

640 *Id.* at 71.

641 *Id* at 71: "Judge Garrity believed that racial balance in student and staff populations, the equitable distribution of funds and programs, school climate and the development of curricular excellence were of equal importance in a school desegregation plan."

642 Transcript of Hearing of Feb 7 1975 Morgan v. Kerrigan No 72-911-G (D. Mass.) at 67(cited in Report of the Masters Mar 31 1975 at 19 (*See* 90 Garrity XXXVIId. f13).

643 *See* Dentler (2006) *supra* note 591.

the connection between the college and the schools of New York City.[644] As one of his first projects, he was invited by New York State Commissioner James Allen to join a small commission to plan for the racial desegregation of the public schools of New York City, at that time, the nation's largest district containing 1,000 schools and a million students. Among the other members of the commission was psychologist Kenneth Clark from City College of New York whose doll studies had formed part of the evidentiary base relied upon by the Social Science brief in *Brown I* [645] and who fostered in Dentler a life-long commitment to desegregation work. Invited to serve as commission research and staff writer, Dentler and the small team of researchers he recruited produced the Allen report: Desegregating the New York City Public Schools which became the opening salvo in the political struggle to desegregate New York's public schools in the period between 1963 and 1970.

Although most of the report's recommendations were not carried out, Dentler, who sat in on all Commission meetings, gained valuable experience concerning remedial options and the role of demographic analysis in desegregation planning, not least the importance of obtaining full and reliable data on issues such as school enrolments, racial/ethnic composition of students and faculty and program/curricular matters.[646] The report's commitment to the value of educational imperatives as part of desegregation planning remained with him throughout the rest of his career.[647] Chief amongst these imperatives was the importance attached to the role of administrative decentralization and community control as mechanisms of an effective desegregation plan.[648]

In October 1964, with the aid of federal funding, Dentler transformed the Institute of Urban Studies into an enhanced Center for Urban Education, one of the new regional educational laboratories established under Title IV of the Elementary and Secondary Education Act of 1965 and specializing in desegregation planning and community

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644 *See* ROBERT DENTLER, THE LOOKING GLASS SELF: A MEMOIR, 174-200 (2002) (copy on file with Archives & Special Collections Dept. Healey Library Univ. of Massachusetts Boston MA).

645 *Id.*

646 *Id.*

647 *Id.*

648 *Id.*

control through decentralization.[649] Between 1963 and 1972, Dentler worked on school desegregation tasks in Hackensack, New Jersey; New York City, White Plains, Glen Cove, Buffalo and Rochester, New York; Bridgeport and Stamford, Connecticut; Harrisburg, Pennsylvania; and other cities including Los Angeles and San Bernadino, California with varying degrees of success.[650]

By 1972, however, the political climate was changing and the supply of federal funds for desegregation work was drying up. In Dentler's words, "the steam had gone out of northern district quests for racial equity in the schools".[651] Exhausted by the demands of school desegregation work and seeking a refuge from its "rigors and setbacks", Dentler took up the position of Dean of Education and Professor of Education and Sociology at the University of Boston, thinking, he says, mistakenly, that Boston with its civil rights traditions and relatively small ethnic minority concentrations would allow him to leave desegregation planning behind him.[652] He brought with him however his reputation as a seasoned educational planner with hands-on experience of desegregation planning.

On 15 March 1972 black plaintiffs assisted by the Harvard Center for Law & Education, and pro bono lawyers Foaley Hoag and Eliot filed suit in the Boston federal district court alleging persistent 14th Amendment violations on the part of the school committee in the running and maintenance of the Boston public schools. The case of *Tallulah Morgan et al. v. James W. Hennigan* was assigned at random to Judge W. Arthur Garrity Jr. The main hearing was held in February 1973 with a brief reopening of the case later that spring.[653]

Judge Garrity's liability decision in Morgan v. Hennigan was handed down on 21 June 1974.[654] Concluding that the members of the Boston school committee and the superintendent of schools had "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities" and had "intentionally brought about and maintained a dual school system," the Judge ordered

649 *Id.*
650 *Id.*
651 *Id.*, at 194.
652 *Id.*, at 195.
653 Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.1974).
654 *Id.*

into effect the State Racial Imbalance Plan for the school year starting in September 1974 as a temporary measure and instructed the school committee to prepare a plan which would satisfy constitutional imperatives.[655]

Devised by Charles Glenn, Director of the State Board of Education's Bureau of Equal Educational Opportunity, to give effect to the requirements of the Massachusetts Racial Imbalance Act of 1965 and ordered into implementation by the state Supreme Judicial Court, the Phase I plan as it became known affected 80 of the 200 (approx.) schools of the Boston public school system and incorporated an element of student reassignment and compulsory busing for approximately 17,000 students, notably by pairing schools in the black area of Roxbury with those of the white area of South Boston.[656] Nevertheless, as a racial balance plan, it did not meet the constitutional standards mandated by the Supreme Court which required not "racial balance" but the elimination of dual systems and racial identifiablity.[657] Accordingly, Judge Garrity directed the Boston school committee to "to begin forthwith" the formulation and implementation of plans to eliminate every form of racial segregation and its vestiges in the public schools of Boston.[658]

When it became obvious that not even the threat of contempt proceedings would induce members of the school committee to produce an acceptable plan, Judge Garrity began exploring the possibility of appointing a special master to undertake the task. His first overture was to the Dean of Harvard Graduate School of Education, Paul N. Ylvisaker who, recognizing the sensitivity of the task, turned the job down on the grounds of a possible conflict of interest.[659]

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655 *Id.*, at 482.

656 The school committee was resolutely opposed to any plan that involved busing students out of their neighborhood schools – for an account of the attempt to implement the Racial Imbalance Act *see* J. MICHAEL ROSS & WILLIAM M. BERG, I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER: THE BOSTON SCHOOL DESEGREGATION CONTROVERSY 63-150 (1981).

657 *See* Green v. County School Board of New Kent County, 391 U.S. 435-438 (1965). The Massachusetts Act defined a racially imbalanced school as one which was more than 51% black. There was no objection to a school which was more than 51% white.

658 *Hennigan*, 379 F. Supp. at 484.

659 As Dean, he was also Director of the Harvard Center for Law & Education which was supporting the NAACP and the plaintiffs in the Morgan case. *See* Ross & Berg, *supra* note 656 at 372-3.

The judge then approached Dentler, by this time one of only 100 or so desegregation planners in the country who "magnetized by his manner of courtesy, integrity and intellectual acuity" agreed to help for "two or three months."[660] In Dentler's opinion, the scale of the Boston dispute required a panel of masters to preside over court hearings and devise a constitutionally acceptable remedial plan for the judge's consideration. Dentler recommended a number of individuals, including Charles V. Willie and Francis Keppel, both of whom were experienced educators and were subsequently appointed by the judge, but advised that he himself would be of most assistance in the capacity of court-appointed expert, in which role, acting jointly with his Associate Dean, Dr Marvin Scott, an African-American with experience of inner-city teaching and desegregation planning, he would provide technical assistance for both the judge and the panel of masters.[661]

On December 18 1974, by which time it was clear that not even contempt proceedings would produce an acceptable desegregation plan from the school committee, Judge Garrity announced in court that he was thinking of appointing an expert.[662] The following day, Dean Dentler wrote to the judge proposing the appointment of Dr Marvin Scott as his assistant ("he and I have worked together long enough to have each other's confidence"), and setting out a proposed framework and terms of service as Court-Appointed Experts on Boston School Desegregation Planning.[663] Dentler and Scott would attend court in accordance with the judge's schedule. Their external contacts would be the planning professionals working on the Boston case and their counterparts in other cities. As Dentler's assistant, Scott would collect materials, and travel for that purpose as requested, conduct special analyses and interviews on request, share in reports to the judge and in progress statements to the press and assist

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660 Dentler, *supra* note 644 at 237.

661 *Id.*

662 Transcript of hearing of 18 December 1974, 56 Morgan v. Hennigan, 379 F. Supp.410 (D. Mass.1974).
By order of the district court issued on October 31 1974 the School Committee was required to file a plan for student desegregation in accordance with guidelines set out in the order by December 16 1974. On the deadline date members of the school Committee voted against submission. Plaintiffs subsequently moved for civil contempt on December 27. On December 30 Garrity issued an order of contempt and imposed sanctions in the form of daily fines, non-participation in committee discussions orders and instigated an inquiry into the possibility of suspension of two of the defendants from legal practice. *See* Ross & Berg, *supra* note 656 at 333-346.

663 *See* Dentler, Dec. 19 1974, *Proposed Framework and Terms for Service as Court-Appointed Expert on Boston School Desegregation Planning* 90 Garrity XXXVIIf. f2.

in the production and co-authorship of reports to the court.[664] Dentler would attend on the judge to make oral reports as required and would make weekly progress reports in writing during each of the 20 weeks from January through May.[665] At the direction of the judge, he and Scott would produce a draft version of a final written report which would contain a critique of the proposed Phase II plans and set out final recommendations.[666] Calculating on the basis of an initial commitment of 65 days for Jan 2 through May 30 1975, Dentler and Scott would, with the permission of (Boston University president) Professor Silber, continue to carry out a portion of their regular duties for the university, their salary being adjusted pro rata accordingly. Their per day consulting fee would be the same as their pre-tax salary from Boston University, namely $192 in the case of Dr Dentler, and $100 for Dr. Scott. The total cost to the court for the 65 day consultancy would be $25,000 including expenses for 3000 man-hours of productive work, an hourly rate, he calculated, of $20.77 for Dentler and $14.62 for Scott.[667]

On January 31 1975, Garrity by order appointed Dentler and Scott as court-experts to assist the evaluation of student desegregation plans already filed and the formulation of a new plan should the filed plans prove inadequate.[668] A week later, on February 7, following publication of a draft order and a hearing to consider objections, came the formal order for the appointment of a panel of. Masters.[669] This tactic of dissemination of draft order together with notice of hearing was to set a precedent for what came to be a defining characteristic of his management style particularly in later years as he struggled together with Dean Dentler to find a way of extricating the court from continuing involvement with the supervision of the Boston public schools.[670]

With three plans on the table (the Boston school department plan, [671] the plaintiffs' plan and a plan submitted by the Boston Home and School Association (BHSA), the

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664 *Id.*

665 *Id.*

666 *Id.*

667 *Id.* The costs would be paid by the defendant school committee.

668 Morgan v. Kerrigan, Order Appointing Experts No 72-911-G (D. Mass. Jan. 13 1975).

669 Morgan v. Kerrigan Designation of Masters and Notice of Hearing on Draft Order No. 72-911-G (D. Mass. Feb. 7 1975).

670 *See supra* Part I.

671 This had been drawn up by officials of the School Department, primarily Planning Director John Coakley, was voted down by the School Committee but submitted to the court on 16

panel of Masters commenced hearing on February 10 1975 for a period of two weeks following which they issued their final report on March 31 1975. They then retired from the case leaving to the judge and his experts the task of carrying out any necessary revisions. Further assistance was provided by two law clerks, Tom Hayes, recruited specially for the task of assisting the Masters and experts, and Terry Seligman, Judge Garrity's regular law clerk, together with Martin Walsh of the Community Relations Service of the U.S. Department of Justice. Dentler in a series of memos to the masters had offered in-depth critiques which, incorporated in the Final Report, found the school committee plan inadequate (largely because of the reliance on parental free choice), the plaintiff's plan "educationally deficient, unwieldy and arbitrary" and the BHSA plan "vague and unduly burdensome to minorities",[672] and had advised the masters in relation to school closings and matters of student transportation. His advice and recommendations were central to the main themes of the plan as originally drawn and as it came to be adapted following hearings into an avalanche of objections which greeted the plan on its submission to the court on March 31.[673]

The Masters' plan was essentially a redistricting and student assignment plan. As originally drawn it proposed a restructuring of the city's schools into a ten district system (subsequently revised to nine) to include one city-wide district with magnet schools and magnet programs, and mandatory busing of approximately 10,700 to 14,900 students.[674]

When, in the course of court hearings, it became apparent that the information concerning school enrolments upon which the masters had based their calculations was unreliable, Judge Garrity directed his team to carry out revisions based upon new figures which indicated a total requirement of 85,001 seats system-wide.[675] Dentler and Scott later discovered that this figure, which included more than 5,000 names of

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December 1974 by counsel who subsequently resigned from the case. Judge Garrity denied a motion by the committee to have the Plan removed from consideration by the Court. *See* Ross & Berg, *supra* note 656.

672 *See* Morgan v. Kerrigan, 530 F.2d 401, 407 (1st Cir. 1976).

673 ROBERT A, DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE, 29- 31 (1981).

674 *Id.*

675 *Id.* at 25-27.

students who had attended no more than five times between September and April and 2,000 names which had been counted more than once (under as many as three identification code numbers), was no more reliable than the earlier information.[676] The struggle to obtain accurate and up to date information concerning the number of students in the Boston public school system at any one time was to bedevil the court's planning efforts. Dentler later took the view that the failure to obtain from the school defendants valid, reliable and complete information concerning not just enrolments but on every aspect of school organization from programs and procedures to staffing and facilities constituted one of the most substantial mistakes of the exercise and its "cruelest lesson;" no amount of good planning could succeed if the information upon which it is based is incomplete or inaccurate.[677]

III. The Boston Plan and Educational Quality

Charged by the judge with the task of assisting the panel of four Masters, two of whom were educators but without specific desegregation experience, for the purpose of devising a desegregation plan that would comply with constitutional standards, Dentler had drawn up outline criteria for gauging effectiveness. [678] In a series of memoranda he critiqued the plans on the table using his criteria as a frame of reference.[679] Heading the list was the requirement of educational improvement: a plan, he wrote "should manifest ways in which its implementation would improve the teaching and learning conditions characteristic of the system."[680] Whereas the BHSA plan offered no design for this, the School Department plan contained useful proposals including those for magnet schools and programs which were subsequently

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676 *Id.*

677 *Id.*, at 47.

678 *See* Ross & Berg *supra* note 656 at 374-5: Judge Garrity appointed four masters to conduct hearings and prepare a desegregation plan. The masters were: Jacob Spiegel (presiding officer), a recently retired State Supreme Judicial Court judge, Edward McCormack, Jr., former state attorney general; Frances Keppel, former U.S. Commissioner of Education; and Charles Willie, professor of sociology and education at Harvard University. Though eminent in their field, none of the appointees was experienced in desegregation planning.

679 *See* Dentler, Memo to the Masters *Tentative Outline of Criteria for Gauging Effectiveness of Planning Proposals* Feb 4 1975. 90 Garrity XXXVIIf f17: The memos were submitted to the Court on February 4 1975.

680 *See* Dentler, *Memo to Masters Feb* 4 1975 90 Garrity XXXVII f. f17. The other principles included: ethnic mix to reflect the system's present mix of students, educational equity, such that each local school would be affected by the plan in roughly similar ways, fiscal soundness, clarity and durability.

adopted by the masters.[681] Significantly for the subsequent development of the case, the plaintiffs' plan made no explicit provisions for improving educational services in the Boston public schools and was rejected by the masters on those grounds.[682] The failure to address these matters right from the very beginning was to mean that when, in the early 1980s, the plaintiffs switched tactics and sought to address educational equity issues, their change of direction was too late; despite Dentler's best efforts, by that time the case was firmly established as a "race case" as opposed to an "education" case.

IV. The Sociological Connection between "Race" and "Education."

For Judge Garrity and for all lawyers following the decision of the Supreme Court in *Green* the purpose of the desegregation remedy was to dismantle the layers of racial duality with the intention of establishing a unitary system of public school instruction and administration.[683] As far as Dentler was concerned this was "legal euphemism"; what was at issue was a system of institutional racism which was "welded onto the walls and doors of schools and built into the subculture and personalities of those who inhabit them and run them."[684] Desegregation was a tool for attacking the roots and branches of structural dominance in teaching and learning systems and to be effective required the political will to be as rigorous and as comprehensive as the case required.[685]

When the Judge came to consider the extent of his powers to include educational matters within the scope of his remedial plan, Dentler spelled out for him what he considered to be the *sociological* as opposed to the legal relationship between "race" and teaching and learning in a schools desegregation suit. [686] Drawing on both

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681 *See* Dentler *Memo to the Masters Application of Criteria to Boston Home and School Association Plan of 1/20/75* Feb 4 1975 90 Garrity XXXIIf f17.

682 *See* Morgan v. Kerrigan 401 F. Supp. 216,223-224: [the plan failed to] "reflect a sufficient concern ... for the educational implications of plan design."

683 Green v.County Sch. Bd., 391 U.S.70 (1968).

684 Dentler *supra* note 624 at 23.

685 *Id.*

686 Dentler, April 11 1975 *Race Case or Race and Education Case* 90 Garrity XXXIIf. f17. (emphasis in the original) For a discussion of the difference between sociological and legal conceptualizations *see infra* Ch.3.

research and his own experience he explained the dangers of desegregation planning orders which were insufficiently comprehensive:

> The conditions under which public instruction and learning occur may be thought of as a triangle within a square. The three points of the equilateral triangle are a) teacher and program, b) student and c) parent. The four sides of the surrounding square are a) school administration; b) the student's peer groups; c) the adult community at large, including the agents of government; and d) the resource base, including facilities, equipment, transport and communications support, materials and total adequacy of the physical environment. [687]

Segregation, he advised, disrupts the model, distorting relations and eroding the equitable distribution of resources. In Dentler's view both social and behavioural research indicated conclusively that if the equal education objectives of desegregation were to be achieved, planning could not be limited to matters of staff and student re-assignment.[688] Where desegregation has been seen solely in terms of re-assignment coupled with safety and transportation issues, the effects on equalizing teaching and learning have varied "from negligible to damaging". Equal education depends upon orders which were "planful" and "comprehensive:"

> Where a defendant will not or cannot figure out how to plan to establish the administrative, peer group, community and resource conditions that will make equal education possible, the court should do so or should recognize that it may become an unwilling partner to the act of discrimination.[689]

Dentler was careful to limit his advice to sociological perspectives. He left what he termed the "semantics of the case law" to others "better qualified" than he on those matters.[690] For the judge of course, however great his personal desire to enhance teaching and learning in the Boston public schools, his over-riding imperative had to be that of legitimacy, deriving as it must for any member of the federal judiciary in his position, in the first and last analysis from the jurisprudence of precedent. Thus for the judge it was exactly the semantics of the case law which were important, to which

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687 *Id.*
688 *Id.*
689 *Id.*
690 *Id.*

he had to attach the ultimate significance and which, would ultimately circumscribe his ability to bring about improvements in the quality of education in Boston's schools.

V. Key Features of the Plan

The plan announced by the court on May 10 1975 for implementation in September of that year (the so-called Phase II Plan) generated widespread hostility and provoked renewed scenes of violence on the streets.[691] This was due largely to the fact that the plan was seen and presented by its opponents in terms of compulsory busing. In fact, busing was but one element of a complex remedy which drew upon a range of desegregation techniques "hammered out nationwide"[692] and sanctioned by the Supreme Court in the course of the previous decade. The novelty of the Boston plan lay not so much in its remedial content as in the comprehensiveness of its design and the intensity of court supervision.[693]

In his liability decision of June 21 1974,[694] Judge Garrity found intentional racially discriminatory practices on the part of school authorities in the following areas: a) facilities utilization, planning and construction, b) definition of school district boundaries; c) student assignment policies which included feeder patterns controlling enrolments at specific high schools, open enrolment and controlled transfer policies and exceptions thereto, and d) staff hiring promotion and assignment policies. The finding of intentional segregative policies in parts of the system gave rise to a presumption which had not been rebutted, that these policies infected the elite citywide examination schools and vocational schools and programs.[695]

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691 For accounts *see* Ross & Berg, *supra* note 656 at 465-475; RONALD P. FORMISANO BOSTON AGAINST BUSING: RACE, CLASS & ETHNICITY IN THE 1960S AND 1970S, 104-105 (1991).

692 *See* Robert A. Dentler *The Boston School Desegregation Plan in* SCHOOL DESEGREGATION PLANS THAT WORK, 62 (Charles Vert Willie ed 1984).

693 *Id.*

694 Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.1974).

695 *See Hennigan,* 379 F. Supp. at 481 (applying Keyes v. School District No. 1, 413 U.S. 189, 208 (1973): "a finding of intentionally segregative school board actions in a meaningful portion of a school system... creates a presumption that other segregated schooling within the system is not adventitious. It establishes ...a prima facie case of unlawful segregative design on the part of the school authorities and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.")

The judge's order to the masters called for a system-wide plan that included the vocational and examination schools, athletic and other programs and made provision for bilingual education, and special needs which in this context included advanced work classes.[696] The plan should include a recommended program and timetable for implementation and could extend to the use of magnet schools designed to enhance the attractiveness of specific schools and programs.[697] The attraction of the magnet school in desegregation was the potential for promoting voluntary racial integration via the educational pull of enriched programs and facilities. By the early 1970s the concept was firmly established in the tool kit of the desegregation planner.[698]

A. Districting and Assignment

At the heart of the Court Plan was a reorganization of the Boston public school system into a number of geographically defined community school districts within which resident students would be assigned to schools on the basis of geocoding, a mapping system that had been devised by the city for use by the police department to communicate the location of calls for radio control cars and sold to the school system for use in Phase I.[699] On this basis clusters of geocode units would be assigned within each school district to particular schools, by reference to already prepared data concerning the ethnicity and grade level of prospective students residing within each geocode unit.[700]

Dentler and Scott's recommendation had been for a system of individual assignment whereby students would be assigned to individual schools on the basis of ID number,

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696 Morgan v. Kerrigan Order of Appointment and Reference to Masters No 72-911-G (D. Mass. February 7 1975)

697 *See* Missouri v. Jenkins (*Jenkins II*), 495 U.S. 33 (1990): "'Magnet schools' as generally understood, are public schools of voluntary enrolment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality" *Id.* at 40.

698 Dentler & Scott *supra* note 673 at 122. *See generally* Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform, 5* YALE L. & POL'Y REV. 291, 292 (1987) and Kimberly C. WEST, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation* 103 YALE L.J. 2567 (1994).

699 Dentler & Scott, *supra* note 673 at 41.

700 *Id.*

address, school grade and ethnicity.[701] Judge Garrity however, conscious of the attraction to parents of a system which allowed students to attend school with their immediate neighbors, opted for the geocode method.[702]

The masters recommended a comprehensive restructuring of the school system into nine community districts,(subsequently telescoped by the judge into eight to take account of downward adjustments in student numbers), supplemented by a tenth citywide district composed of designated 'magnet schools', i.e. schools offering distinctive programs of instruction designed to be attractive to students residing anywhere within the city.[703] Each district was to be headed by a district superintendent who would serve as chief school officer and would chair the district council of principals and heads which would have responsibility for internal monitoring within the district.[704] Thus the key to desegregation in Boston lay in the twin techniques of districting and student assignment. So far as possible, the districts were drawn "like slices of a pie, each wedge including black neighborhoods toward the pie's center and white communities toward the edge".[705] Assignment was to be carried out in such a way that the racial composition of each school would be reflective of that of the community district within which it was situated plus or minus a given percentage.[706] Where necessary, desegregation was to be achieved by busing. The Masters' plan had called for between 10,000 to 15,000 students to be bused, as opposed to the 17,000 bused under Phase I.[707] Under the plan eventually ordered by

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701 Their recommendations were based on their previous experience, Dentler with Harrisburg Pennsylvania schools in 1971 and Scott with a student record system at Boston University. See Dentler & Scott supra note 673 at 40-41.

702 *See* Morgan v. Kerrigan, 401 F. Supp. 216, 240 n.12: " 'Geocodes' are the 800-odd areas, each several blocks in size, into which the school department has divided the city for planning purposes [...] The units were devised originally for police reporting purposes and vary in geographical area and also in student population, ranging from a few to several hundred students'" *See* also Dentler & Scott *supra* note 673 at 41

703 *See* Dentler & Scott, *supra* note 614 at 29-44.

704 *Id.*

705 *See* O'Donnell *supra* note 639 at 77 (citing Martin Walsh, Director, Community Relations Service U.S. Justice Department.).

706 The degree of variation was initially 10%, but this was later modified by the Judge to 25% as the shortage of white students in the system made desegregation more difficult to achieve. *See* Morgan v. Kerrigan, 401 F. Supp. 216, 420-241 (D. Mass.) (1975).

707 Morgan v. Kerrigan, Report of the Masters, 51-52 (copy on file with Archives 7 Special Collections, Healey Library, University of Massachusetts 90 Garrity XXXVIId. f13).

Judge Garrity this number was increased to 25,000 to take account of corrections to the data upon which the Masters had worked.[708]

Whilst the task of developing assignment guidelines provided Dentler and his team with their most demanding task in intellectual terms[709] and became the focus of the popular opposition which manifested itself in rioting and disorder on the streets of Boston, other aspects of the plan concerning facilities and the desegregation of faculty and administrative staff were equally contentious.[710] The issue of school facilities in particular was central to the task of equalizing the quality of educational opportunity for all students throughout the city. Thus the plan directed the immediate closing of 22 schools and the removal from use of 10 others closed in 1974.[711] It provided for programs of construction of new facilities and for the repair and renovation of others and called for the prompt completion of programs already in hand. The consequent political struggle provides the focus for the third chapter of this section.

B. Educational Enrichment

Underpinning the court plan was recognition of a general perception on the part of educators and politicians alike that urgent action was required to arrest the continuing deterioration of Boston's public schools. Dentler's conviction that effective desegregation planning required a central role for measures of educational enhancement was broadly shared by the educational planners of the school department who had produced the "official" school committee plan and whose recommendations of magnet schools and programs as mechanisms of educational

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708 Figures taken from O'Donnell *supra* note 639 at 77 but *cf* Dentler & Scott *supra* note 614 at 27 (noting the need for revisions and explaining the view taken by the Masters that 'the Boston case was never a case about busing', ie "over 30,000 out of an alleged 90,000 students had been taking buses, subways and taxis from home to public schools in Boston for many years prior to 1974.").

709 *See* Dentler & Scott *supra* note 673 at 41: "Development of the guidelines for assigning students proved to be the most demanding intellectual task confronting the court. None of the planning proposals had treated this problem more than cursorily. Assignment of students in 1974 had been carried out using incomplete guidelines, with poor results in terms of errors and delays. When the masters retired from the case, therefore, Judge Garrity assigned Tom Hayes, the law clerk who had assisted the masters, the task of formulating guidelines on a full-time basis. It took him, even with a mind that worked as logically and smoothly as that of a chess master, about 400 hours to complete the puzzle."

710 For accounts *see* J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (a Pulitzer prize-winning account). See also Formisano (for a historian's response) and Ross & Berg supra note 691 (drawing largely upon contemporary newspaper reports).

711 Morgan v. Kerrigan 401 F. Supp. 216, 245-247 (D. Mass. 1975).

enrichment were subsequently adapted and incorporated by the masters and approved by the Court.[712] Even members of the Boston school committee, apparently implacably opposed to the "forced busing" aspects of the court plan, were happy to support the magnet idea as a "freedom of choice" alternative.[713] The plan endorsed by the committee and submitted to the court on January 27 (as opposed to the school department plan voted down by the committee but submitted by counsel on December 16) contained proposals for a network of 55 magnet schools.[714] Whilst the masters rejected these proposals as too ambitious to be workable, they were attracted by the concept in principle and asked Dentler and Scott to draw up lists of schools at all levels with existing programs of magnetic quality or the potential for magnetic development.[715]

Their recommendation, which was adopted by the masters and with some modifications formed part of the court plan, was that the recommended schools should form a separate city-wide district, offering seats to students at elementary, junior and high school level on a city-wide basis though with the first 20% of seats reserved for residents of the district within which the magnet was sited.[716] The aim was to provide a mechanism for enhancing the connection between city and neighborhood community which in the experts' vision was where the key to educational enhancement would be found.[717] As the masters' report explained:

> The Citywide District should constitute the source of dynamism toward quality desegregated education for the total system. [...] [T]his District can revive the educational vitality of the city, enable the exercise of preferences by citizens, and contribute fundamentally to the system.'[718]

Magnetic programs were part of on overall strategy which took democratization and decentralization as the way to enhance the quality of education in Boston's public schools. Thus the masters' plan, on Dentler's advice, contained a number of

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712 Dentler & Scott *supra* note 675at 22.
713 *Id.*,at 122-3.
714 *Id.*
715 *Id.*
716 This figure was later increased by Judge Garrity to 25%. *See* Dentler & Scott *supra* note 673 at 124.
717 *See* Dentler & Scott *supra* note 673 at 122.
718 *See* Dentler & Scott *supra* note 673 at 127 (citing Report of the Masters at 17).

additional provisions designed to foster community involvement and active participation which were incorporated into the May 10 Court plan. The lynch-pin was a combination of voluntary college-public school pairings and court-ordered structures of citizen participation, monitoring and reporting.

C. College-School Pairings.

Dentler had made the suggestion to the masters that Boston's colleges and universities could make a contribution to the enhancement of educational quality on the basis of his experience in New York where he had headed up just such a scheme of providing assistance to the public schools between 1965 and 1972.[719] The masters secured promises of support from twenty presidents, vice presidents and principals and Dentler drew up a list of potentially suitable pairings based on magnet program themes and college expertise. The scheme was then extended from the magnets to community district schools and endorsed by the judge who stated that the objective was to improve and equalize learning outcomes by means of staff development and training, the design of teaching, materials and methods and concentration on community relations.[720]

Whilst Judge Garrity endorsed the masters' recommendation for formalization via contracts or memoranda of agreement, and ordered the school department to "use its best efforts" to negotiate acceptable terms, he did not mandate any particular form or terms, almost certainly mindful of the potential for challenge before a superior court.[721] He was similarly restrained in relation to the Boston Trilateral Force, a forum of Boston's great and good established in 1974 and the Metropolitan Cultural Alliance, an organization committed to the value of educational enhancement as an aid to peaceful desegregation. He invited their continuing support but attempted no order in this respect. Thus the main structural underpinnings of the court plan for quality enhancement rested not upon court order but on the shaky foundation of voluntarism and goodwill.[722]

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719 *See* Dentler, *supra* note 644 at 210.

720 Morgan v. Kerrigan, 401 F. Supp. 216, 247 (D. Mass. 1975).

721 *Id.*

722 *See* Dentler (2006) *supra* note 591.

D. Community Involvement

The second plank of the strategy to harness community support for the desegregation process took the form of structures of parents' committees intended to link together into a citywide system of parent and student participation which would facilitate peaceful implementation of the court plan. Informed by the Community Relations Service of the U.S. Justice Department on the success of parent participation in desegregation schemes elsewhere, notably Denver, CO, the judge adopted the masters' recommendations for the establishment of a Citywide Coordinating Council with responsibility for monitoring implementation of the court's orders and for community District Advisory Councils that provided a structure for community participation.[723] These were to be supplemented by racial-ethnic parent and student councils ("RPCs" and "RSCs") which had been established to deal with racial problems and particular problems at individual schools in Phase I of the remedy stage. Membership of RPCs and RSCs was determined by elections, representatives from the RPCs and RSCs would sit on the District Councils with guidelines to ensure racial and ethnic diversity.[724] With the backing of court authority, these units were much more than the well-understood parent-teacher or home and school association and their power to interfere with classroom matters later became a source of contention as far as teachers were concerned.[725]

VI. The Missing Elements: Teaching and Learning

Judge Garrity was careful to note that in relation to both the use of magnets and community monitoring groups, he was resorting to desegregative techniques whose use was well-supported in desegregation case law. The novelty of the Boston plan lay not in its content so much as in the comprehensiveness of its design and in the difficulties of its implementation.[726] Writing in 1981 Dentler and Scott noted the

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723 *Kerrigan*, 401 F. Supp. 216, 248.

724 *Id*

725 *See* Dentler, *supra* note 673 at 203-204 (claiming that a year after an acceptable monitoring plan was filed with the court, the effect of negative teacher response was to dilute its impact: "The concept of monitoring remains timid, parental approaches toward classrooms are hedged in with a thicket of advance notices and permissions, and any semblance of evaluation is rejected. The hegemony of classroom teachers is preserved and the school department has no recorded obligation to do anything in particular with the results.").

726 *See supra* notes 624 - 633 and accompanying text.

plan's limitations; it did not specify the machinery for implementation which had to be worked out on an incremental basis over a period of years as the planning unit of the School Department was transformed initially into an Office of Implementation and then into a Department of Implementation which could ultimately be trusted with responsibility to take over the task of monitoring implementation of the court plan.[727]

Most crucially however, in the context of quality enhancement, the court plan contained no specific measures for the improvement of teaching and learning per se. The plan, they wrote, emphasized structural remedies to the neglect of functional concerns. Thus the plan contained no provision for retraining an 'overwhelmingly white and insular' body of 5,000 teachers in methods that would facilitate multiethnic instruction and promote the learning of both white and black students in the ethnically mixed and academically diverse desegregated public school system that it sought to create.[728]

The reason for this was not difficult to understand. As Judge Garrity was constantly to iterate, the case was a race case and not an education case and reform of pedagogy per se did not feature in the jurisprudence of desegregation. Matters of teaching and learning were best left to be determined at local level by officials with responsibility to local electorates. Federal court intervention was appropriate only to remedy the consequences of deliberate constitutional violation and plaintiffs had so far not made the case that deficiencies in the academic outcomes of African-American students could be directly attributable to intentional state discriminatory practices.[729]

Thus, given the state of federal desegregation jurisprudence at the time, parent power represented a legitimate mechanism by which a measure of quality could be injected into the Boston public schools without infringing sensitive considerations of federalism and the primary accountability of locally elected officials. Parental involvement, reasoned the judge and his advisors, would generate the interest and general awareness of what was going on in the public schools that would lead to

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727 *See* Dentler & Scott *supra* note 673 at 43.

728 *Id.*, at 45-46.

729 *See infra* Ch. 2 (discussing the scope of the desegregation mandate); Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61 (2008).

political pressure for the increased resources that in turn would promote better teaching and learning. Thus the court plan, comprehensive as it was by the standards of its time and expressly committed to the enhancement of education, rested upon a central assumption concerning the relationship of court-ordered integration and resource and achievement outcomes that was later to prove unreliable in practice.[730]

When in 1981 the number of white students in the system had dwindled, increased resources had not been forthcoming and the academic achievement of African-American children was coming to be perceived as an issue, support for the court plan ebbed.[731] Parents began to lose confidence in the ability of court desegregation plans to bring about real improvements in the academic achievements of African-American children. Counsel for the black plaintiffs and El Comite (the organization of Hispanic-speaking parents) changed tactics, demanding equalization of resources and facilities but to no avail. The "semantics of case law" ensured that the case was a race case and not an education case.

The next chapter examines the meaning of "desegregation" in Supreme Court jurisprudence

730 See *infra* Ch. 2.
731 *Id.*

Chapter Two: From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law

I. Introduction: The Paradox of Desegregation Jurisprudence

In 1979, after a decade of urban school desegregation, Judge Harvie Wilkinson wrote:

> The problem is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, it is also less clearly a constitutional requirement the Supreme Court is entitled to impose. [732]

The loss of faith with the desegregation process which took place in Boston in the 1980s was underpinned by confusion about what exactly the process of desegregation was intended to achieve. It raised questions about what the Constitution might or might not require: how does a right not to be discriminated against turn into a requirement for racial balance? What is wrong with freedom of choice and the neighborhood school? Why must children be bused and schools closed? The Boston plan made specific provision for educational enrichments but the Court refused to consider matters of teaching and learning or to take into account disparities in academic outcomes.[733] When the burdens of busing, school closures and teacher lay-offs seemed to fall disproportionately upon the black community which had sought desegregation, their leaders returned to the issue which *Brown v. Board of Education*,[734] had supposedly resolved and asked once again: what exactly is the relationship between racial isolation and educational opportunity for African-

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732 J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION 1954 – 78,132 (1979).

733 *See supra* Ch. 1.

734 Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*). Technically there were four cases which were consolidated on appeal to the Supreme Court: Belton v. Gebhart, 87 A.2d. 862 (Del. Ch. 1952) (on appeal from Delaware), Brown *v.* Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (on appeal from Kansas), Briggs *v.* Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) (on appeal from South Carolina), and Davis *v.* School Bd. of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952) (on appeal from Virginia).
Following the Supreme Court's ruling that the provision of "separate but equal" education was a violation of the Fourteenth Amendment, the case was adjourned for the Court to hear argument concerning the remedy. The remedial ruling came one year later in Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). In this text, references to *"Brown"* should be taken as references to both *Brown I* and *Brown II*.

Americans?[735] To seek answers to these questions in key aspects of this branch of Equal Protection jurisprudence is to discover what desegregation analyst David J. Armor has termed "the desegregation dilemma", namely the apparent paradox that *Brown,* the case which declared the constitutional incompatibility of racial discrimination, came itself to require purposive racial discrimination as an aspect of effective relief.[736]

As Professor Graglia suggests, the history of the law of race and schools since *Brown* has seen the Supreme Court convert a prohibition of segregation into a requirement of integration.[737] In the process, he argues, a decision that stood as authority for a prohibition on all forms of racial discrimination became the basis for a new form of racial discrimination.[738] Public schools were required to conform to requirements of racial balance.[739] Access to schools was once again controlled by reference to considerations of race.[740] A constitutional mandate to desegregate to prevent discrimination became the affirmative requirement to discriminate to secure integration, despite the assurance given contemporaneously with *Brown I* that the Constitution did not require integration.[741]

Most commentators have concluded that it was the need to provide an effective remedy that pushed the Court in the direction of affirmative action.[742] Two challenges in particular required an effective response. The first was the attempt by elected officials in Southern states to subvert the effect of *Brown*, initially by outright opposition and then by the adoption of policies which were overtly race-neutral but

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735 *See infra* Part III

736 DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 3. (1995).

737 Lino A. Graglia, *'From Prohibiting Segregation to Requiring Integration: Developments in the Law of Race and the Schools since Brown', in* SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 69 (Walter G. Stephan, and Joe R. Feagin, *eds.*,1980) (hereinafter Graglia, *Developments*). *See also* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS (1976)(hereinafter Graglia, DISASTER BY DECREE).

738 *See* Graglia, *Developments*, *supra* note 737 at 69-96.

739 *Id.*

740 *Id.*

741 Briggs *v.* Elliott, 132 F. Supp. 776 (E.D.S.C. 1955) ("Nothing in the Constitution or in the decision [in *Brown I*] takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination").

742 *See* Graglia, *Developments*, *supra* note 737 at 75. *See also* Armor, *supra* note 736 at 27-28.

which operated in practice to perpetuate segregation.[743] Freedom of choice assignment plans fell into that category.[744] By 1968, noting that ten years after *Brown*, a "freedom of choice" policy had made virtually no changes to the racial composition of the schools of New Kent County (VA),[745] a unanimous court declared that "such delays are no longer tolerable" and imposed on school boards a duty to take affirmative action to establish a "unitary non-racial system".[746]

The second challenge was the need to respond to segregation in urban areas where racially identifiable schools were a reflection of residential segregation coupled with neighborhood school policies. In a case from North Carolina, the Court had accepted racial balance as a criterion of desegregation and compulsory busing as an appropriate response to this kind of situation.[747] By the time that Judge Garrity came to order his remedial plan for Boston, compulsory reassignment of pupils to secure racial balance in the public schools had become the norm in northern school desegregation planning, despite its unpopularity with white parents whose withdrawal to the suburbs made racial balance in urban schools impossible to achieve.[748]

Whatever the justification, it is undeniable that the objective of racial integration as a mechanism for the enhancement of the life opportunities of African-Americans is, or ought to be, a social policy objective requiring political decisions involving the allocation of public resources and judgments as to what results could thereby be

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743 Practices included the pupil placement laws and freedom of choice plans explained in Green *v.* County School Bd. of New Kent County, Va., 391 U.S.430, 431-433 (1968).

744 *See Green*, 391 U.S. at 437- 438.

745 Under a Virginia pupil placement law adopted after *Brown*, students were automatically reassigned to schools previously attended unless they specifically applied for permission to change. *See Green*, 391 U.S. at 433.

746 391 U.S.430, 439. *See also* 441, 442: The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board. The Board must be required to formulate a new plan and, in the light of other courses which appear open to the board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

747 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

748 *See generally* Robert A. Dentler, School Desegregation Since Gunnar Myrdal's American Dilemma in THE EDUCATION OF AFRICAN AMERICANS 27-49 (Charles Vert Willie et al. eds., 1991); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* 80 MINN. L. REV. 825, 825-873 (1996).

achieved. This is exactly the kind of decision in respect of which politicians turn to the work of social scientists, but it is not normally one within the purview of the federal judge. In *Brown v. Board of Education*, the Court appeared to require federal judges to take on the task of implementing social policy objectives for reasons which were not clear and in a manner which was not directly articulated.[749]

In this chapter I explore the meaning of desegregation for both lawyers and social scientists and its consequences for desegregation planning. I argue that, whereas for social scientists desegregation was a process of social change and required integration, for lawyers, desegregation was a remedy and its content shaped by the nature of the litigation process. That the two conceptions of social science and law came together for a period of twenty-five years or so following the *Brown* litigation should not divert attention from the fundamental underlying differences which contained within themselves the basis for divergence, and underpin the reluctance of current members of the Supreme Court to sanction race-conscious remedies which are not directly linked to issues of constitutional fault.[750]

In Part One I outline the general argument by reference to what I term the "underlying imperatives" of social science and law. By this I refer to the values of social policy reform and remedial process that underpin these respective disciplines and which determine the disciplinary boundaries within which solutions legitimate to that discipline must be framed. The disciplines of law and social science were brought together as a matter of conscious policy on the part of the National Association for the Advancement of Colored People (NAACP),[751] the organization formed in 1909 which

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749 *See* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 18-19 (2004).

750 *See e.g.*, Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995) (Thomas J., concurring).

751 Technically, the NAACP Legal Defense Fund Inc., later known as the LDF, which was set up as a separate organization headed by Thurgood Marshall in 1939, achieved financial independence in 1957, and finally broke with the NAACP in 1978 following an unsuccessful lawsuit by the NAACP to compel the LDF to drop the NAACP initials from its name. For a personal account see JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 517 (2004). For a history of the NAACP and its involvement in school desegregation cases *see* MINNIE FINCH, THE NAACP: ITS FIGHT FOR JUSTICE (1981); LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP (1962); CHARLES FLINT KELLOGG, NAACP; A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (1973). The LDF played no part in the Boston case but NAACP General Counsel Nathaniel Jones acted for the black plaintiffs in Morgan *v.* Hennigan, his successor Thomas Atkins taking over from Harvard Center for Law and Education counsel Larry Johnson in the later stages of the litigation.

became the nation's premier civil rights organization largely because, as George Washington University law professor Robert S. Cottroll *et al.* suggest, it recognized and harnessed the power of litigation to initiate social change.[752] Two issues relating to NAACP litigation strategy have particular significance for the development of desegregation jurisprudence: first the decision to litigate for integration as opposed to educational equity, and secondly the strategic use of social science statements with which to lobby the US Supreme Court.

In Part Two I consider the main contours of this strategic use by reference to four such statements. Sociologists Chesler et al [753] have drawn on the influential work of Professor Abram Chayes[754] to argue that the effect of social science in schools desegregation litigation has been the development of "new legal theory", in the course of which the remedial imperative may be said to have moved from a "private law" conception of litigation as assertion of individual rights in favor of a "public law" conception of litigation as correction of social grievance. [755] I consider the extent to which the Court's desegregation jurisprudence can be said to have been influenced by social science conceptualizations of the harm of segregation and the benefits of integration. I argue that, whereas some of the earlier decisions may be consistent with such an argument, in later years this is no longer the case. With the benefit of hindsight I argue that the earlier cases represent the aberration and that, with the disengagement cases of the 1990, we see a reversion to a private law model which probably never really went away and in respect of which the extent to which social science can influence legal content is necessarily circumscribed.[756]

The decision to press for integration as opposed to educational equity I deal with in Part Three when I return to the questions with which this chapter opened and consider the claim that *Brown* should have been decided differently.

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752 ROBERT.J COTTROL. ET AL. BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION 51 (2003).

753 MARK. A. CHESLER ET AL., SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES (1988).

754 *See* Abram Chayes,. '*The Role of the Judge in Public Law Litigation*', 89 HARV. L. REV. 1281. (1976).

755 *See* CHESLER ET AL, *supra* note 753 at 27-61

756 For the "disengagement cases" *see* Freeman v. Pitts, 503 U.S.467 (1992) and Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995) (discussed *infra* Part II).

Whatever the impact of social science on the content of legal doctrine, in practical terms the remedial imperative inherent in the litigation process required judges and social scientists to interact at district court level in the construction of a desegregation remedy. I return to the relationship between social science and law in my conclusion. In the uncertain content of the term "desegregation" itself, I identify a framework for analysis which sees the court expert as fundamental to the process by which federal district judges gave meaningful content on a pragmatic basis to the process of desegregating the nation's schools.

II. Law and Social Science in Schools Desegregation

Much has been written about the underlying ambiguities of the *Brown I* reasoning and the difficulty of identifying a constitutional justification for the decision.[757] In over-ruling the decision in *Plessy*[758] which underpinned the racial segregation laws of the South, the Supreme Court made clear that in the field of education the doctrine of "separate but equal" had no place,[759] but failed to make clear the nature of the harm of segregation. Although, as Professor Ronald Dworkin has suggested,[760] the scope for reliance in constitutional adjudication upon matters of empirical evidence is necessarily limited, the reference in footnote 11 of *Brown I* to the research of seven social scientists on the social and psychological effects of segregation upon black children has inaugurated a debate about the impact of social science which continues to characterize school selection jurisprudence to this day.[761] Since *Brown I*, lawyers have continued to argue, with varying degrees of success, that the federal judiciary should take notice of social science research regarding the causes and consequences

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757 *See* Owen Fiss, (1971) *'The Charlotte-Mecklenburg Case - Its Significance for Northern School Desegregation'*, 38 U. CHI. LAW. REV. 697 (1971); *see also* Mark G Yudof, *'School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court'*, *42* LAW AND CONTEMPORARY PROBLEMS 57 (1978); James S. Liebman, *'Desegregating Politics: All-out School Desegregation Explained,* 90 COLUM. L. REV. 1463 (1990); Herbert Wechsler, *'Toward Neutral Principles of Constitutional Law'*, 73 HARV. L. REV. 150 (1955); Wilkinson, (1981) *supra* note 732.

758 Plessy *v.* Ferguson, 163 U.S. 537 (1896).

759 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1955).

760 Ronald Dworkin,. *Social Sciences and Constitutional Rights – The Consequences of Uncertainty* in EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS (Ray C. Rist & Ronald J. Anson eds., 1977).

761 *See* Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007) (discussed *infra* Part II).

of racial isolation and its impact upon the psychological and educational development of African-American children.[762]

The result has been the emergence of what Judge John Minor Wisdom has referred to as a "love match" between social science and law.[763] Lawyers have relied upon social science research to substantiate claims of constitutional harm and the effectiveness of the desired relief; social scientists have provided the empirical bases upon which schools cases have been fought.[764] Social scientists have addressed federal courts on matters such as the changing demographic patterns of cities, the causes of "white flight", the relationship between state policy, patterns of residence and the racial identifiability of schools[765] and the extent to which the under-achievement of African-American children constitutes a "lingering vestige" of discrimination.[766] In this kind of litigation more than almost any other, lawyers have looked to social science to translate issues of social fact into constitutional issues and constitutional requirements into social remedies.

As Charles T. Clotfelter points out, however, it is important to bear in mind that lawyers and social scientists have differing conceptions of what constitutes segregation and what the process of desegregation might require.[767] In social science research, the term "segregation" is used descriptively. Segregation occurs when black children are educated separately from white children. In this sense, the terms "segregation" and "racial isolation" are synonymous and integration is the appropriate social policy response.[768] For lawyers, however, the term refers to state-mandated or sponsored discrimination on the grounds of race, which gives rise to a violation of the Fourteenth Amendment equal protection guarantee. To be successful, a plaintiff must establish an element of fault on the part of the state or state actors, and seek a remedy which is specifically tailored to respond to harm which is a direct consequence of the

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762 *See* Part II.

763 John Minor Wisdom, Judge, *Random Remarks on the Role of Social Sciences in the Judicial Decision-making Process in School Desegregation Cases*, 39 *LAW AND CONTEMPORARY PROBLEMS* 134, 142 (1975).

764 *See infra* Part II.

765 Columbus Bd. of Educ. *v.* Penick, 443 U.S. 449 (1979).

766 Missouri *v.* Jenkins, *(Jenkins III)*, 515 U.S. 70 (1995).

767 CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION, 201(2004).

768 *Id.*

constitutional violation.[769] It is the legal emphasis on issues of causation which ties this branch of Equal Protection jurisprudence to the empirical evidence afforded by social science research.

A. The Differing Imperatives of Social Science and Law

Although the term does not appear in either case, desegregation following the *Brown* decisions came to represent the American commitment to deliver on the promise of equal opportunity for all. The process of public school reform brought together social scientists and lawyers with different understandings of what the word meant and what the purpose of the exercise might be. I argue here that these differences reflect the fundamentally different imperatives of social science and law.

As education professor Diane Ravitch points out, the way in which words are defined "is far more than a semantic exercise" but reflects important underlying assumptions concerning values and policy goals.[770] To that extent, the act of definition becomes in itself a statement of policy with the capacity to have important strategic consequences. I argue that, whereas both professionals speak in terms of desegregation as process, for social scientists the underlying imperative is one of social change requiring integration measured in terms of racial balance[771] and inter-racial exposure.[772] The integration imperative is underpinned by what Armor has termed the "harm-benefit thesis of social science", i.e. the thesis "that school segregation is harmful and desegregation is beneficial to the educational and social outcomes of schooling".[773] On this view, full integration in terms of student

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769 *See* Justice O'Connor on equal protection analysis in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) ("All racial classifications imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.") *See also* Grutter v. Bollinger, 539 U.S. 306, 308-09 (2003).

770 Diane Ravitch, *Desegregation: Varieties of Meaning in* 'SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION' 31 (Derrick Bell ed., 1980).

771 This ties the racial mix of a school to that of its surrounding district within specified permissible limits of deviation. *See* Armor, *supra* note 736 at 159 (noting that what is important is the possibility of "meaningful interracial contact"); *see also* Clotfelter, *supra* note 767 at 201.

772 This measures the extent to which white children and black children are able to mix with each other in the same school or classroom. *See* Christine H. Rossell, *The Effectiveness of School Desegregation Plans, in* SCHOOL DESEGREGATION IN THE TWENTY-FIRST CENTURY 75 (Christine H. Rossell, et al. eds., 2002).

773 Armor, *supra* note736, at 4.

population, faculty and educational programs, and also of resource allocation, addresses the psychological and educational harm of segregation and enables African-American children to compete on an equal footing not just in the classroom but also in terms of wider life opportunities. In social policy terms, integration was the way to respond to the disparity between the condition of "the Negro"[774] in American society and the American ideal of equal opportunity for all, which Gunnar Myrdal had identified as representative of the "American dilemma".[775]

For lawyers, however, the process of desegregation is remedial and governed by what are well-understood constraints concerning the nature and limits of remedial relief. The underlying imperative is that of legitimacy, the need to keep within the proper compass of the law and of judicial process which ultimately must tie judicial intervention to the remedial process.

The judicial function in constitutional litigation is to declare the nature and extent of constitutional rights and to provide a remedy which must be tailored to the nature of the right. Attention to the requirement of legitimacy in constitutional adjudication must also require a court to pay due respect to the limitations which considerations of federalism and the separation of powers place on the nature and extent of the judicial role. In this chapter I refer primarily to those aspects of legitimacy arising out of the nature of the remedial process which can be expressed by reference to the maxim *ubi ius ibi remedium* (where there is a right there must be a remedy).[776] The principle has two related ideas: the existence of an actionable right which will usually require the identification of fault on the part of a defendant, and the requirement for a remedy which must address the fault either by giving effect to expectations which have been

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774 I use this term self-consciously to reflect contemporary usage.

775 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xlvii (1944): The ever-raging conflict between on the one hand, the valuations preserved on the general plane which we shall call the 'American creed,' where the American thinks, talks and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of persons or types of people; and all sorts of miscellaneous wants, impulses and habits dominate his outlook. *Id.* at xii.

776 *See* Marbury v.Madison, 5 U.S. 137, 163 (1803).

aroused or, more usually, by providing recompense or restitution in respect of loss which has been sustained.[777]

In lawyers' terms, desegregation is a remedy for a constitutional violation. The action is usually couched in terms of the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, which provides that "no state shall... deny to any person within its jurisdiction the equal protection of the laws".[778] The question then is: what constitutes the violation and what must be done for the purpose of affording relief?

In *Brown I*, the Court's declaration was clear but its reasoning ambiguous. State-mandated separate provision of schooling for black and white children must cease because a) separation offends the Constitution *per se*;[779] b) governmental discrimination by race causes psychological damage to black children[780] and c) governmental discrimination by race deprives black children of the educational benefits of mixing with white children.[781] *Brown II* directed federal courts to supervise implementation of the remedial process but was similarly vague as to how this was to be done.[782] The Court invoked the exercise of equitable discretion but gave little guidance to federal judges as to how that discretion was to be exercised.[783]

Since then the Court has attempted to provide remedial guidelines which, at times, have been couched in the very widest terms. It has authorized desegregation plans for racial balance,[784] compulsory busing,[785] magnetic schools and programs[786] and even

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777 *Id.*

778 U.S. CONST. amend. XIV, §1.

779 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) at 495 "Separate educational facilities are inherently unequal."

780 *Id.* at 494. "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

781 *Id.* at 493 (citing Sweatt *v.* Painter, 339 U.S. 629 (1950), and McLaurin *v.* Okla. State Regents for Higher Educ. et al., 339 U.S. 637 (1950) (discussing the "intangible" benefits for a law student of mixing with white students, i.e "his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession".).

782 Brown v. Bd. of Educ. (*Brown II*), 349 U.S. at 300 (1955).

783 *Id.*

784 Swann 402 U.S. 1 (1971).

785 *Id.*

786 *See* Missouri v. Jenkins (*Jenkins II*), 495 U.S. 33,40 (1990).

programs of educational enhancement,[787] apparently on the basis that it shared the social science view of the curative effects of racial integration although it has never made this clear. It has, however, continued to assert, as it did in *Swann*, the remedial imperative that "the nature of the violation determines the scope of the remedy".[788] In other words, the issue of fault as defined in legal terms remains central to the definition of the remedy. Thus in the absence of fault, as the Court made clear in *Swann*[789] and again in *Keyes*,[790] issues of racial isolation or the under-performance of African-American children are simply not the Court's concern.[791]

In legal process of this kind it is, of course, the plaintiff who seeks relief, and the role of the court to that extent is passive; it either grants or refuses to grant the relief sought. In this connection and with the benefit of hindsight, the decision of the NAACP to abandon claims for "equal education" and press for "racial integration" has been criticized. Professor Derrick Bell goes so far as to offer an alternative response to *Brown* which would have upheld the legality of *Plessy*, specifically for the purpose of giving full effect to its premise of "equality".[792] I offer a brief outline of NAACP strategy and deal with Bell's arguments below.

My argument in general terms is that, for a period of twenty-five years or so following *Brown*, the social science imperative of integration and the legal remedial imperative coincided in the identification of racial balance or integration as the appropriate remedy for segregated schools. Desegregation during this period meant integration, and integration could justify race-conscious action. The coincidence was, however, temporary and was undermined as demographic changes coupled with white flight frustrated the attempt to integrate and cast doubt upon the assumptions that racial integration *per se* was a necessary aspect of equal education. New questions were asked concerning the extent to which the continuing academic under-achievement of African Americans should be regarded as a "vestige" of discrimination sufficient to warrant the adoption of affirmative action policies and the retention of court

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787 Milliken *v.* Bradley (*Milliken II*), 433 U.S. 267 (1977).

788 *Swann,* 402 U.S. 1(1971) 16.

789 *Id.*, "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis". *Id.* at 28.

790 Keyes v. School District No.1, Denver, Colo, 413 U.S. 189 (1973).

791 *Id.*

792 Bell, *supra* note 749 at 20.

supervision. As social scientists argued amongst themselves, the causal value of their research in legal terms was correspondingly reduced. Reluctant to act on the basis of inconclusive "pedagogical sociology"[793] and anxious to set limits to the duration of the remedial process, the Rehnquist Court turned to those other aspects of legitimacy, federalism or states' rights and the separation of powers to justify federal court disengagement.[794]

The result was that the jurisprudence of schools desegregation returned to the more familiar territory of the "color-blind Constitution"[795] and the negative imperative of non-discrimination by reference to race. No longer prepared to accept that integration *per se* constituted a legitimate constitutional goal, the Court struck down affirmative action policies unlinked to official segregative action.[796] The re-appearance of racially-identifiable schools in a way that reflects demographic issues, as opposed to intentional state discrimination, has been termed "resegregation" and the accusation made that the Court has betrayed the legacy of *Brown*.[797]

B. Resegregation and Race-Conscious Policies

The issue of so-called resegregation perpetuates the dialogue between social science and law by posing new constitutional questions about the harms of racial isolation and the benefits of integration.[798] In cities where active court supervision of the desegregation process has ceased, school boards which have voluntarily adopted race-conscious assignment policies or quotas have been challenged in the courts by white students denied a place at over-subscribed schools on the grounds of their race.[799] The

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793 Jenkins by Agyei *v.* State of Missouri, 19 F.3d 393, 404 (8th Cir. 1994) (Beam Circuit Judge, dissenting).

794 *See infra* Part II D.

795 *See* Justice Harlan's dissent in Plessy *v.* Ferguson, 163 U.S. 537, 552 (1896).

796 Adarand Constructors, Inc. *v.* Pena, 515 U.S. 200 (1995); City of Richmond *v.* J.A. Croson Co., 488 U.S. 469 (1989); Millikin *v.* Bradley, 418 U.S. 717 (1974).

797 *See, for example*, GARY ORFIELD AND SUSAN E EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: the Court's Role* 81 N.C. L.REV.1597. (2003)

798 *See infra* Part II.

799 *See* McLaughlin *v.* Boston School Commission, 938 F. Supp. 1001 (D. Mass. 1996) (discussing Boston School Commission policy); Wessmann *v.* Gittens, 160 F. 3d. 790 (1st Cir.1998); Boston's Children First *v.* City of Boston, 62 F. Supp. 2d 247 (D. Mass. 1999) (BCF I); Boston's Children First *v.* City of Boston, 98 F. Supp. 2d 111 (D. Mass. 2000) (BCF II); Boston's Children First *v.* Boston School Comm'n, 183 F. Supp. 2d 382 (D. Mass. 2002)

ensuing litigation once again raises the social policy questions concerning the educational purpose of racial integration which were not answered in *Brown I*: is integration a necessary ingredient of equal education? Or conversely: what is the harm of racial isolation and how will integration advance the educational opportunities of minority children?

III. Lobbying the Supreme Court: The "Harm-Benefit Thesis" as Litigation Strategy

The two affirmative action cases from Seattle and Kentucky which have recently come before the Supreme Court represent the latest attempt in the endeavor to link social science research with constitutional or legal imperative.[800] The court was asked to test the issue of constitutionality of race-conscious admissions policies by reference to the harm to be prevented and the goal to be achieved. The school boards argued that racial balance is necessary in order to enhance the educational opportunities of African-American children.[801] The white parents' groups who were the petitioners in these cases opposed this on the grounds of unconstitutional racial preference.[802] At issue, once again, were the alleged "harm" of racial isolation and the educational benefits of integration. The court was asked to consider exactly what the constitutional relationship was between racial integration and the equal opportunities of African-American children[803].

As has become typical in schools cases, the litigation set expert against expert. The school authorities' argument that race-conscious policies promote educational benefit was supported by an *amicus curiae* brief submitted by 553 social scientists who testified to the educational benefits of racially integrated schools and the harmful educational implications of racial isolation. [804] In a rival brief for the plaintiffs, social scientist and desegregation expert Armor, together with the academics Thernstrom

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(BCF III); Boston's Children First *v.* Boston School Comm'n, 260 F. Supp. 2d 318 (D. Mass. 2003) (BCF IV); Anderson *v.* City of Boston, 375 F.3d 71 (1st Cir.2004).

800 Parents Involved in Cmty. Schools *v.* Seattle Sch. Dist. No.1, 127 S.Ct. 2738 (2007).

801 *Id.*

802 *Id.*

803 *Id.*, at 2746.

804 Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 1-2, Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No.1, 127 S, Ct. 2738 (2007) (Nos. 05-908, 05-915).

and Thernstrom critically reviewed the research in the field, concluding that evidence of either short-term or long-term benefit is "simply lacking".[805] There is, in their view, "no evidence of a clear and consistent relationship either between desegregation and academic achievement" or "between desegregation and longer-term outcomes such as college attendance, occupational status and wages [...]"[806] In terms of social outcomes such as "racial attitudes, prejudice, race relations and inter-racial contact," they suggest that the impact of racial balancing policies on white students is likely to be negative.[807]

The Seattle and Kentucky brief represented the fifth in a series of statements which have been submitted to the Supreme Court in schools cases, starting with *Brown I* where Earl Warren's footnoted reference to the work of social scientists began a debate concerning the influence of social science on Supreme Court jurisprudence in school desegregation cases. [808]

A. The Topeka Brief and the Harm of Segregation

The NAACP argument as set out in the Appellate Brief submitted to the Supreme Court on behalf of the Plaintiffs made two assertions which, it claimed, represented the consensus of social scientists: 1) Distinctions or classifications based upon race or color reflect a myth of Negro inferiority which has no basis in fact, and 2) State-enforced segregation harms the psychological development of African-American children who interpret separation as connoting inferiority and are deprived of the benefits of an integrated education.[809]

Attached to the brief in the form of an appendix was a social science statement with 32 signatories who claimed to be "some of the foremost authorities in the area of American race relations",[810] and represented a spectrum of expertise from sociology and anthropology, through to psychology and psychiatry.

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805 Brief for David J. Armor et al. as Amici Curiae Supporting Petitioners at 5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, 127 S, Ct. 2738 (2007) (Nos. 05-908, 05-915).

806 *Id.*

807 *Id.*

808 Brown v. Bd. of Educ (*Brown I*), 347 U.S. 483, n.11 (1954).

809 Brief for Appellants at 5, Oliver Brown, et al., Appellants, v. Bd. of Educ. of Topeka, KS et al., 347 U.S. 483 (1954).

810 *Id.*

The decision of NAACP lawyers to use social science to mount a direct attack on the constitutionality of segregated education has been well-documented.[811] The so-called "Jim Crow" laws[812] of the South were legitimated by the Supreme Court decision in *Plessy*[813] which held that separate facilities for blacks were not inherently objectionable: "laws permitting, and even requiring, [racial] separation ... do not necessarily imply the inferiority of either race to the other."[814] Moreover, the Court held that while the purpose of the Fourteenth Amendment was to enforce equality before the law, "it could not have been intended to abolish distinctions based upon color, or to enforce social, as opposed to political equality."[815] Enforced racial separation connotes black inferiority only because "the colored race chooses to put that construction upon it".[816]

Early NAACP challenges had had some success in requiring states to eliminate substantial disparities in the provision of facilities and educational opportunities, but left intact the racist assumptions upon which *Plessy* rested.[817] Under the leadership of Thurgood Marshall, NAACP lawyers worked with social scientists to develop a strategy which would disrupt these assumptions by demonstrating a) that the biology of race and racial inferiority was unsound, b) that the causes of racial inequality were

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811 HERBERT HILL AND JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 555-557, (1975) (describing fissures within NAACP over the use of social science data); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (describing early stages of litigation that led to the 1954 decision in Brown); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 197-205 (1998) (describing NAACP's decision to submit psychologist Kenneth Clark's "doll study" as evidence of segregation's harmful effect on black children); Louis Menand, *'Civil Actions: Brown v. Board of Education and the Limits of Law'*, NEW YORKER Feb. 12 2001at 91.

812 *See, e.g.*, C.VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2001) (the classic account of these state laws).

813 Plessy *v.* Ferguson, 163 U.S. 537,544 (1896).

814 *Id.*, at 544.

815 *Id.*

816 *Id.*

817 *See* Missouri *ex rel.* Gaines *v.* Canada, 305 U.S. 337 (1938). The *Gaines* court believed that the "separate but equal" doctrine rested "wholly upon the privileges which the laws give to the separated groups within the State". *Id.* at 349. Missouri's failure to provide a law school for blacks constituted a manifest denial of equal protection, even though the State offered the black applicant a scholarship to attend a law school in an adjoining State. *Id.* at 345. "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color" *Id.*, at 349.

social and economic, and c) that segregative practices reflecting scientifically unsound assumptions reinforced the psychological perceptions of young black children concerning their own inferiority and so operated as a structure of subordination.[818]

The "sociological argument" that they developed drew heavily upon the work of sociologists such as Kenneth and Mamie Clark, whose "doll studies" indicated the negative effects of racism on young children,[819] and Gunnar Myrdal, whose *American Dilemma* (1944) had done much to familiarize the American public with sociological arguments concerning the connection between race and social oppression.[820] In sociological terms, the argument went, equalization of resources and materials would not of itself provide black children with an equal education because in a dual system, black schools, however well-resourced, would continue to be regarded as inferior.[821] Calculation of the "harm" of segregation was more than a matter of resources; the intangible social and economic consequences rendered a dual system inherently discriminatory.

The Topeka arguments were trialed in two cases (*Sweatt* and *McLaurin)* which preceded the *Brown* litigation and reached the Supreme Court in 1950.[822] NAACP lawyers assembled expert testimony from social scientists, sociologists, psychologists and educators who all testified to the psychologically harmful potential of segregation.[823] The novelty of the approach was recognized in the opening words of the *Sweatt* Petitioner's Brief:

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818 *See sources* cited *supra* note 811.

819 *See, e.g.* Kenneth B. Clark & Mamie K. Clark,, *Segregation as a Factor on the Racial Identification of Negro Pre-school Children: A Preliminary Report*, 8 J. EXPERIMENTAL ED. 8 161 (1939). For further discussion *see* Cottrol et al., *supra* note 752 at 124. *See also* Kluger, *supra* note 811.

820 Myrdal, supra note 775.

821 *See sources* cited *supra* note 811.

822 Sweatt *v.* Painter, 339 U.S. 629 (1950), and McLaurin *v.* Oklahoma State Regents, 339 U.S. 637 (1950).

823 *See* Kluger, *supra* note 811 at 256 (discussing the trial court evidence). In Sweatt v. Painter, the court received evidence on the psychological effects of segregation from Robert Redfield, Chair of the Department of Anthropology at the University of Chicago. An *amicus* brief submitted on behalf of a group of 187 law professors (The Committee of Law Teachers Against Segregation in Legal Education) made the argument that racial segregation was unconstitutional *per se*. *See* Kluger supra note 811, at 275. *See also* Tushnet, *supra* note 811, at 70, 82, and 105.

> This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised. It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation [...][824]

The argument had some success. Both *Sweatt* and *McLaurin* were "equalization" cases and the Court was not required to address directly the constitutionality of *Plessy*.[825] Nevertheless, by emphasizing the importance of the "intangible" benefits as an aspect of equality, the Court signaled its receptiveness to the sociological argument. In *Sweatt*, where a black applicant was denied access to the University of Texas Law School, the court referred to qualities "which are incapable of objective measurement but which make for greatness in a law school", and included matters such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige", as aspects of equal educational opportunity.[826] In *McLaurin*, Chief Justice Vinson for the Court laid particular emphasis upon the need for black students to mix with their white counterparts.[827] Thus when shortly afterwards the NAACP Board of Directors announced its resolution to seek desegregation in all future education cases, the structure of the arguments which were later deployed in *Brown* I was largely in place.[828]

Whether the decision of the Supreme Court was thereby influenced is a matter of some debate.[829] The words of Chief Justice Warren are well-known: "to separate [children] from others of a similar age and qualifications solely because of their race

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824 Petition for Writ of Certiorari, Sweatt v. Painter, 339 U.S. 629 (1950) (No. 2).

825 Sweatt v. Painter, 339 U.S. 629,636 (1950).

826 *Id.*, at 634.

827 McLaurin v. Oklahoma, 339 U.S. 637,641 (1950). "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained." *Id.*

828 The resolution was announced in July 1950 following a conference of lawyers convened by Marshall to "map [...] the legal machinery for an all-out attack" on segregation. *See* Tushnett, *supra* note 811 at 136.

829 *See* Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L.REV.793 (2002).

generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[830] His quotation of the lower court[831] and the famous footnote 11 which referenced the work of seven social scientists [832] to support his rejection of *Plessy* invited an affirmative conclusion from which he himself subsequently backtracked[833] and which has garnered opposition from both contemporary and subsequent academic commentators.[834]

As Dworkin and others have commented, the task of constitutional adjudication is a search for values which ought not to be dependent upon matters of empirical research particularly when researchers themselves do not agree.[835] The validity of the "doll studies" upon which the Topeka brief had drawn was itself challenged more or less immediately by subsequent researchers,[836] while the Coleman Report of 1966 sponsored by the U.S. Office of Education failed to find either the expected resource disparities between black schools and white schools or a discernible relationship

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830 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954).

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

832 *Id.*, at 495, n.11 (citing K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); PERSONALITY IN THE MAKING (Helen Leland Witmer & Ruth Kotinsky eds.,1952), c. VI; Max Deutscher and Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J.PSYCHOL. 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT'L. J. OPINION AND ATTITUDE RES. 229 (1949); THEODORE BRAMELD, EDUCATIONAL COSTS, IN DISCRIMINATION AND NATIONAL WELFARE 44--48 (MacIver ed.,1949); FRANKLIN E.FRAZIER, THE NEGRO IN THE UNITED STATES 674 -681 (1949), and GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1949)).

833 Kluger, *supra* note 811 at 706 (quoting Warren C.J.: "it was only a footnote, after all.")

834 *See* Mody, *supra* note 829 (discussing the literature).

835 *See* Dworkin, *supra* note 760. *See also* Edmond Cahn, '*A Dangerous Myth in the School Desegregation Cases*', 30 N.Y.U. L. REV. 150, 157-158 (1955) ("[I] would not have the constitutional rights of Negroes – or of other Americans – rest on any such flimsy foundation as some of the scientific demonstrations in these records"); Herbert Wechsler, *'Towards Neutral Principles of Constitutional Law'*, 73 HARV.L. REV. 1(1959).

836 *See* ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 70 (2005)(discussing research critical of the "doll studies". The "doll studies" conducted by Professor Kenneth Clark and his wife and fellow sociologist Mamie, claimed that black children in New York when given a choice of playing with a black or white doll showed a clear preference for the white doll. When asked to draw "the nice doll" the children again opted for the white. The Clarks drew the conclusion that black children in a segregated school system suffered from a sense of self-rejection and loss of self-worth. *See generally* Kluger, *supra* note 811 at 317-18).

between distribution of resources and academic achievement.[837] Its conclusion, that the major causes of under-achievement of both blacks and whites lay not in segregation but in the socio-economic class of their parents, undermined the harm-benefit thesis which produced the Topeka argument and brought about a split in the social science community.[838] In the years that followed, social scientists were no longer necessarily prepared to testify that racial separation constituted a denial of equal educational opportunity.[839]

Nevertheless, the Topeka statement set a strategic precedent which was followed in the years after *Brown* as the focus of desegregation moved to the north where there was no overtly discriminatory legislation. Here the NAACP needed social scientists to establish the causal connections between official policy and school and faculty composition required for a finding of constitutional violation.

B. Social Science and Desegregating the North: The Columbus Brief and "The Web of Institutional Discriminations"

The hope that the Supreme Court would extend recognition of the social science harm-benefit thesis to the schools of the North, where racial identifiability reflected the heavy concentrations of the black urban population rather than state-mandated racial separation, evaporated after the Court ruled in *Keyes* that *de facto* segregation was not a constitutional violation *per se*.[840] Chesler *et al.* describe *Keyes* as "the last nail in the coffin of the harm theory of northern school desegregation".[841] Although, as Justice Powell pointed out, social science research confirmed that segregation in biracial metropolitan areas is largely a function of residential patterns,[842] the Supreme Court majority was not prepared to accept that racial separation *per se* offended the

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837 Armor, *supra* note 736 at 66 (discussing James. S. Coleman,.et al.,Equality of Educational Opportunity (1966)).

838 Professor Coleman himself refused to testify from this data in support of desegregation. *See* Chesler, et al., *supra* note 753 at 41,42,43.

839 *Id.*.

840 Keyes *v.* School District No.1,, 413 U.S. 189 (1972).

841 Chesler et al.., *supra* note 753 at 46.

842 *Keyes,* 413 U.S. at 223 (Powell J., concurring in part and dissenting in part) ("[T]he familiar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws.")

Constitution.[843] What was required was an officially mandated or produced dual system, involving proof of two things: segregative purpose causing segregative effect.[844] Causal analysis assumed central importance in northern schools desegregation jurisprudence: "where Plaintiffs proved that the school authorities had carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of a dual school system".[845] Following the Detroit schools case[846] which was the immediate predecessor for the Boston case, social science testimony on the causes and effects of racial separation and particularly the interrelationship between schools and their surrounding neighborhoods became a standard feature of NAACP-LDF litigation strategy, not simply in relation to issues of liability but also to support a claim for a system-wide remedy.[847]

The *Keyes* court had been generous in one respect: the Court held that a finding of intentional discrimination in one part of the school system gave rise to a presumption that the discrimination is system-wide, shifting the burden to the school authorities to prove that segregated schools were not "the result of intentionally segregative acts".[848] However, when the Detroit case reached the Supreme Court in 1974, causal analysis moved centre-stage as the Court refused a metropolitan solution to a city-district problem. [849] The plan, which involved busing from the (black) city to the (white) suburbs, was not acceptable because the out-of-district suburbs were not implicated in the urban-district violation.[850] A remedy which involved desegregation across district

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843 *Keyes,* 413 U.S. at 205.

844 *Id.,* at 205, 208 (stating that "the essential elements of *de jure* segregation [are] stated simply, a current condition of segregation resulting from intentional state action" [...] "[w]e emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation [...] is purpose or intent to segregate". *See also* Washington *v.* Davis, 426 U.S.229, 240 (1976)).

845 *Keyes,* 413 U.S. at 201.

846 Bradley *v.* Millikin, 338 F. Supp. 582 (E.D. Mich. 1971), decided at district court level on September 27 1971; this reached the U.S. Supreme Court for the first time in 1974: Millikin *v.* Bradley (*Millikin* I), 418 U.S. 717 (1974).

847 *See supra* note 818and accompanying text.

848 Keyes v. Sch. Dist. No.1, 413 U.S. 189,208(1973).

849 *Millikin I,* 418 U.S. 717 at 744, 745.

850 *Id.*

lines was only permissible where the plaintiffs could show "a constitutional violation within one district that produces a significant segregative effect in another district".[851]

Two cases from Ohio in which the Court was asked to sanction system-wide remedial plans were the occasion for the second social science statement submitted to the Supreme Court. [852] In *Dayton I* the court, whilst emphasizing the importance of tying relief to acts of discrimination, was prepared to recognize the existence of "incremental segregative effect" which might justify a system-wide remedy.[853] When *Dayton II* and *Columbus*[854] reached the Supreme Court on the remedy issue, the Social Science Statement attached as an appendix to the *Columbus* Respondents' Brief[855] had 38 signatories, whose background was not psychology or social psychology as in *Brown*, but who were primarily identifiable as sociologists, or political or educational scientists.[856] The purpose was to lend support to the NAACP claim for a system-wide remedy by asserting the cumulative effect of a "web of institutional discriminations" as the basic cause of school and residential segregation.[857] The statement recast the "harm-benefit" thesis into three basic claims:1) that patterns of residential segregation were attributable to the actions of public authorities, including school boards; 2) that the relationship between school segregation and residential segregation was interdependent; and 3) that neighborhood school policies and attendance zones which produce racially identifiable schools can and do contribute to residential segregation and thus can be regarded as discriminatory.[858] In a section headed "Conclusions Social Science Can and Cannot Supply", the social scientists set out two important caveats: 1) the cumulative effect for which they were arguing was not susceptible to a "but for" test (i.e. would the

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851 *Id.*

852 Dayton Board of Education *v.* Brinkman (*Dayton II*), 443 U.S. 526 (1979); Columbus Bd. of Educ. *v.* Penick, 443 U.S. 449 (1979).

853 Dayton Bd. of Educ. *v.* Brinkman (*Dayton I*), 433 U.S. 406, 420 (1977) (Rehnquist J., dissenting). Rehnquist stated that [when a constitutional violation has been found] the District Court [...]must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a system wide remedy." *Id.*, at 420 (citing Keyes, 413 U.S. 526(1979)).

854 *Dayton II*, 443 U.S. 526; Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

855 Brief for Respondents, Columbus Bd. of Educ. v. Penick, 443 U.S.449 (1979) (No. 78-610).

856 *See* Chesler et al., *supra* note 753 at 25. The list of signatories included Robert A. Dentler.

857 Brief for Respondents, *supra* note 855, at 13a.

858 *See id.*, at 3a, 7a,and 10a-14a.

segregation have occurred "but for" the discriminatory acts complained of),[859] and 2) there was an absence of consensus about matters such as the terms of the debate, the appropriate measurement techniques and theoretical formulations and the trustworthiness of empirical results.[860]

The assertion of "an emerging consensus" concerning a preference for system-wide relief was apparently enough for the *Dayton II* and *Columbus* majorities[861] (there is no direct or indirect reference to the statement in the majority opinion in either case), but not for Justice Rehnquist whose criticism of the district court's "cavalier approach to causality and purpose" continued to emphasize the importance of a "but for" approach to issues of violation and remedy.[862] Thus awareness of a likely segregative effect should not be regarded as intentional discrimination, and remedies must be tailored to the violation. In his view "the fundamental mission of [desegregation] remedies is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct".[863]

C. The Harm-Benefit Thesis and Unitary Status: The Freeman and Jenkins Briefs

The inability of social science to provide precise answers to questions concerning the exact relationship between specific discriminatory acts and alleged lingering effects represented significant limits to the utility of the "harm-benefit" thesis in the termination cases of the 1990s. In *Brown II*, the Court had directed school boards "to effectuate a transition to a racially non-discriminatory school system" and directed district judges to maintain jurisdiction during the transition.[864] The *Green* Court recast

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859 *Id.*, at 18a: The brief argues: "[s]ocial scientists cannot answer such questions with precision. The questions can be rephrased to call for stating what the present would be like if the past had differed in certain specified respects. This is reminiscent of the grand 'what if' games of history[...] The present state of empirical knowledge and models of social change does not permit precise specification of the effects of removing particular historical actions. Although many of the causes of segregated outcomes are known, this knowledge is not so thoroughly quantified as to permit precise estimates of the effects of specific discriminatory acts on general patterns of segregation." *Id., at 19a.*

860 *Id.*, at 25a.

861 *Id.* Research indicated that system-wide desegregation plans which minimize the possibility of 'white-flight' were more successful at establishing stability in student enrolments and thus more likely to succeed than plans which were limited "to the immediate vicinity of a ghetto or barrio." *Id.*, at 25a-26a.

862 Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 515. (1979),

863 *Id.*, at 524,(Rehnquist J.dissenting).

864 Brown v. Bd. of Educ. (*Brown II*) 349 U.S. 294, 301(1955)

the goal of desegregation in terms of "unitary status": "the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about".[865] In the case of *Board of Education v. Dowell*,[866] the Court required a two-part inquiry for unitary status and federal court withdrawal: 1) had the school district complied in good faith with the court order, and 2) had the vestiges of past discrimination been eliminated "to the extent practicable"?[867] In considering the latter point, the District Court should consider not only student assignments but "every facet of school operations – faculty, staff, transportation, extra-curricular activities and facilities".[868] The question in *Freeman* was whether the District Court could relinquish jurisdiction incrementally even though full compliance with a desegregation order might not have been achieved.[869]

The Social Science Statement submitted by way of an *amicus* brief[870] re-articulated the "harm-benefit thesis" in terms of the benefits of desegregation: "desegregation is generally associated with moderate gains in the achievement of black students and the achievement of white students is typically unaffected."[871] "Its benefits extend beyond the classroom to the larger issues of integration in employment, higher education, and housing".[872] It acknowledged the association with "white flight" but asserted that the relationship between school segregation and residential segregation is reflexive; desegregated schools can influence housing choice and desegregation plans, including extensive court-ordered plans, can foster long-lasting demographic stability.[873] At its best, it concluded, desegregation is not simply a process of placing black and white children together in a school, but is a matter of developing techniques, including those of educational innovation that will further the goals of racial integration.[874]

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865 Green v. County Sch. Bd.,391 U.S. 430, 436 (1968).

866 Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

867 *Id.* at 249,250.

868 *Id.*, (citing Green, 391 U.S. at 435)

869 Freeman *v.* Pitts, 503 U.S. 467, 417 (1992).

870 Brief for NAACP et al. as Amici Curiae Supporting Respondents, Freeman *v.* Pitts, 503 U.S. 467 (1992) (No.89-1290) *See generally* Armor, *supra* note736, 71-76.

871 Brief for NAACP et al., as Amici Curiae Supporting Respondents, supra note 870 at 51 (quoting Willis D. Hawley & Mark A. Smylie, The Contribution of School Desegregation to Academic Achievement and Racial Integration in Eliminating Racism: Profiles in Controversy 284-285 (Phyllis A. Katz and Dalmas A. Taylor eds. 1988).

872 *Id., at 58*

873 *Id.*, at 44-50

874 *Id.*, at 72-73

However, as Armor suggests, the acknowledgement that effective desegregation is dependent upon certain conditions, without which the promised benefits will not necessarily be delivered, weakened the impact and deprived the "harm-benefit" thesis of some of its moral authority. [875] Upholding the power of the District Court to withdraw from supervision incrementally, the Supreme Court was not to be deflected from strict causal analysis.[876] In a rare unanimous decision, the Court affirmed what it said was implicit in its earlier ruling in *Pasadena Bd. of Educ. v.Spangler*: "racial balance is not to be achieved for its own sake, but is to be pursued only when there is a causal link between an imbalance and the constitutional violation."[877] Justice Scalia, in concurrence, noted the difficulties of attributing the existence of racially imbalanced schools to constitutional violations "dating from the days when Lyndon Johnson was President or earlier."[878]

The inclination of the Court to move its jurisprudence to a post-desegregation climate was the occasion for the fourth social science statement to be submitted to the Court, this time in a case which considered the harm-benefit thesis in terms of educational under-achievement. In *Jenkins III*, the issue was whether the State of Missouri should continue to fund quality education programs established to compensate for the reduction in achievement levels of minority children attributable to prior *de jure* segregation. [879] The *Millikin II* Court had accepted the argument that the harms of unconstitutional segregation could include educational harm as well as racial isolation. [880] The remedial plan ordered into effect in Missouri had been described as the most ambitious and expensive remedial program in the history of school desegregation.[881] The total cost for the quality education programs alone had exceeded $220 million.[882] The class plaintiffs now opposed a partial termination

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875 Armor, *supra* note 736 at 73.

876 Freeman v. Pitts 503 U.S. 467 (1992)

877 Pasadena Bd. of Educ. *v.* Spangler, 427 U.S. 424 (1976). In *Spangler* the Court held that once a unitary system had been achieved there was no duty to maintain racial balance where the imbalance was the result of demographic forces rather than constitutional violation. *Id.*, at 435-37.

878 *Id.*, at 506 (Scalia J., concurring) *See also id.* at 503 (Scalia J. concurring) ("Racially imbalanced schools are hence the product of a blend of public and private actions and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of these factors is guesswork.")

879 Missouri *v.* Jenkins (*Jenkins III*), 515 U.S. 70 (1995).

880 Millikin *v.* Bradley (*Millikin II*), 433 U.S. 267 (1977).

881 *Jenkins III*, 515 U.S.70, 78.

882 *Id.*, at 76.

order, arguing that the fact that student achievement levels as measured by annual standardized tests were still "at or below national norms at many grade levels" constituted a vestige of discrimination which had yet to be fully eliminated.[883]

Submitted as an appendix to a social science amicus brief and entitled *Educational Remedies for School Segregation: A Social Science Statement*, the purpose of the statement was to caution against application of a crude causal analysis in relation to the "vestiges of segregation."[884] The documented under-achievement of minority children, it argued, reflects a culture of low expectations on the part of teachers and students alike, and is associated with the high concentration of economic poverty in urban school districts. Both of these factors have their origins in decades of racial segregation and continue to affect behavior and achievement patterns long after the unconstitutional discriminatory practices have ceased.[885] To be effective, the scientists argued, remedial programs needed to be long term, and the educational components should be rigorously monitored and evaluated by recognized indicators which include standardized testing of student outcomes.[886]

D. Does the Court Take Note? The Harm-Benefit Thesis and a Public Law Remedial Model

The extent to which desegregation jurisprudence at Supreme Court level has, or indeed should, take account of social science has generated considerable debate.[887] Apart from Footnote 11 in *Brown*, it is difficult to identify any clear evidence that social science submissions have had a direct impact on the jurisprudence of the Court.[888] However, as Professor James Ryan points out, in a political climate supportive of the goal of integration, the Court was apparently prepared to accept the remedial benefits of integration for minority students more or less without question.[889]

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883 *Id.*, at 72.

884 Brief of Anderson *et al.*, as Amici Curiae Supporting Respondents, Missouri v. Jenkins, 515 U.S. 70 (1995) (No. 93-1823), reprinted in Mark A. Smyllie et al., *Educational Remedies for School Segregation: A Social Science Statement to the U.S. Supreme Court in Missouri v. Jenkins*, 27 THE URBAN REVIEW (No. 3) 207(1995).

885 Smyllie, *supra* note 884 at 212.

886 *Id.*, at 220-224.

887 For a recent review of the literature re *Brown see* Mody, *supra* note 829. For recent discussions of the later case law *see* James E Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases 81 N.C. L. REV. 1659* (2003).

888 Ryan, *supra* note 887.

889 Ryan, *supra* note 887 at 1666.

Indeed, the relaxed approach to issues of causation evident in the presumptions of *Green*,[890] *Swann*,[891] and *Keyes*[892] more or less assumes the "web of institutional discriminations" which the later Columbus social science statement argued made education a "pervasive governmentally organized activity".[893]

There is, however, no doubt that in the termination cases of the 1990s, the Court accorded higher priority to disengagement than to social science-based arguments concerning the continuing harms of segregation. In *Dowell* the Court upheld a finding of unitary status even though, as the dissent pointed out, the conditions likely to inflict the "stigmatic injury condemned in *Brown I*" persisted and there remained "feasible methods of eliminating such conditions" [894] In *Freeman*,[895], the Court sanctioned partial and incremental withdrawal from desegregation supervision, and in *Jenkins III* it permitted termination of remedial programs which had been in place for seven years on the basis, despite the findings of the district judge to the contrary, that "white flight" and the continuing disparities between the achievements of minority and majority students must be attributable to "external factors, beyond the control of the [school committee] and the State".[896] The social science statement was more or less ignored. Justice Thomas, concurring, was overtly dismissive of the value of social science evidence generally in schools cases: "[T]he judiciary is fully competent to make independent determinations concerning the existence of state [discriminatory]

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890 Green *v.* Bd. of Educ., 391 U.S. 430 (1968).

891 Swann *v.* Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

892 Keyes *v.* School District No. 1, 413 U.S. 189 (1973).

893 Brief for Respondents at 7a, 13a, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (No. 78-610). *See also Green*, 391 U.S. 430; *Swann*, 402 U.S. at 26 (establishing the presumption that any present segregation was the result of prior acts of segregation); *Keyes*, 413 U.S. at 208 (establishing the presumption that a finding of intentional acts of discrimination in one part of a school district warranted a presumption that other parts of the district were similarly affected).

894 Bd. of Educ. *v.* Dowell, 498 U.S. 237 (1991)(Marshall, J., dissenting).

895 Freeman *v.* Pitts, 503 U.S. 467 (1992).

896 Missouri v. Jenkins (*Jenkins III*) 515 U.S. 70, 102 (1995). The trial court had specifically found that *de jure* segregation "caused a system-wide reduction in student achievement" in the Kansas City, MO schools and developed a remedial plan. Jenkins v. Missouri, 639 F.Supp. 19, 24 (W.D.Mo. 1985), *aff'd* Jenkins *v.* Missouri, 807 F.2d 657 (8th Cir. 1986).. The Eighth Circuit upheld the district court's later decision denying the school district's motion for a finding of unitary status: Jenkins *v.* Missouri, 19 F.3d 393, 404 (8th Cir. 1994). Dissenting from the denial of a request for rehearing en banc and objecting to the district court's establishment of a student achievement goal, gauged by results from standardized tests, Judge Beam wrote "in my view, this case as it now proceeds, involves an exercise in pedagogical sociology not constitutional adjudication" *Id.*, at 404 (Beam J. dissenting). The Supreme Court ordered the district court to "sharply limit, if not dispense with, its reliance on" student achievement as measured by test scores (*Jenkins III* 515 U.S. at 101).

action without the unnecessary ... assistance of the social sciences."[897] Lower courts "should not be swayed by the easy answers of social science, nor should they accept the findings and the assumptions of sociology and psychology at the expense of constitutional principle".[898] The Civil Rights Project has these remarks in mind when it attributes the decline in the momentum of desegregation to changes in Supreme Court jurisprudence. "Since the Supreme Court changed desegregation law in three major decisions between 1991 and 95, the momentum of desegregation for black students has clearly reversed in the South, where the movement had by far its greatest success." In consequence, it charges, federal courts have changed from being "on the leading edge" of desegregation activity to become "its greatest obstacle".[899]

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897 *Jenkins III,* 515 U.S. at, 122 (Thomas J., concurring).

898 *Id.*,at 122-123.

899 Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 5-6 (2003) (Available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.)
See e.g. Little Rock School District *v.* Pulaski County Special School District No. 1, 237 F.Supp. 2d. 988 (E.D.Ark. 2002) (for Jenkins-induced skepticism regarding social science testimony in termination cases); *see also* Davis *v.* School District of Pontiac, 95 F. Supp. 2d. 688, 697 (E.D. Mich. 2000) (dismissing social science information).
In *Pulaski*, the district court holding that plaintiffs had not come forward with evidence to attribute the achievement gap to unconstitutional conduct of the school board commented:
" sociologists and educators have recognized for over a decade that there are a host of factors, completely unrelated to the effects of *de jure* segregation, that also are responsible for the minority student achievement gap. Some of these other factors include low birth weight, poverty, whether the student is raised by a single parent, parental interest and involvement, and peer influence. Complicating this issue still further is the fact that the achievement gap 'exists across the country in prior segregated school districts and school districts that have not discriminated against minority students.'" 237 F. Supp.2d. at 1037 (quoting Jenkins v. Missouri, 959 F. Supp. 1151, 1158-64 (W.D. Mo. 1997)).
The court continued: "How does a trial court go about determining, with *any* degree of precision, the percentage of the achievement gap (assuming there is any) that is causally related to *de jure* segregation (which ended many decades earlier)-after somehow excluding the host of other socioeconomic factors that are universally recognized as also contributing to the achievement gap? Reviewing the reported cases in which brave souls have undertaken this task puts one in mind of trying to nail jelly to a wall." *Id.*
In *Davis* the court was dismissive of the information value of social science evidence:
"even now, with the perspective of almost three decades, historians, sociologists and legal scholars vigorously disagree over the socio-economic, demographic and educational impact busing has had on our communities. As in so many areas of debate, current perspectives on the impact of busing appear divided along the lines of the old adage, 'Where you come in is where you go out' " *Davis,* 95 F.Supp. 2d. at 695
Accord Wessmann *v.* Gittens, 160 F. 3d.790, 804-808 (1st Cir.1998) (finding that a post-termination race-conscious admissions policy for the Boston Latin schools was not justified by the prior history of *de jure* segregation, was critical of the expert testimony, dismissing all of their conclusions as methodologically unfounded, and expressing its own ineptitude with the statistical information presented: "we do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena").

Chesler *et al.*[900] have suggested that school desegregation remedial jurisprudence evidences a tension between two models of adjudication described in Chayes' much-cited article published in 1976.[901] Chayes argued that the traditional conception of the civil lawsuit as a vehicle for settling disputes between private individuals about private rights does not fit class action suits in constitutional matters which are primarily concerned with grievances about the operation of public policy.[902] In the traditional conception, the "private law model", the focus of judicial inquiry is on issues of intent (intentional infringement of plaintiffs' rights) and the remedial purpose is restitution or compensation.[903] The orientation is retrospective; the court asks "what are the consequences for the parties of specific past instances of conduct?" and tailors relief to remedy those consequences. In the school desegregation class action, however, issues of intent lose their centrality and the orientation of inquiry becomes essentially forward-looking. The relief sought is usually injunctive, and fashioned by reference to the likely consequences of policy implementation and official behavior.[904] The consequence is that in a public law model, remedial outcomes depend upon a process of fact-evaluation more akin to legislative than judicial process as traditionally conceived:

> "the whole process begins to look like the traditional description of legislation. Attention is drawn to a "mischief", existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act".[905]

E. Pedagogical Sociology and Judicial Activism: The Search for Legitimacy

Brown II required the federal judiciary to step outside a traditional role of adjudication and assume responsibility for tasks of management and supervision. The

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900 CHESLER, *supra* note 753.

901 Chayes, *supra* note754.

902 *Id.*, at 1302.

903 *Id.*, at 1285.

904 The court is asked "to enjoin future or threatened action or to modify a course of conduct presently in train or a condition presently existing" *(Id.*,at 1296).

905 *Id.*,at 1297.

widespread expansion of the process, described by Chayes,[906] into fields such as prisons, housing and mental health, underpinned by a widespread cynicism verging on nihilism concerning the autonomous nature of legal reasoning, has generated what Professor Mark Yudof has described as a "crisis of legitimacy" in relation to judicial activity.[907] In this context, he suggests, an attraction of social science evidence is its capacity to defuse arguments concerning the irrational nature of judicial reasoning; if processes of legal reasoning could not themselves be described as "scientific", they could at least claim to be of social benefit, as determined by the objective processes of "scientific" disciplines.[908]

In desegregation litigation, the submission of sociological information and data for the judge's information became unremarkable to the point of routine; yet, as Cahn[909] points out, the so-called Brandeis brief,[910] when used as a strategy of attack, is a two-edged sword.[911] In an adversarial process, "shrewd, resourceful lawyers can put a Brandeis brief together in support of almost any conceivable exercise of legislative judgment".[912] The politicization of social science research in schools desegregation cases did much to undermine faith in its claims of objectivity and maturity and engendered a growing perception of a crisis of legitimacy on the part of the social sciences themselves.[913] The dissent's dismissal of "pedagogical sociology" in *Jenkins III* articulates the growing mistrust on the part of the judiciary concerning the value of testimony from the "soft sciences" in constitutional matters.[914]

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906 Chayes, *supra* note 754.

907 Yudof, *supra* note 757 at 67.

908 *Id.*

909 Edmond Cahn, *Jurisprudence*, 30 N.Y.L. REV. 150, 154 (1955).

910 LOUIS D. BRANDEIS, ASSISTED BY JOSEPHINE GOLDMARK, WOMEN IN INDUSTRY: DECISION OF THE UNITED STATES SUPREME COURT IN CURT MULLER *V.* STATE OF OREGON: UPHOLDING THE CONSTITUTIONALITY OF THE OREGON TEN HOUR LAW FOR WOMEN AND BRIEF FOR THE STATE OF OREGON(1908)available at http://ocp.hul.harvard.edu/ww/organizations-ncl.php.The brief was filed by future Supreme Court Justice Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908)), and argued the need for special protection for women on health and safety grounds in support of an Oregon statute that purported to restrict women's working hours. The Brandeis brief contained two pages of legal argument accompanied by approximately 100 pages of sociological and economic data. The style was replicated in the NAACP's brief in *Brown I. See generally* PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 75-101, 134-172 (1972).

911 See Cahn, *supra* note 909 at 154.

912 *Id.*, at150, 154. *See generally*. ROSEN, *supra* note 910 at 75.

913 Yudof, *supra* note 757 at 71.

914 Jenkins v. Missouri (*Jenkins III),* 19 F. 3d 393, 404.(8th Cir. 1994).

Chesler *et al.* suggest that what was at stake in school desegregation cases was a battle over a point of view: what kind of a problem is racial inequality?[915] It was also a battle about responsibility. The NAACP/LDF use of social science evidence in school desegregation cases was a strategy designed to persuade the Court to conceptualize desegregation in terms of outcomes rather than intentions.[916] From this point of view, the affirmative action requirement of *Green*[917] and the racial balance criterion of *Swann*[918] represent public law models of adjudication whereby the Court, apprised of a social problem requiring address, sanctioned orders which required policy formulation and implementation.[919] In the northern cases however, the Court drew back from the logic of this approach. By preserving the de *jure/de facto* distinction and refusing to accept the social science based argument that segregation was a "harm" *per se*, the Court returned to a private-law model at least as far as issues of liability are concerned.[920] *Millikin II*, in which the Court refused to sanction a metropolitan remedy for an intradistrict violation, is fully consistent with this approach. [921] In remedial terms, however, as the Ohio cases demonstrate, the Court continued to sanction system-wide remedial decrees characteristic of a public law results-oriented approach[922] until the 1990s termination cases, by which time the priority of the Court was no longer social change but legitimacy and the propriety of continuing judicial supervision of state affairs.[923]

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915 CHESLER ET AL.. *supra* note 753, at 203.

916 *Id.,at* 37.

917 Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).

918 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S.1 (1971).

919 *See also* Fiss, *supra* note 757.

920 Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

921 Millikin *v.* Bradley, 418 U.S. 717, 746-752 (1974).

922 *See* Dayton Bd. of Educ. *v.* Brinkman (*Dayton II*), 443 U.S. 526 (1979),and Columbus Bd. of Educ. *v.* Penick, 443 U.S. 449 (1979): "where a racially discriminatory school system has been found to exist, Brown II imposes a duty on local school boards to 'effectuate a transition to a racially non-discriminatory school system' *Brown II* was a call for the dismantling of well-entrenched dual systems' and school boards operating such systems were 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'. Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.") (quoting Brown v. Bd. of Educ., 347 U.S.294, 301 (1955) and Green *v.* County School Board, 349 U.S. 430, 437-438 (1968).

923 *See* Freeman v. Pitts, 503 U.S. 467 (1992). *See also* Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995).

F. The Changing Priorities of Constitutional Adjudication

The Court has never articulated a theory of desegregation which can adequately explain either the contradictions inherent in the above account or the role that social science should play in constitutional adjudication.[924] In an attempt to do both, Dworkin has distinguished between what he terms the causal and interpretive judgments of social sciences.[925] The former, he argues, derive from observation and, without a mechanical model of causation, rest upon statistical correlations which are susceptible to fluctuation and have no resonance in the normal vocabulary of constitutional adjudication.[926] However, judgments about the nature of a community's response to a particular social phenomenon or practice – such as segregation – are interpretive judgments of the kind regularly employed by the judiciary in constitutional adjudication: "interpretive judgments are not foreign to the judge; they do not draw on a kind of technology that is for him arcane. On the contrary, they draw upon the same kind of skills, and are indeed identical in their structure, with the judgment that a judge makes when he draws from a line of precedent a characterization that seems to him a more sensitive characterization of the precedents than any other".[927]

If, as Dworkin argues, the equal protection guarantee of the Constitution is a commitment that the government, in making political decisions, will treat each individual with equal concern and respect, and the judicial decision to require government to take affirmative action to desegregate reflects the Court's judgment that the political process at any particular time cannot be relied upon to secure that guarantee,[928] then two things become clear and an explanation for the changing attitude of the Court emerges. Interpretive judgments of social science may have done much to convince the federal judiciary, first of the social consequences of "the Negro problem", and the value of integration as an appropriate response and. secondly, of

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924 (Yudof, *supra* note 757 at 87) ("Indeed it has done all that is within its power to obfuscate the underlying bases of its decisions"). *See also id.*, for discussion of theoretical models; James S. Liebman, *Desegregating Politics: 'All-out' School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Susan P. Sturm, *A Normative Theory of Public Law Remedies* 79 GEO. L.J. 1357 (1991) (stating that "The remedial process in public law litigation is a practice in search of a theory".).

925 Dworkin, *supra* note760, at 20-26.

926 *Id.*

927 *Id.* at 21.

928 *See id.*, at 24-26.

the "web of segregation" that renders political process an unreliable mechanism of change. Justice Thomas's comments in *Jenkins III*, however, reflect a clear perception that, forty years after *Brown*, the interpretive assumptions of "Negro inferiority" which underpinned the judicial mandate for affirmative action were outdated, while the causal judgments concerning segregation's lingering effects were no longer sufficiently reliable to warrant continuing departure from the norms of federalism and judicial deference to elected legislatures which otherwise set limits to the legitimacy of judicial interference with state and federal affairs.[929]

In the schools affirmative action cases which came before the Supreme Court in the 2006-2007 Term,[930] hopes that the Court would afford a favorable reception to social science submissions, as it had in the case of the University of Michigan Law School admission policies were dashed.[931] Despite extensive social science submissions on both sides, the plurality chose not to enter the debate, basing their decision upon the primacy of the "color-blind constitution" in a non-desegregation situation.[932]

The affirmative action cases differ from the desegregation cases in that they do not as yet directly engage the question of remedy. At issue is the legitimacy of policies of racial preference in the pursuit of racial diversity and the extent to which, more than fifty years after *Brown*, a Court in retreat from an activist model of adjudication should be willing to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.[933] For the Seattle Court, the distinction

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929 Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 114, 138 (1995) (Thomas J., concurring). "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior."

930 *See* Parents Involved in Cmty Sch. *v.* Seattle Sch. Dist. No. 1,127 S.Ct. 2738.

931 Grutter *v.* Bollinger, 539 U.S. 982 (2003). The majority opinion accepted the testimony of *amici* who included business and military leaders as well as social scientists concerning the educational benefits of racial diversity. "The Law School's claim of a compelling interest is further bolstered by its *amici* who point to the educational benefits that flow from student body diversity" *Id.*, at 333. "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints" *Id.*, at 333-34. "High-ranking retired officers and civilian leaders of the United States military assert that, 'based on [their[decades of experience, a 'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security" *Id.*, at 331.

932 *Parents Involved in Cmty Sch.*127 S.Ct. at 2255-8, 2765-68.

933 Id., at. 2778-9 (Thomas J., concurring) (stating that the constitutionality of the school boards' race-conscious policies should not be left "at the mercy of elected government officials

between "integration" and "desegregation" was clear. School boards act unconstitutionally if they seek to perpetuate the 'hard won gains' of the desegregation era by race-conscious programs to combat "resegregation" which is not directly attributable to state action.[934] The divisions within the Court were predictable. For Justice Breyer, the school board plans "represented local efforts to bring about the kind of racially integrated education" that was the promise of *Brown.*[935] Justice Kennedy was prepared to recognize the compelling nature of state action to further the nation's "historic commitment" to equal educational opportunity for all;[936] but, for Justice Thomas, once again the "tenuous"[937] or "far from apparent"[938] link between racial balance and improved educational outcomes for black children did not justify unconstitutional race-based experiments to achieve socially desirable ends: "this Court does not sit to 'create a society that includes all Americans' or to solve the problems of 'troubled inner city schooling'. We are not social engineers".[939]

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evaluating the evanescent views of a handful of social scientists. To adopt [such an approach] would be to abdicate our constitutional responsibilities."
The Grutter majority had been careful to bolster its reliance on social science with the opinion of business and military leaders on the benefits of racial diversity, while Justice Thomas in dissent dismissed the "faddish slogan of the cognoscenti" with counter-research citations with contrary outcomes. *See Grutter*, 539 U.S. at 350, 364, Thomas J., dissenting).

934 Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.1, 127 S.Ct. 2738 (2007)

935 *Id.*, at 2800, (Breyer J.,dissenting).

936 *Id.*, at 2797(Kennedy J., concurring) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating equal opportunity for all its children").

937 Id., at 2778 (Thomas J. concurring) ("Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling").

938 *Id.* at 2776 "The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement".

939 *Id.* at 2779, n.14. The court stated:
"regardless of what Justice Breyer's goals might be, this Court does not sit to 'create a society that includes all Americans' or to solve the problems of 'troubled inner city schooling'. We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it" *Id.*

In his concurrence, Justice Thomas directly articulates the view that the "actual" gain in these cases lies not in the elimination of racial imbalance but in the elimination of state-enforced separation. "The dissent's assertion that these plans are necessary for the school districts to maintain their 'hard-won gains' reveals its conflation of segregation and racial imbalance". (*Id.*, at 2770, n.3). His opinion continues: "In the context of public schooling, segregation is the deliberate operation of a school system to 'carry out a governmental policy to separate pupils in schools solely on the basis of race' In *Brown,* this court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment[...][but] racial imbalance is not segregation." *Id.* at 2769 (quoting Swann v.

IV. Education versus Integration in Boston

One of the main arguments employed by the Boston school committee to justify its opposition to court-ordered desegregation was that of usurpation of power:[940] Judge Garrity's court plan and orders[941] took power which the constitution had given to elected state officials; yet, as Judge Frank Johnson has explained, so-called "judicial activism" in cases like this was a function of abdication of civic responsibility.[942] Federal judges faced with official opposition were left very largely to their own devices. The Supreme Court had declared war on "gradualism" and "freedom of choice" and other overtly race-neutral policies which masked attempts to subvert the effect of *Brown*, and had declared the parameters of the broad remedial powers of district courts to fashion appropriate decrees where school authorities default; but it left the detail to be worked out by district judges on a case-by-case basis.

As Judge Frank Coffin has pointed out, the process was unfamiliar and far from standardized.[943]

Charlotte-Mecklenburg Bd. of Educ., 402 U.S.1, 6 (1971). "Outside the context of remediation for past *de jure* segregation, 'integration' is simply racial balancing". *Id.*, at n.2.

940 Morgan v. Kerrigan,530 F.2d 401 (1st Cir.1976).

941 I have been unable to ascertain an exact figure. The court records are not complete. Formisano gives a figure of 415 orders in eleven years: RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS AND ETHNICITY IN THE 1960S AND 1970S 2 (1991).

942 Frank M. Johnson Jr., *The Role of Federal Courts in Institutional Litigation*, 32 ALA. L. REV.271, 279 (1981). Johnson asserts:
"the remedy for judicial activism is a recognition that this trust is not one solely for the judiciary. As long as government officials entrusted with responsibility for constitutional governance disregard that responsibility, the judiciary must and will stand ready to intervene to the extent necessary on behalf of the deprived. To avoid this intervention, all that government officials need to is confront their responsibilities with the diligence and honesty that their constituencies deserve. Conscientious, responsible leadership will in most instances make judicial intervention unnecessary." *Id.*

943 Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL.L. REV. 983, 985 (1979). It could also be extremely complex, presenting reviewing courts with considerable difficulties, *vide* the Fourth Circuit's abdication in *Swann*: "we understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court." *Swann*, 431 F. 2d at 147.

> The judge must find the best way to accomplish a goal, seeking help not only from the parties but from court-appointed experts and masters and from citizens' committees. In this case, the district judge was concerned with such things as bus routes and distances, appropriate white-black-other minority ratios from specific schools, magnet schools, enrichment programs, methods of transfer between schools, teacher recruitment, and pairings of colleges and universities with specific secondary schools. All of these issues ordinarily would be appropriate grist for the relevant educational policymaking body, here the Boston School Committee. Indeed, the function is very close to legislative decision-making. Because the legislative authorities would not act, however, the district judge was forced to move beyond the traditional role ...and fashioned his own remedy.[944]

The immediate precedent for the Garrity orders came from the Southern state of North Carolina, where District Judge James B. McMillan faced a residentially segregated urban school system and a school committee unable or unwilling to produce an acceptable plan. Judge McMillan's appointment of education expert Dr James Finger as court advisor was a tactic which was subsequently followed by Judge Jack Weinstein in New York as well as by Judge Garrity in Boston.[945] The court-ordered Finger Plan which adopted "racial balance" as a criterion of desegregation and compulsory busing as a strategy received Supreme Court approval in 1971 and provided a blueprint for Northern school desegregation.[946]

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944 Coffin, *supra* note 943 at 985.

945 Swann v. Charlotte Mecklenburg Bd. Of Educ., 311 F. Supp. 265 (W.D.N.C.1970) (*vacated in part*, Swann v. Charlotte Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, Swann v Charlotte-Mecklenburg Bd. of Educ., 402 U.S.1 (1971). *See* BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986)(discussing Judge McMillan's order); *see also* DAVISON M. DOUGLAS, READING WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOL (1995)(for a general account).

As Schwarz points out the choice of Dr Finger reflected the practical difficulties faced by judges and counsel in securing assistance from local educators who were unwilling to testify for fear of antagonizing the school board. SCHWARZ, *supra* at 14. It seems that the first appointment of an educational expert in a schools case was by Judge Bohanon, supervising the desegregation of the public schools of Oklahoma City. He appointed education experts Dr William R. Carmack, Dr. Willard B. Spalding and Dr. Earl A. McGovern to carry out a study and file a desegregation report which the court then adopted. *See* Dowell *v.* Sch. B.d of Okla. Cuty Pub. Sch., 244 F. Supp. 971, 973 (W.D. Okla. 1965).

For Judge Weinstein's orders, *see* Hart *v.* Community School Bd., 383 F. Supp. 699 (E.D. N.Y. 1974); *see also* the discussion by Special Master Curtis J. Berger, *Away from the Courthouse and into the Field: the Odyssey of a Special Master*, 78 COLUM. L. REV. 707. For Judge Garrity's appointment of experts, *see* Morgan v. Kerrigan, 401 F.Supp. 216 (D.Mass. 1975).

946 Hart v. Cmty Sch.Bd., 383 F.Supp. 699 (D.C.N.Y.1974).

Judge Garrity's court plan implemented, in September 1975, was essentially a student assignment and redistricting plan on the *Swann* model, with additional educational enrichment features of the kind later approved in *Milliken II*.[947] The "political dynamite"[948] of both plans which provoked controversy on the national stage and rioting on an unprecedented scale on the streets of Boston was the requirement for compulsory transportation of students.[949] Busing in Boston became the focal point for school committee-led opposition to court-ordered desegregation. Both the state plan, ordered into effect in September 1974, and the court plan which took effect the year required the busing of students out of their neighborhoods to schools in another part of the city.[950] The arrival of buses carrying black children into white, mainly Irish working class South Boston triggered the riots which made Boston the worst symbol of white racism outside the South and saw state troopers join city police on the streets and in the schools in the effort to restore order.[951]

A. The Campaign for Racial Balance in Boston

The lawsuit filed against the Boston school committee on March 2 1972 on behalf of black plaintiffs did not come out of the blue.[952] Dissatisfaction on the part of black parents with the poor level of instruction available to their children predated the *Morgan* litigation by more than one hundred years. Although *de jure* segregation had never existed in Massachusetts, the city of Boston had maintained separate schools for black children since 1820.[953] In 1849, the case of five-year old Sarah Roberts became

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947 Millikin v. Bradley (*Millikin II*), 433 U.S.267, 275-76, 279 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S.1 (1971); *Kerrigan*, 401 F.Supp.216.

948 Schwarz, *supra* note 945, at 17.

949 *See* J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985); *see also* FORMISANO, *supra* note 941; J.MICHAEL ROSS & WILLIAM M. BERG, 'I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER': THE BOSTON SCHOOL DESEGREGATION CONTROVERSY (1981).

950 *Kerrigan,* 401 F.Supp. at 239. The Court plan required the busing of approximately 21,000 students: This number was an estimate based upon analysis by the court-appointed experts. School committee figures had grossly over-estimated the numbers of students in the system. *See* ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE, 27-28 (1981).

951 In October of 1974, Governor Sargent's request for federal assistance resulted in the 82nd Airborne Division, stationed in Fort Bragg, (N.C.) being placed on stand-by alert. *See* ROSS & BERG, *supra* note 949 at 263).
Announcing his Phase II plan for implementation at school opening in autumn 1975, Judge Garrity noted that 166 state and local police officers continued to be stationed inside South Boston High, with 134 stationed in the vicinity during school hours. Morgan v.Kerrigan, 401 F. Supp. 216, 225 (D. Mass. 1975).

952 Morgan *v.* Hennigan, 379 F. Supp. 410 (D. Mass.1974).

953 *See* Roberts v. City of Boston, 59 Mass. 198 (Mass. Dist. Ct.1849).

a *cause célèbre* when her father took action in the state courts to secure her admission to a white school.[954] The black school that she attended was badly run down. An evaluation committee had reported to the city that "the school rooms are too small, the paint is much defaced" and the equipment was "so shattered and neglected that it cannot be used until it has been thoroughly repaired".[955] Sarah had to walk past five white elementary schools to reach it.[956] The action was argued on her behalf by anti-slavery campaigner Charles Sumner, who advanced the argument of racial stigmatization which, one hundred years later, found approval in *Brown*.[957] The case was ahead of its time and failed in the state Supreme Judicial Court, Chief Justice Lemuel Shaw articulating the principles of "separate but equal" which the *Plessy* court subsequently adopted.[958] The case symbolized the underlying assumption on the part of black parents that, in a dual system which separated white children from black, the education offered to their children would be inevitably inferior.

In June 1961, the Massachusetts Commission Against Discrimination examined the issue of student allocation. Its finding that there was no intentional discriminatory practice on the part of the school committee was rejected by NAACP leaders who called upon the black community for support by boycott action.[959] On February 26 1964, following a nationwide week of boycotts, a "Freedom Stay Out" day in Boston was supported by 22,000 students; a figure which represented over 20 per cent of the city's 92,000 student population.[960] The following month saw the establishment of the Kiernan Committee with 21 members drawn from the ranks of university presidents, religious leaders and representatives of labor and business, with a remit to assist the state Board of Education to carry out a study of racial imbalance in Commonwealth schools.[961] The Committee's report, published on April 15 1965, identified fifty-five schools in the state, forty-five in Boston itself, which were racially imbalanced,

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954 *Id.*

955 Quoted in KLUGER, *supra* note 811 at 75.

956 *Roberts,* 59 Mass. at 201.

957 Brown v. Bd. of Educ. (*Brown I),* 347 U.S. 483 (1954).

958 *See* Roberts *v.* City of Boston, 59 Mass. at 209, *as approved in* Plessy *v.* Ferguson, 163 U.S. 537, 544 (1896).

959 *See* ROSS AND BERG, *supra* note 949, at 47, 48.

960 *Id.*, at 49.

961 *Id.*

defined as having over fifty percent minority enrolment.[962] In terms of educational effect, the report concluded that racially imbalanced schools caused serious educational damage to black children by "impairing their confidence, distorting their self-image and lowering their motivation".[963] Moreover, the inferior educational facilities in predominantly black schools further reduced the opportunities of black children to prepare for the "professional and vocational requirements of our technological society".[964]

In 1965, when Governor John Volpe signed into law the Racial Imbalance Act (RIA), Massachusetts became the first state to mandate racial balance in its public schools.[965] In the course of the next seven years, neither the State Board of Education nor the federal government was able to make the Boston School Committee produce an acceptable plan.[966] The State Board finally produced its own plan which the state Supreme Judicial Court ordered into implementation for September 1974 and which Judge Garrity adopted as an interim measure until the Court could devise a desegregation plan in accordance with Supreme Court mandate. Busing was integral to both State and Court plans and, given the city's residential patterns, an unavoidable desegregation technique, as defendant School Committee Chairman Kerrigan himself testified.[967] However, as Dentler and Scott point out, the concept of "forced busing",

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962 MASS. STATE BD. OF EDUC., BECAUSE IT IS RIGHT – EDUCATIONALLY; REPORT OF THE ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION 2, (1965).

963 *Id., as quoted in* Ross & Berg, *supra* note 949, at 50.

964 *Id.*

965 MASS. GEN.LAWS ANN. ch. 71 SS 37C, 37D (2008).

966 The State Board withheld state aid, giving rise to action in the state courts by the school committee to release the funds and annual bills in the legislature for the repeal of the RIA. *See* Morgan v. Hennigan, 379 F.Supp. 410, 439 (D. Mass. 1974). A complaint by a black parent to the Massachusetts Commission Against Discrimination produced a "cease and desist" order against the Committee and enforcement proceedings in the Superior Court which remanded for a consideration of mootness as the complaining student had graduated. *See id.*, at 450. On May 28 1974 an MCAD Commissioner reported that the discriminatory practices continued and had not been eliminated. *See id.*, at 451. Abortive attempts by Federal officials to secure compliance resulted in the withholding of Federal funds and enforcement action by the Department of Health Welfare and Education (HEW). *Id.*, at 421. Following a complaint by HEW, Administrative Law Judge Ring found the city in violation of federal statute. *Id.* "Judge Ring's decision was affirmed, with minor exceptions, by the final reviewing authority in HEW, In the Matter of Boston Public Schools, April 19, 1974, which found that the city had been guilty of *de jure* segregation ". *Id.* For a general account *see* ROSS AND BERG, *supra* note 949, at 63-66.

967 Morgan *v.* Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975) (quoting Committee Chairman Kerrigan, "There is no way it [desegregation] can be done without the forced busing of children").

like the neighborhood school, was essentially a fabrication.[968] There was nothing remarkable about school buses: they had been a fact of Boston school life for many years prior to 1974,[969] while school committee zoning practices had ensured that the "neighborhood school" was a reality only in those parts of the city where residential segregation was firmly entrenched.[970] The rallying calls of "forced busing" and the "neighborhood school" were ostensibly neutral objectives behind which lurked the racism which the black plaintiffs and their lawyers sought to expose: "just as the myth of neighborhood schools gave its believers something 'neutral' to support, so busing gave them something 'neutral' to oppose".[971]

Judge Garrity retained active oversight of the desegregation process in Boston for ten years. The Court plan which he ordered into implementation was an ambitious attempt to overhaul and modernize the outdated Boston public school system, and much was achieved. By the early 1980s, however, the project was in trouble; a coalition of plaintiffs, school defendants, teachers and parents combined to frustrate court orders for school closings. Support for racial mixing ebbed, undermined by growing disillusionment with the ability of the desegregation process to bring about lasting improvements to the quality of education experienced by black children. Influenced by the radical ideas of Derrick Bell and Ronald Edmonds,[972] plaintiffs' counsel Larry Johnson began actively to question the nature of the desegregation process and to advocate a "freedom of choice" plan focusing on educational equity as opposed to "desegregation". In so doing, he fragmented the plaintiffs' case and frustrated the consent decree negotiations that had been begun by State Commissioner Anrig as a way of terminating court jurisdiction, but largely to no avail. By this time, the 'law of the case' was firmly established. The case was a "race" case and not an

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968 DENTLER & SCOTT, *supra* note 950, at 27.

969 *Id.* On their figures "over 30,000 out of an alleged 90,000 students had been taking buses subways and taxis from home to public schools in Boston for many years prior to 1974". *Id.* School Department figures for the school year 1972-73 showed that 10% of elementary, 50% of intermediate and 85% of high school students rode to school. *See* Memorandum from Robert Dentler to the Masters: Commentary on Busing and Student Transport, (Feb.24 1975) (90 Garrity XXXVIIe. f.16).

970 Morgan v. Hennigan, 379 F. Supp. 410, 473 (D. Mass. 1974).

971 DENTLER AND SCOTT, *supra* note 950, at 27.

972 *See, e.g.*, Ronald Edmonds, *Desegregation Planning and Educational Equity*, THEORY INTO PRACTICE 12 (1978); Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518. (1980).

"education" case.[973] The consequence was that, however sincere the judge's concern with educational improvement might initially have been, the requirements of desegregation as mandated by the Supreme Court set limits to the extent that this concern could be realized, raising questions concerning the gains that *Brown* had been able to achieve.

B. Lawyers versus Clients: Should *Brown* Have Been Decided Differently?

In 1976, Derrick Bell, himself a former NAACP/LDF staff attorney, published an important article asserting a conflict of interests between NAACP/ LDF attorneys and the black plaintiffs whom they claimed to represent.[974] Black plaintiffs, he argued, wanted the best education for their children, but litigators were committed to a strategy of integration as racial balance and paid insufficient attention to making black schools educationally effective.[975] A court desegregation plan requiring the transportation of students over long distances in the interests of racial integration which failed to materialize could not command the confidence of black parents, if the schools and the education they provided were of poor quality.[976] Though not the first to make these arguments, Bell's article – in effect advocating a return to the neighborhood school policies in force in most school systems prior to desegregation – reignited a debate about tactics within the NAACP/LDF which dated back at least to 1935, when W.E.B. Du Bois warned that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education."[977]

As Yudof points out, whilst in the pantheon of constitutionally protected values the status of equal educational opportunity is secure, consensus breaks down in the task of translating the general into the particular.[978] Equal opportunity in the context of education can mean one of three things: equal access (which requires absence of discrimination); equal resources (requiring equal inputs in terms of financial

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973 *See* Morgan v. McDonough, 689 F.2d 265 (1st Cir.1982) (observing that absent racial bias, dislike of a desegregation proposal on educational grounds was not a valid reason for rejecting it.).

974 Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation'*, 85 YALE L. J.470 (1976).

975 *Id., at* 488.

976 *Id., at* 480.

977 W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC.328, 335 (1935).

978 Mark Yudof, *Educational Opportunity and the Courts*, 51 TEX. L. REV.411, 412 (1973).

expenditure and availability of resources) or equal outcomes (measured in terms of academic achievement).[979] As a litigation strategy, the third will always be the least attractive, being dependent upon social science evidence, that has been heavily politicized. The argument received short shrift in *Jenkins III* on the basis that the District Court had not identified "the incremental effect [of] segregation [...] on minority student achievement, i.e. it had not paid enough attention to the fact-finding exercise necessary to establish the required direct causal link between segregative acts and continuing educational harm.[980] In the absence of such a link, continuing achievement disparities must be attributable to external factors which were not the court's concern:

> just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of [the school committee] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when [the school committee] will be able to operate on its own.[981]

The initial NAACP strategy was one of equalization. The campaign to challenge the disparities in expenditure between white schools and black schools in state courts on matters such as, for example, teachers' salaries had received piecemeal success, but left individual teachers exposed to victimization while the ability of the state to rely on endless permutations of possible factual situations made litigation an expensive long-term strategy.[982] The decision to press for access in federal courts represented a change of tactic;[983] the immediate success of *Brown* deflected attention from the underlying assumption that integration in the form of access to white schools would of itself bring about the objective of educational enrichment.[984] Had the NAACP

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979 *Id.*

980 Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 101 (1995).

981 *Id.*, at 102.

982 *See* Cottrol et al., *supra* note 752 at 54. The tactic was to confront the State with a "Hobson's choice": abolish the dual system or face bankruptcy. *See also* Tushnet, *supra* note 811, at 2; Kluger, *supra* note 811, at 132; Greenberg, *supra* note 811. The NAACP's first major victory in a federal court was Missouri *ex. Rel.* Gaines v. Canada, 305 U.S. 337 (1938).

983 *For a discussion see* Robert L.Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).

984 Tushnet, *supra* note 811, at 105-37.

continued to press for educational equity, the argument goes, the difficult questions of the legitimacy of race-conscious action unlinked to fault would not have arisen. As it was, the statement that "separate" was inherently unequal invited the conclusion that all that needed to be done was to integrate. Once that had been accomplished, official responsibility for the education of African-Americans was *prima facie* discharged.[985]

In the early 1970s, disenchantment with the failure of desegregation to bring about measurable improvements in the quality of education experienced by many black children prompted a new strategy focusing on funding. School expenditure is funded in most states by means of local property taxes. The variation in property values within a particular state, coupled with residential patterns which concentrate black families in poor urban areas and white students in wealthier suburban areas, can lead to serious disparities in the funding available to black students relative to white students.[986] Bell wrote that "many, including myself, decided that given the difficulty of integrating black and Latino students with their swiftly fleeing white counterparts, we should concentrate on desegregating the money".[987]

School funding suits had some initial success in state courts in California, the state Supreme Court ruling that the public school funding system which relied heavily on local property taxes and caused substantial disparities among individual school districts in the amount of revenue available per pupil invidiously discriminated against the poor and violated the equal protection clause of the Fourteenth Amendment.[988] The hope that equalized expenditure suits might substitute for racial integration suits was dashed when the U.S. Supreme Court, in a case from Texas, ruled that education was not a fundamental right and wealth was not a suspect classification.[989] Thus the Texas system attracted mere rationality scrutiny as opposed to strict scrutiny, and prevailed despite substantial disparities in local school resources

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985 *See generally*, DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM, 20-28,186 (2004).

986 *See generally* DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001).

987 BELL, *supra*, note 749, at 161.

988 Serrano v. Priest, 487 P.2d 1241,1244 (Cal.1971).

989 San Antonio Indep. Sch. Dist. *v.* Rodriguez, 411 U.S. 1, 55 (1973).

and differences in tax effort throughout the State.[990] *Per* Justice Powell, the system – which was similar to those employed in virtually every other state – was not the product of purposeful discrimination against any class but, instead, was a responsible attempt to arrive at practical and workable solutions to educational problems.[991]

V. Conclusion

The immediate answers to the questions with which this chapter opened can be concisely stated: all these actions were necessary because the Constitution so required. Where official action and policy had resulted in a dual system and freedom of choice would perpetuate the status quo, affirmative action was a mandate, not an option.[992] Racial balance in terms of student assignment and faculty composition were indicia of desegregation and achievement might require school closings.[993] Magnet schools and educational enrichment programs were legitimate techniques of enhancing "desegregative attractiveness."[994] The latter might be required to combat lingering vestiges of segregation in which case however detailed fact-finding must be scrupulously undertaken and the duration must be limited.[995] The curriculum was a legitimate area for scrutiny but, in the absence of proof of discriminatory intent, teaching and learning were pedagogical issues which were properly left to the State; the case was a "race" case, not an "education" case. Desegregation was not a mandate to equalize schools.[996]

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990 *Id.*, "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard." *Id.*, at 55.

991 *Id.*, at 55. School finance litigation has had some success at state level but as Professor Ryan contends, it continues to be "hamstrung by the obstacles created by poor race relations and the Court's desegregation jurisprudence." James E. Ryan, *Schools, Race and Money*, 109 YALE L. J.249, 255 (1999). *See also* Godwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW AND INEQ. 24 (2006).

992 Green v. Cty Sch. Bd.. 391 U.S. 430, 438-40 (1968).

993 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

994 Missouri v. Jenkins (*Jenkins III)* 515 U.S. 70, 100-103 (1995) (stating that the district court plan was designed to improve the desegregative attractiveness of the Kansas City MO School District (KCMSD) but was "so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that [...]it is beyond the admittedly broad discretion of the District Court").

995 *See Jenkins III*, 515 U.S. 70; Milliken v. Bradley, *(Milliken II)*, 433 U.S. 267 (1977).

996 Morgan v. McDonough (1982) 689 F. 2d, 265, 277.

Chapter Three: The Politics of School Closings.

This chapter explores the work of the court experts by reference to the tension between the imperatives of race and education as played out by what Dentler came to call the "politics of school closings." [997]

I. Introduction

A. The Long Search for a Unified Facilities Plan

On April 22 1985 Judge Garrity apologized to the assembled court room for being late; whenever the Unified Facilities Plan was on the agenda, he said, it took him half an hour to find the previous versions and the orders relating to it. The court had so far entered no less than 20 orders on this matter but the parties' failure to even commence compliance with court orders was by now the principal obstacle to the closing of the case.[998] Moreover, what the court had in front of it he termed a "Unified Facilities non-Plan"; it was a maintenance plan whereby the urgent critical needs of the schools across the city could be met but it had nothing to say regarding desegregation except in the "dim distant future" and it was not going to be approved.[999]

Within six months, however, the court had bowed to political realities. "A bird in the hand is worth two in the bush" the judge explained; "[h]aving sought a UFP for nearly a decade, it would seem unwise at this juncture to embark on a new search".[1000]

Facilities planning was an essential component of the desegregation plan[1001] and the judge had been trying to get one in place since May 1977[1002] but, as former superintendent of schools Robert Wood later pointed out, for many parents and partisans of the "neighborhood school" the UFP, as it was termed, was code-speak for school closings and this had become "an almost certain lightening rod for community

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997 *See* ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 85 (1981).

998 Transcript of Hearing Morgan v. Nucci No 72-911-G (D. Mass. April 22 1985) (Center for Law & Educ.) at 3, 51-54.

999 *Id.*

1000 Morgan v. Nucci 617 F. Supp. 1316. 1325 (D. Mass. 1985).

1001 *Id.*

1002 *Infra* note 1008 and accompanying text.

opposition and emotion."[1003] As plaintiffs' attorney Larry Johnson drew towards the coalition of black and Hispanic parents and teachers which opposed school closings and began to argue instead for better facilities, Superintendent Wood put together a compromise plan which he thought that he could sell to parents and the school committee whilst at the same time satisfying the requirements of the court. On the advice of the experts Judge Garrity turned it down; "[b]ecause it did not meet the targets the Court experts had anticipated, all agreement and support for the plan disappeared in a flash."[1004] With it went the Superintendent's credibility with the school committee; by the time the First Circuit had ruled on the school committee appeal, Robert Wood was out of office.[1005]

Superintendent Wood was dismissed on August 21 1981, a victim of the costs of compromise. Among the official reasons given for his dismissal were "negligent administration of the 1979-80 School Department budget." and "[g]eneral dissatisfaction by the majority of the School Committee with the Superintendent in the performance of his duties." [1006] In his efforts to please his school and parent constituency by avoiding school closings the Superintendent had paid insufficient attention to the effect upon the overall budget which stood in deficit to the tune of between 18 to 20 million dollars. The taxpayer, claimed school committeewoman Palladino, could not support the system the superintendent envisioned.[1007] The politics of school closings had claimed his scalp.

B. The Wood Plan

Judge Garrity's orders relating to facilities began almost on day one when the court plan as announced required the closing of twenty schools.[1008] The search for a long-

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1003 Robert Wood, *Looking Back Without Anger: Reflections on the Boston School Crisis* 120 NEW ENG. J.PUB. POL'Y 19, 32 (2005).

1004 Wood, *supra* note 1003 at 33.

1005 *Id.* Judge Garrity's orders were upheld by the First Circuit in Morgan v. Nucci, 689 F. 2d 265 (1st Cir. 1982) *See infra* note1146 and accompanying text.

1006 *See*.J. MICHAEL ROSS & WILLIAM M. BERG, " I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER: THE BOSTON SCHOOL DESEGREGATION CONTROVERSY (1981) 696-697.
Other reasons stated were "inadequate leadership in the area of occupational-vocational education data" and "[p]oor administration in the office of Curriculum and Competency in the preparation, evaluation and presentation of reading test score data [...]." Ross & Berg suggest that the Superintendent had also been caught up in the "old style" politics of patronage. *Id.*

1007 *Id.*

1008 Morgan v. Kerrigan, 401 F. Supp. 216, 245 (D. Mass. 1975).

range plan began later, in May 1976, when the court required specific repair programs and construction projects to begin during the following summer, ordered the city and state to appropriate the necessary funds and directed the school city and state defendants as joint planners to undertake long-range planning for future construction.[1009] On the basis of a Memorandum of Stipulations agreed by "the joint planners",[1010] the Superintendent of Schools and the plaintiffs and providing that the mayor and state defendants in consultation with the superintendent would devise a long-range construction, renovation and school closing plan together with a statement of desegregative impact and budgetary proposals, Judge Garrity's order of May 6 1977 required a ten-year UFP to include an analysis of the anticipated impact on desegregation and equal educational opportunity to be filed by September 1 of that year.[1011] Superintendent Fahey eventually filed a plan on November 25 but the plan was unacceptable to the court because it was not "unified" and was not acted upon.[1012]

Superintendent Fahey's replacement, Robert Wood, took office in July 1978 as the school department's nineteenth superintendent and the first to be appointed from outside the system in sixty-six years.[1013] No stranger to the politics of desegregation in Boston, (he had served as chair of the court-ordered Citywide Coordinating Council (CCC) which monitored implementation of the court's desegregation orders),[1014] his commitment to integration was not in doubt. In his view the Boston public school system was at that time the only large city system with sufficient numbers of white students still in the system for integration to be a real possibility but he made plain to the committee that his task as he saw it would be to assert the recently strengthened management authority of the superintendent and to persuade the Court to withdraw from what he considered to be its policy of micro-management of the school system.[1015]

1009 By order dated May 3 1976. *See* Morgan v. Nucci, 617 F. Supp. 1316, 1319 (D. Mass. 1985).

1010 *I.e.* the City of Boston, the school committee, the State Board of Education.

1011 *Nucci,* 617 F. Supp. at 1319-20.

1012 *Id.*

1013 Wood, *supra* note 1003 at 20. His appointment was confirmed on July 18 1978. *See* J. BRIAN SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS,124-126.

1014 *Id* at 19.

1015 *Id:* "My interest was encouraged by the recent enactment of Chapter 333 of the General Laws of Massachusetts, initiated by then School Committee chair David Finnegan. Chapter 333 increased the management authority of the Superintendent over the entire school system, including its business operations as well as academic offices, and granted the authority of the

In April 1979 Judge Garrity ordered the joint planners to "face up to the consequences of sharp declines in public school enrolment in Boston and in the school-age population of the city" and submit by way of a revised UFP a comprehensive plan for school facilities, to include a space/program matrix for the school year 1980/81 and a specification of the geo-codes from which students would be assigned to elementary schools, to show how desegregation would be sustained as the school population continued to decline.[1016] Specifically he directed the elimination of not less than half the excess seats in elementary schools which he "conservatively" estimated at 10,000[1017] but in the hearings which followed this figure together with the formula to be adopted became the "factual issue most keenly contested."[1018]

The issue was complicated by the requirement to make provision for the additional space requirements of the bilingual programs, advanced work classes (for the examination schools), kindergartens, special needs programs and remedial classes which were required by the court plan or upon which state and federal funding depended.[1019] The court had set overall capacity ceilings for each facility but assignable capacities were determined by a space/program matrix devised by DI data processing officers for this purpose and were appreciably lower.[1020]

As the joint plaintiffs, led by attorney Larry Johnson, began to argue against school closings and in favor of facilities equalization, the judge required increasingly refined

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Superintendent to make senior personnel appointments." For an account of Finnegan's overhaul of the administration of the Boston public school system *see* SHEEHAN 1013 at 178-80.

1016 *See* Morgan v. McDonough, Memorandum and Draft Order 72-911G (D. Mass. April 12 1979) (The order regarding elimination of seats was confirmed after hearings. *See* Morgan v. McDonough Further Memorandum and Order Regarding UFP 72-911-G (D. Mass. Aug. 12 1979) (90 Garrity XLd. f72). *See also* Morgan v. Nucci, 617 F. Supp. 1316, 1320 (D. Mass. 1985).

1017 *McDonough,* Memorandum and Draft Order 1, (April 12 1979).

1018 Morgan v. McDonough, Memorandum and Draft Order 72-911-G (April 2 1980): "The formula stipulated by the parties after protracted negotiations and adopted by the court over a year ago is that surplus seats should first be identified, then reduced by 25% to allow for flexibility and contingencies resulting in a figure of total excess seats; then in order to arrive at a minimum reasonable reduction and to provide further against contingencies, the number of excess seats to be closed was cut in half" *Id* at 2,n.1.

1019 *See* Morgan v. McDonough Memorandum of Decision 72-911-G (D.Mass. April 2 1980) (90 Garrity XLd Misc. Postscript Orders 1978-88 f72).

1020 *See* Dentler, Dec.16 1979, *UFP Commentary Series 4* (90 Garrity XXXVIIf f29.)

space matrices for each facility and finally directed that facilities planning and educational planning were to go "hand in hand."[1021]

Under the Wood administration, school department responsibility for the UFP lay primarily with former civil rights activist and African-American Episcopalian priest James Breeden, who had served with the superintendent on the CCC and was now in charge of the newly formed Office of Policy and Planning, required to act in conjunction with John Coakley and the Department of Implementation which had responsibility for student assignments and transportation. [1022] Under Dr Breeden's direction a UFP Manual for District Planning Activities dated April 23 1979 was accepted as a blueprint, providing "a basis for producing an outstanding UFP which will merit the support of all interested parties",[1023] the court setting another deadline of December 1 1979 for production of a final plan.[1024]

Dentler had a high opinion of Dr Breeden: "[w]hen we saw a draft [of his final plan] in August, we reported to Judge Garrity that excellence in planning had come to Boston at last"[1025] but as he later observed, he lacked a basis of support in the 'white school establishment'.[1026] When Breeden went public with his proposals the consultation process "put the school committee, the city council and the November 2 mayoral elections between him and his final version."[1027] As school committee and public opinion hardened against the closings of schools, Superintendent Wood moved to limit the political fall-out.[1028]

1021 *See McDonough* Memorandum of Decision (April 2 1980) at 5.

1022 Wood, *supra* note 1003 at 21, 32.

1023 Morgan v. Nucci, 617 F. Supp. 1316. 1320 (D. Mass. 1985).

1024 Morgan v. McDonough, Further Memorandum and Order as to UFP 72-911G (D. Mass. August 15 1979) (90 Garrity XLd. f 72). *See also* Morgan v. Nucci, 617 F. Supp. 1316. 1320 (D. Mass. 1985).

1025 Dentler & Scott, *supra* note 997 at 89: "Breeden had mustered help from students at MIT, Harvard and elsewhere. New enrollment projections were prepared. Data on seats and building conditions were collected and ordered sensibly. Critical concerns were sifted, arrayed and then carefully considered in making inventive judgments about how to desegregate the school system as well as to upgrade quality and to conserve stability for the system across the future." *Id.*

1026 *Id.* at 88.

1027 *Id.*

1028 *Id* at 89-90.

When it came, on December 3 1979, the "Wood plan" as it now was contained no long-range planning for expenditures or space-utilization but consisted largely of proposals to close a reduced number of schools (ten instead of Breeden's proposed sixteen)[1029] and to consolidate others in accordance with "beacon school" and "linkage" plans. The former were district magnets intended as an alternative to the regular community district school and were regarded by the court as incompatible with the court desegregation plan despite provisions that no transfers to beacon schools would be permitted unless the court-set racial ratios in the 'sending 'school were preserved and the effect of the transfer would be to enhance desegregation at the beacon school.[1030]

The linkage proposals attempted to draw the sting of school closings by a combination of deferment plus pairing of elementary schools one of which would be closed at an indefinite date in the future but the second would not.[1031] Both sets of proposals were opposed by plaintiffs' counsel Larry Johnson who regarded them as diverting funds for the purpose of dealing with "white flight" with no showing of educational or other benefit as an aspect of equal protection and were eventually rejected by the court. [1032] Neither the "white citizenry" nor the black population of Boston, he argued, would support a majority black system if they saw no educational benefit flowing there from.[1033]

In effect the plan was a political compromise designed to defuse community anxieties concerning the loss of "neighborhood schools" and the loss of white students from the

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1029 *See* Morgan v. Nucci, 689 F.2d 265, 270-271 (1st Cir. 1982).

1030 *See* Morgan v. McDonough, 689 F.2d 265,276 (1st Cir. 1982).

1031 *Infra* note 1093 and accompanying text.

1032 Morgan v. McDonough, Memorandum of Decision, 72-911-G (D. Mass. April 2 1980) (90 Garrity XLd. f 72). See also *Nucci,* 617 F. Supp. at 1320-21 .

1033 *See* Morgan v.McDonough Transcript of Hearing 72-911-G (D. Mass. March 14 1980) at 114-115. Attorney Johnson said: "The court began its analysis of the Unified Facilities Plan by talking about the concerns of citizens as to what is going to be delivered for their money, and I think we must show them an educational product and not an assignment plan which tells them year to year the student population will be reshuffled, reassigned to maintain some racial balance. I think that the citizens at large will reject that, and we got a sense of that by the testimony of Dr Wood, who raised the specter not only of white flight but that the white citizenry in the city would not support a majority black school system, and I think they certainly will not support a majority black school system if they don't see the educational benefits flowing therefrom."

system[1034] but it pitted the court experts and the school superintendent directly against each other and in so doing rendered the judge vulnerable to the charge of interfering in educational matters properly left to the city and the state. In recommending that ten rather than sixteen schools be closed in the first round and a new pattern of school assignments, Dr Wood, who had written the final court submission himself in longhand, thought he had achieved a political consensus which he could deliver to the various interest groups involved. The rejection of his efforts he later attributed to a lack of experience on the part of the court, the lawyers and the experts which had failed to bridge the "gap between the Boston desegregation case and the knowledge about and reform of pedagogy."[1035]

"As the months went by," he wrote, "I realized that neither the court, nor its experts, nor the participating lawyers were managers. None had worked in large organizations, public or private, and none were knowledgeable about implementation, let alone momentum."[1036][...] "I welcomed the chance to inject some of my past professional experience in urban planning, and Breeden employed two of my former MIT colleagues to demonstrate, using simultaneous equations, that our "moderate plan" fulfilled the court's earlier order. When I introduced the equations in court, the judge rebuffed my testimony. 'That's something for Dr. Einstein.' he observed. 'It is not evidence.' For the first time I learned first-hand the difference between fact and evidence". [1037]

In the following section the experts' briefing which preceded the rejection by the court of the Wood plan is uncovered in narrative fashion via the Dentler and Scott memos.

1034 *See* Morgan v. Nucci, 689 F.2d 265, 270 n.3 (1st Cir, 1982): "The record discloses that the number of whites in the Boston schools dropped from 53,503 in 1973-74 to 25,206 in 1978-79. The number of black and other minority students slightly increased during this period from 40,054 to 40,559."

1035 Wood, *supra* note 1003 at 32.

1036 Wood, *supra* note1003 at 28.

1037 *Id.*

II. The Dentler & Scott Memos

A. The Burden of School Closings

The perception that the burden of school closings fell unduly on black children was not new. In its response to the 1977 UFP the court-ordered Citywide Parents Advisory Council (CPAC) which had not been party to the planning process commented that the plan was "based upon inaccurate and insufficient data," its decisions ignored "educational, desegregation and community factors," the recommended pattern of school closings "burdened minority children unfairly" while the economic arguments for closing had not been made out and the long term implications for Boston generally had been overlooked.[1038]

In a memorandum dated February 21 1978 Dentler explained that this perception went right back to the initial arguments over the masters' plan which were now revived and applied specifically in opposition to the proposal to close Roxbury High School. The community organization, Freedom House, had written to the judge alleging a definite pattern to terminate schools in the black community tantamount to "Educational Genocide"[1039] and Sandra Lynch, counsel for the state board, had warned Dentler that attorneys for the black plaintiffs intended to use this as the main plank of their opposition arguments.[1040]

In this memorandum, Dentler presented for the judge what he termed "the facts on racial equity in school closings" as they had developed since adoption of the court plan.[1041] In the first place, he pointed out, from the point of view of the court plan, the concept of a "black community" was inherently problematic; no school district was designed to preserve or establish racial or ethnic hegemony and every district included a predominantly black settlement.[1042] As of December 1977, black students comprised 44 percent of the total number of students enrolled in the Boston public schools as opposed to 41 percent white and 15 other minorities giving a standard of 44/56 plus or

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1038 *See* Morgan v. Nucci, 689 F.2d 265, 269-270 (1st Cir. 1982).

1039 Dentler, *The Facts on Racial Equity in School Closings Feb. 21 1978* (90 Garrity XXXVIIf. f25).

1040 *Id.*

1041 *Id.*

1042 *Id.*

minus ten percent for determining issues of racial equity.[1043] On that basis, he wrote, Freedom House's assertion was just plain wrong; the proportion of school facilities closed within black residential areas pursuant to court orders since 1975 equaled the proportion of black students in the system as a whole and this remained true in relation to the facilities which the experts now proposed for closing. In relation to the construction of new facilities only two instances could be criticized on racial equity grounds. Both had been removed from court orders following consensus stipulations from all parties, and one would be eliminated in the near future.[1044]

Dentler conceded that there was some validity to the claim that black students had walk-in access to fewer facilities overall than white students but this, he explained. was a historical product of the practice of siting schools adjacent to expanding white neighborhood settlements and not a function of the orders of the court.[1045] Given that both communities would continue to decline in size (his projections indicated a similar figure of 10,000 fewer students for both blacks and whites in ten years time, "the matter of closing schools in order to consolidate students desegregatively" he concluded, "constitutes a far greater contribution to fostering equal opportunity and preventing any form of educational genocide than does exempting particular facilities from being closed because they happen to be located within historic [black] Roxbury."[1046]

A year later, the issue of "white flight" and the potential for "resegregation" could not be ignored. The question was whether this could be attributed to implementation of the court plan. The school department produced for the first time a detailed analysis of student withdrawals and on February 1 1979 Dentler and Scott in a commentary for the judge noted that whilst out-migration and declining birth rates constituted uncontrollable economic and demographic forces, the loss of 20,000 white students over a period of five years was undoubtedly attributable to "educational, programmatic and institutional defects" resulting in wholesale transfers out of the

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1043 *Id.*
1044 *Id.*
1045 *Id.*
1046 *Id.*

system.[1047] The parochial courts, they claimed, could not escape their share of responsibility. Back in 1974 Cardinal Medeiros had asserted his commitment to the implementation of racial balance and in January 1975 the Archdiocesan Board of Education had issued a policy statement to the effect that the parochial schools would only accept transfers of white students for the purpose of improving the racial balance.[1048] This, it seemed, was being ignored:

> "If the parochial schools obeyed the directives of the Cardinal, for example, 1,355 white students, or 25 percent of the total for the period, would have been unable to switch from public schools into the parochial schools in Boston and around its fringes."[1049]

If the "self-defeating" sources of attrition were not rectified, they warned, by 1985 the result would be a "resegregated, very predominantly black and other minority public school system".

B. The Politics of School Closings and Court Strategy

There were two main tools for responding to demographic change built into the court plan: school closings and revision of the geocode unit attachments but the former created instability and the upheaval of the second was becoming politically impossible. Between February 1978 and April 2 1980 when the court rejected the Wood plan, Dentler sent Garrity memos specifically on the subject of school closings supplemented by others addressing the related issue of student assignments, the space/program matrix and geocodings together with other on-going aspects of the court plan such as transfers, transportation, advanced work classes for the examination schools and teacher and administrative staff desegregation whilst all the time briefing the judge on the progress of the developing political coalitions.

The following narrative now picks up the political situation in February 1979 when Dentler summarized what he had learned from meetings and telephone calls during the previous week with James Breeden, John Coakley and DI associates, and Muriel

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1047 Dentler & Scott, *Detailed Analysis of Student Withdrawals Feb 1 1978*(90 Garrity XXXVIIf. f27.)

1048 Jan 27 1975 Statement of Policy on Admission of Students from Boston Public Schools issued by Archdiocesan Board of Education. *See* Scott, July 9 1979 Transfer Policy (90 Garrity XXXVIIf. f27).

1049 *Id.*

Cohen, education reporter for the Boston Globe.[1050] The school committee, he reported, had again failed to "bite the bullet of decision on school closings."[1051] A "coalition of opposition" that included the teachers union, home and school association, Boston Association of School Administrators(BASAS), and the Citywide Parents Advisory Council (CPAC), as well as mini-coalitions of parents, teachers and students from a number of the schools scheduled for closing was threatening James Breeden's planning efforts with a " rising coastal tide of opposition."[1052]

On March 12 1979 Dentler wrote three "advisories" for the coming hearing. The first concentrated on strategy. The two primary premises for disengagement, he wrote, had been shattered.[1053] In the first place, he feared, the DI would never be able to accomplish its full court mandate. For the school committee and the superintendent "policy planning, significant revisions in the status quo, monitoring activities, and the provision of valid and reliable public information" were functions that were "too vital" to be left to "the valiant workers in the DI."[1054]

The second premise of the preceding summer had been that of cooperation with the aims of the court but hopes that the newly elected committee would, with Dr. Wood and Dr. Breeden, and its new constituency of coalesced parents and teachers, "accomplish compliance through its own initiatives" now amounted to "little more than a politically engineered and legally talented manipulation of public images". [1055] With the issue of school closings, it had become apparent that "the constituency has not changed except to become larger, better organized, more vocal, and ever more deeply given over to pursuit of the status quo." [1056]

> "On Monday, March 12", he continued "attorneys for the school committee will file with the court a report recommending that no schools be closed for September 1979. The grounds will be that the list of 11 elementary schools, with three alternates, prepared by the DI

1050 Dentler February 26 1979 *School Closings and Student Assignment Preplanning* (90 Garrity XXXVIIf. f27).

1051 *Id.*

1052 *Id.*

1053 Dentler March 12 1979 *A Plan for Court Disengagement and the Hearing of March 16. 1979* (90 Garrity XXXVIIf. f27).

1054 *Id.*

1055 *Id.*

1056 *Id.*

> (Department of Implementation), if closed, would not affect further school desegregation significantly. In this way, the superintendent and the committee with their attorneys, can seek to preserve the status quo and cloak their objective in the language of the aims of the court".[1057]

The court, he recommended, "should not play this game." Instead its strategy should reflect the premise that the court already put in place "constitutional and workable remedies" and would sanction alternatives only when satisfied that the remedies had been put to work by the defendant.[1058] The court could say that it was satisfied with progress in the Citywide District 9, plus community district high and middle school assignments and kindergarten assignments, thus narrowing the "zone of dispute" to community district elementary schools. [1059] Here concern should go not to school closings but to the need for the defendants to initiate proposals for the desegregation of those ten elementary schools that have continued to remain minority segregated in the extreme.[1060]

> "(T)he remedial tools the court has fashioned [...] include district boundaries, grade structures, ethnic ratios for each district, geocode unit attachments to specific schools that are modifiable, allowances for special programs, school closings and replacements and renovations, magnet schools, and new methods of student recruitment and transfer. None of these tools has been used by the defendant in an effort to desegregate any of the above elementary schools, [...]. [1061]

If the defendant wished to maintain a system that had, "by its own count, more than 11,000 empty elementary school seats", in Dentler's view it must bear the burden of satisfying the court as to how it proposed to tackle the desegregation of the remaining segregated schools.[1062] The court should now require attorneys for the defendants to set the date by which the plan for the ten elementary schools would be filed.[1063]

In a second memo he reiterated for the judge the importance of school closings for the desegregation remedy and for court disengagement noting that although a total of 60

1057 *Id.*
1058 *Id.*
1059 *Id.*
1060 *Id.*
1061 *Id*
1062 *Id*
1063 *Id.*

schools and annexes had been closed by order of the court between September 1974 and September 1977, seven schools from the list initially prepared by the school department for their December 19 1974 desegregation plan (subsequently rejected by the school committee) continued in operation.[1064] It had been conceded by the mayor at the time that failure to close the schools would leave a surplus of elementary seats, then predicted at 5,000, and the Boston Finance Commission had repeatedly criticized the Boston School Committee on fiscal grounds for "the severe and costly underutilization of many elementary buildings citywide."[1065]

In his third memo entitled "School Closings and Openings: Framing the Issues" Dentler set out to provide background information and advice for the coming hearing.[1066] The court should focus on community district elementary facilities and address two issues:

> First, is the court plan for school desegregation as well as the court plan for implementation feasible? Second, will the steps be taken after four years that will begin to bring to an end to what Superintendent Robert Wood declared [...] this week to be "four years of siege"? [1067]

If the plan were feasible then the closings proposed by DI represented only minimal forward movement. The DI had reported 11,137 empty seats in the elementary schools and identified 14 elementary schools with enrollment of 2,239 for closing which would contribute "20 percent movement."[1068] If the plan or its implementation were infeasible, then the parties owed the court an indication of this and an alternative proposal before students were assigned under the terms of existing orders for September1979.[1069] However:

> [i]f the plan of the court is feasible and if the school defendant fails or refuses to take action, then the court will need to consider how to treat the second issue. Shall it make an order that generates movement toward elementary school desegregation, in lieu of actions by the

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1064 Dentler, March 12 1979 Background Report on Aspects of School Closings (90 Garrity XXXVIIf. f27).

1065 *Id.*

1066 Dentler, March 12 1979 School Closings and Openings: Framing the Issues (90 Garrity XXXVIIf. f27).

1067 *Id.*

1068 *Id.*

1069 *Id*

> school committee? Shall it continue involvement in other facets of the case but act as if movement toward desegregation is eventually going to emanate from the defendant? Or, shall it declare a victory and rationalize the persistence of racial segregation in one out of every four school facilities in the system? [1070]

Two days later, Dentler reported on a visit with Superintendent Robert Wood in his office at his request.[1071] Dr Wood, he said, was considering proposals to put to the court at the hearing on March 16 concerned with reorganizing the Department of Implementation., particularly in relation to planning, monitoring, public information or liaison, and computer operations management functions. His view was "that the DI is organizationally 'sui generis,' that it does not conform with the principles of modern public administrative organization and that its functions overlap those of other units in confusing ways" and he wanted the experts' responses. Dentler reported that he and Scott had indicated that whilst intramural processes were generally the superintendent's own concern the DI was designed to carry out functions ordered by the court, and so wherever he proposed to relocate those functions, "liaison with the court's agents would then follow as day follows night and changes would need to be reviewed and approved by the court."[1072] Dr Wood, he concluded, was engaged in "political engineering;" his objective was to deliver for the school committee (and specifically school committee chair David Finnegan) "visible economies in administration of the system, while giving the system their dual imprimatur." The effect however was to undermine the DI: "[a]s the political engineering widens, stupefaction deepens in the ranks."[1073]

On March 20 Dentler reported that the superintendent had formed a special panel of experts with a view to planning that would "'bring existing court orders in conformity with changes in school population and the demography of the city.'"[1074] The underlying political strategy here, in Dentler's opinion, was to promote the view that the court plan was unworkable and thereby outflank the court:

1070 *Id.*

1071 Dentler, March 14 1979 Visit with Robert Wood (90 Garrity XXXVIIf. f27).

1072 *Id.*

1073 *Id.*

1074 Dentler, March 20 1979 *Special Panel of Experts Formed by Superintendent Wood* (90 Garrity XXXVIIf. f) (quoting Suoerintendent Wood).

> The letter marshals every available argument, including several that are contradicted by evidence from the department of implementation submitted in November, 1978, to allege that the court's orders need to be modified. Dr. Wood tried the beginnings of this strategy out on Dr. Scott and me during a meeting in November, and we replied then that we had no brief for or against his approach, except that the orders have yet to be implemented. We added that, so far as we could determine, the student desegregation plan remained technically feasible in every particular, including the various modifications that had been introduced during 1975, 1976, 1977, and early 1978, but that it awaits full execution.[1075]

Dentler was particularly concerned that the effect of this strategy would be to draw the DI into supporting a "part time panel of experts located considerable distances from Boston [and] unable to process the history and demographic details [of] the court orders that are foundational to their assignment." "There is some hypothetical limit on the number of directions in which the DI can face at any one time, perhaps" he warned.[1076]

Dentler had studied Dr Breeden's draft for a UFP Manual[1077] and recommended that it be adopted by the court with the provision that the draft UFP complete with a hypothetical geocode unit attachment and student assignment plan from the DI be supplied to the court not later than October 1 1979 "so that the court can examine for compliance with its racial-ethnic composition guidelines for every district and every school."[1078] Between April and June, Dentler and Scott continued to comment on errors and infeasibilities in court filings, suggest draft proposals for court orders and to urge the court to hold its line:

> In our opinion, no court action at this time would confirm the acceptability of non-compliance with standing court orders. Partial remedial actions, whether of the kind we outlined in a previous memorandum or of the kind suggested by the state board, will generate extreme public confusion, contribute to stimulating a new politics of defiance that could unseat the superintendent, and produce assignments that have to be redone yet again next year for at least 1,000 elementary students. While our approach places the remedy into the forward year

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1075 *Id.*

1076 *Id.*

1077 *See* discussion *supra,* note 1023 and accompanying text.

1078 Dentler, April 24 1979 *Unified Facilities Plan Manual Draft of March 29 1979* (90 Garrity XXXVIIf. f27) See also Dentler 26 April 1979 *Proposed Revision of UFP Draft Order Id.*

> of 1980 and imposes no sanctions at this time, it does make progress toward court disengagement feasible. It also demonstrates support for the current position of the superintendent and the beleaguered department of implementation.[1079]

On August 6, Dr Breeden's UFP materialized. Dentler and Scott summarized their impressions for the judge.[1080] The draft, they wrote comprised "the most coherent, logically developed facilities document we've seen in nearly five years from any source."[1081] Its workmanship and fidelity to the principles of the court plan merited congratulations. [1082] Two issues needed watching; the "uneasy and delicate balance" between community and magnet schools which the popularity of the latter threatened to upset [1083] and the list of facilities proposed for closing which required "painful judgment calls." Dr Breeden's proposals here made "excellent sense" and paralleled their lists prepared for the court over the years.[1084] Breeden's proposals for boundary changes, however, were potentially troublesome particularly those in relation to the boundary between Districts Five and Six, or Dorchester (65% black) and South Boston (37% black). His aim was to distribute black and Hispanic students more evenly by reducing the "exceptionally large" size of the former but Dentler and Scott sensed trouble ahead:

> We urged him to couch this proposal—if it endures his next round of planning—in terms other than improving racial balance and to show how changes in the boundary can lead to providing better and more equal instruction for students.[1085]

In this context timing was a sensitive issue:

> Breeden urges that the date be set for immediately after the November 2 elections in the city. [...] he liked our suggestion that perhaps the Court should leave the date setting with [counsel for the school committee] Simonds and should obtain his commitment through a

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1079 Dentler & Scott, April 1979 *Commentary on State Board Filing of April 5 and Final Advisory on Pending Student Assignment Issues for 1979* (90 Garrity XXXVIIf. f28).

1080 Dentler & Scott, August 13 1979 *Progress Report on Unified Facilities Plan (UFP)* (90 Garrity XXXVIIf. f28).

1081 *Id.*

1082 *Id.*

1083 *Id.*

1084 *Id.*

1085 *Id.*

> query in court. We think that November 16 should be the last possible date, but that it would help to get this from Simonds rather than impose it. Breeden thinks interest groups will begin stirring the planning pot hard in September.[1086]

C. The Linkage and Beacon School Proposals

By November, under the influence of the DI, the so-called "Beacon" and "Linkage" proposals had emerged. The Linkage concept was a plan to defer school closings and then to phase them in over a period of five years. Dentler quoted from John Coakley's briefing paper:

> "[linkage schools] are sets or two (or three) proximate elementary schools which are combined for purposes of enrolment. Usually one school is a 'base' school and the other is a 'support' school. The geocodes for the two schools are combined; children residing in the geocoded area are assigned to the set of Linkage Schools (e.g. the Barrett/Gardner set)."[1087]

The primary purpose was to provide stability during a period of enrolment decline by means of a guarantee that one school out of the set would remain open but for Dentler the effect was the reverse:

> the concept builds uncertainty into the situation by leaving ambiguous which facilities will persist and thus prevail. It is closely analogous to what the school committee did for thirty years in building new plants but then failing to shut down the schools they were planned to replace, leaving the latter in a permanent zone of uncertainty. [1088]

There was a secondary allegedly desegregative purpose. Coakley's claim was that linkage schools maximized classroom desegregation:

> For example, if in the first few years one school[...] is the home for first and second graders and the other is the home for third, fourth, and fifth graders, then each grade level in the set can be arranged so as to bring about as much desegregation as possible. [1089]

1086 *Id.*

1087 Dentler, November 26 1979 *Further Commentary on Department of Implementation Approaches to the Unified Facilities Plan* (90 Garrity XXXVIIf. f28).

1088 *Id.*

1089 *Id.*

Dentler's advice was that the strategy here reverted to the pre-1974 model of "city-wide patchwork quilts" of multiple and varying grade structures which the court in its liability opinion had condemned for their segregative effect.[1090]

Other features of the plan were similarly retrograde. The proposal to designate the principal of one linked school to be the Senior Administrator of a set and the other to be the Junior Administrator would contravene the court plan requirement for each community district school facility to be headed by an administrator at the rank of principal or headmaster.[1091] The envisaged reduction of 1,560 seats was far short of the 3,000 reduction required by the court while the "Third-Site Programs" of field trips, school exchanges and teacher center visitations recommended for activation within Linkage Schools that failed to meet racial-ethnic guidelines had been ruled out by the Panel of Masters in their Final report of April 1975 and had been declared unconstitutional by a federal district court in the Denver, Colorado desegregation case.[1092]

As for "Beacon Schools", these were magnet schools within community districts designed to enable the latter to compete with the citywide magnets which were better resourced and oversubscribed.[1093] Beacon Schools, Dentler pointed out, had been central to the January 1975 plan drawn up by John Coakley for the school committee. They represented the "dream of preserving neighborhood schools" and the voluntarism that the masters had found unacceptable. The proposals in his view were

> attempts to revive failed and rejected schemes that divert attention from the standing and urgent requirements: (1) that the number of available seats correspond at least roughly to the expected numbers of students; (2) that a facility is a single, free-standing school with a permanent principal as its leader; and (3) that geocode units be

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1090 *Id.*

1091 *Id.*

1092 *Id.*

1093 Admission to the magnets was done on an individual basis rather than by geocodings. The racial guidelines imposed by the court plan required the white and combined black and other minority percentages at each magnet to be within five percentage points of the systemwide percentages but in a situation of declining white enrolments the popularity of the magnets threatened the desegregative capability of the community districts *See* Morgan v. Kerrigan, 401 F. Supp. 216, 262 (D. Mass. 1975).

> attached to schools in ways that accomplish compliance with variable racial-ethnic guidelines for each district. [1094]

It was, he commented, an "appalling paradox" that these "diversionary proposals" should have come from a DI, created in order to achieve compliance with court orders. Had they come from a different source, "they would hardly be worthy of consideration."[1095]

D. Commentaries on the Wood UFP

Despite Dentler's views, the Beacon and Linkage proposals found their way into the Wood plan which was filed with the court on December 3 1979.

Between then and April 2 1980 when the plan was rejected, Dentler wrote eleven memos on the subject. On 6 December Dentler sent Judge Garrity what he said was the first in a projected series of commentaries he intended to send during December on the issue of the Wood UFP.[1096] The superintendent was querying the reliability of enrolment projections in the absence of new census data. Dentler's response was decisive; the projection model used in the (consultant) Harbridge House studies and the state board report did not depend upon census data. The current practice throughout the United States was to rely on the age cohort or grade cohort method. There was no reason why Boston should not do the same.[1097]

Moreover, the Wood plan did not comply with court orders. In the first place the plan was not long-range but restricted to "'the immediate issue of school closings for 1980.'" This was itself violative of the court order but by incorporating into the plan new modes of student assignment and the linkage, and beacon proposals, the superintendent had violated his own asserted restriction.[1098] The result was "that the Wood UFP is not long-range except in the injection of concepts aimed at confounding appraisal of the expected effects of his plan." [1099]

1094 Dentler, November 26 1979 *supra* note 1087.
1095 *Id.*
1096 Dentler, 6 December 1979 *First Commentary on Wood UFP* (90 Garrity XXXVIIf. f28)
1097 *Id.*
1098 *Id.*
1099 *Id.*

In the second place, the Wood plan was not a Unified Facilities Plan; "it did not come to the court with the school committee "as obligor," after they sought that role; because the state and the city got it from Wood too late to share in reviewing and unifying it; and because it does not include the data on facilities included in the Breeden Plan."[1100] It did not include the specifics about funding replacements, renovations, and repairs, "which are foundational to facility planning" and omitted from the models for appraising reassignment effects "the only one that [had] pertinence for the aims of the court", namely the DI simulations showing the effect on within district, school- by-school compliance with racial/ethnic guidelines of the revised geocode unit attachments.[1101]

Finally "as the shadow of propaganda falls farther and farther across this sunset of a plan," Dentler noted Wood's prediction that the reassignment model that "had at least a remote bearing on desegregation" would produce "a 72 percent increase" in transportation but that on his figures this translated into 534 additional riders or the equivalent of 11 additional yellow-bus trips each way overall.[1102] How this amounted to 72 percent, or what it was 72 percent of, Dentler could not say.[1103]

Dentler's preliminary advice, which was intended to meet the "criteria of clarity and simplicity" was to conduct the three days of hearings "without revealing a single one of the dispositions of the court, relying wholly upon the parties" and to issue an order in early January, adopting the UFP as published by the school department in October, with minor modifications which should however include the deletion of the proposal of support schools. The court should say "that future closings are part of the return of autonomy of the school committee and superintendent and that the list of closings satisfies the court." The court order should require the DI to revise the geocode unit attachments between January 15 and March 30, under the supervision of the court experts as in previous years (a final sacrificial act) and should not critique the Wood plan but should express "special appreciation for the Wood administration's

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1100 *Id*
1101 *Id.*
1102 *Id.*
1103 *Id.*

achievement in executing such an outstanding plan." [1104] The effect might then be to show the court's responsiveness to the concerns of parents and to "bring the long politics of closings to an end in a way everyone can comprehend; to make a short ending to an otherwise endless fugue; and to lay a definite basis for court disengagement."[1105]

A week later in a second commentary [1106] Dentler repeated his view that the Wood plan "is the front end of the Breeden plan with Coakley's nostrums added."[1107] Adoption and implementation of the plan would not have substantial desegregative impact but would be the "least clamorous option available", and would be acceptable to exercise, with stipulations which included dropping the beacon school and linkage school proposals, revised geocoding for all elementary schools in districts 1-7, state and city commitment to repairs, renovations, replacements and a written assurance that similar planning would be conducted annually by the school committee in each year from 1980 to 1985.[1108]

In a third memo written two days later, [1109] Dentler suggested a third, "more intriguing option", namely court approval of the Wood plan "wherever it offers to meet the standard of workability, with court introduction of additions in order to go the remainder of the distance."[1110] The latter he fleshed out in a fourth memo of December 16 1979 setting out detailed proposals to increase the number of schools scheduled for closing from thirteen to eighteen thus raising the number of seats to be eliminated from Wood's figure of 2,864 to a potential 5820, a figure approximating to the 50% cut ordered by the court.[1111] He continued to advise that the concepts of linkage and beacon schools should be rejected.

1104 *Id.*

1105 *Id*

1106 Dentler, December 12 1979 *Merits of Approving the Wood Plan; Commentary Series No. 2*(90 Garrity XXXVLLf. f 28).

1107 *Id.*

1108 *Id.*

1109 Dentler, December 14 1979 *UFP Commentary Series #3* (90 Garrity XXXVLLf. f 28).

1110 *Id.*

1111 Dentler, December 16 1979 *UFP Commentary Series #4 (*90 Garrity XXXVLLf. f 29).

On December 18 1979 in a "Comprehensive Report on Facilities Planning and Student Assignments" [1112] Dentler summarized for the judge both the rationale for school closings and the history of progress to date together with the objections to the Wood plan. Crucially, he pointed out, the planning process had spanned eight months of an election year. A financial crisis was brewing; Dr Wood's plans now required expenditure which neither the city nor the state would support and of which the public was apparently blissfully unaware:

> "No media coverage took place that revealed the urgency of reducing the scale of the system. No public discussion of continuing non-compliance took place. As in 1973, all discourse focused upon preventing further "white flight" from Boston's public schools."[1113]

Federal legislation required that school desegregation be implemented with fiscal prudence yet, in Dentler's view, in Boston only the federal court showed concern in this respect.[1114] According to a National School Boards Association survey out of a sample of the 180 largest urban systems, the Boston public school system was now the eighth most costly in the nation. A "phased reduction of the scale of the system, beginning with facilities and extending to staff" would correspond with the need for financial prudence but "no elected official, appointed officer, or attorney" made the case:

> It is not that closings in themselves produce great savings. It is that renovation and repair outlays are saved for years to come and that all other educational expenditures can be refitted to the reduced scale of the system. [1115]

The impasse resulting from the December hearings had become total. The Boston Teachers Union (BTU) wanted to retain capacity "for the advent of a future massive return of students to the public schools", and opposed the enrolment projections. The Home and School Association was fostering "strong parental identification" with the schools scheduled for closing whilst the plaintiff had joined with El Comite (the

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1112 Dentler, December 18 1979 *Comprehensive Report on Facilities Planning and Student Assignments* (90 Garrity XXXVIIf. f29).

1113 *Id.* For a discussion of the fiscal problems of the Boston public schools see ADAM R. NELSON THE ELUSIVE IDEAL: EQUAL OPPORTUNITY AND THE FEDERAL ROLE IN BOSTON'S PUBLIC SCHOOLS 1950-1985, 152-180 (2005).

1114 Dentler, *supra* note 1112

1115 *Id*

Hispanic parents' group), CPAC, and the BTU, to challenge the space/program matrix which was the basis for identifying the facilities listed for closure.[1116]

Court orders in January 1980, he suggested, should focus on the closings in his list together with the geo-code revisions necessary to ensure "timely assignments in compliance with racial/ethnic guidelines".[1117] That said, however, facilities planning should be able to continue without court orders; the court should:

> "conclude its proactive role by going half of the ultimately inevitable distance. It should go the half that enables close approximation of its guidelines. If the joint party planners in reading a draft order want to substitute from this list, however, they should be welcomed to do so as long as they approximate the 56% criterion shown in Table 1 (of his memo).[1118]

In the new year, Dentler returned to the theme of financial prudence, briefing that serious school department analysis of the costs of closings had yet to be undertaken.[1119] Savings from closings needed to be set against the costs of keeping schools open. Relevant factors for these purposes would include: the dollar value of the land and buildings if freed up for alternative uses, the personnel costs involved in maintaining half-empty schools, the costs of maintaining old facilities, and the impact of inflation should investments in major renovations and replacements be deferred. Moreover, the argument that savings from closings were offset by new costs of additional busing did not stand up. The percentage of students bused in Boston had increased since 1975 from 35% to 52% but this was largely self-induced; reassignments had been avoided "like the plague". How then, he asked could this "self-induced expansion" be used "to rationalize the economics of keeping schools open?"[1120]

Finally, he pointed out, despite the closure of 40 schools between 1974 and 1977, and the loss of more than 10,000 students from the public school system, Boston's school

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1116 *Id.*
1117 *Id*
1118 *Id.*
1119 Dentler, January 3 1980 *School Closings and Money* (90 Garrity XXXVIIf f.29).
1120 *Id.*

operating costs had increased each year. In the 1980s, he warned, "this kind of caprice in public education" would not be tolerated:

> Stiff retrenchments will occur, or this public service itself will collapse. No one in 1985 ought to have a basis in historical fact for alleging that the advent of constitutional law laid the conditions for the destruction of public education. Evidence of prudence will prevent such false and embittering claims. [1121]

Three days later he was briefing the judge on the parties' criticisms of the Harbridge House enrolment projections, pitching his comments at a general level in order to "guide the thinking of the court." [1122] A few days earlier he had submitted to the judge a detailed commentary on the filing by attorney Robert Pearlman for the BTU as the basis for the BTU's arguments concerning the facilities plan. [1123] He now reiterated his position that whilst the objections raised by the parties had some merit, they had no "noteworthy implications" for facilities planning and did not undermine his commitment to the validity of the projections which he would 'elucidate in discussion' if required. [1124] There was nothing, he concluded, that "should lead the court away from attention to the extreme and growing discrepancy between declining enrolments and assignable capacities."[1125]

In the next two weeks Dentler continued to brief the judge on the issues relating to the hearings scheduled for January 11 and 16 1980. On January 8 Dentler reported on Superintendent Wood's 'Schedule of Investments for his UFP noting that although the allocation for 1980-81 appeared to under-benefit facilities in black and hispanic neighborhoods in 1980-81, this was remedied in the following year's allocation, but the schedule identified no allocation rationale in spite of proposals from his predecessor in 1977 and Dr Breeden in 1979.[1126]

1121 *Id.* (underlining in the original).

1122 Dentler, January 6 1980 *Enrolment Projections* (90 Garrity XXXVIIf. f 29)

1123 "Critique of the Factual Base of the United (sic) Facilities Plan and the Harbridge House Enrollment Projections." filed with the court on November 16 1979. *See* Dentler December 30 1979, *Commentary on the Pearlman Report* (90 Garrity XXXVIIf f29).

1124 *Id.*

1125 *Id.*

1126 Dentler, January 8 1980 *Wood Report on 'Schedule of Investments' for his UFP*,(90 Garrity XXXVIIf f.29).

Moreover, the number of excess seats was still in dispute. Dentler prepared a summary statement on the number of excess seats in all Boston public school facilities as of December 1979. His figures showed a total of 14,557 out of 83,577, 11,639 of which were at elementary level [1127] representing a utilization of 73 per cent. The court however needed to get a "factual grasp of the 'great cushion' of reserve seats." A 25 per cent allowable surplus gave a surplus total of 4,850 but this figure failed to take account of the fact that court ceiling capacity in 1979 was 88,675 giving a reserve cushion of 5,098 seats missing from the DI space/program matrix. "The 'great cushion' thus equals 4,850 + 5,098, or 9,948 seats not counted as excess." [1128] Closing 18 elementary schools as he recommended would reduce the total official excess from 14,557 to 9,657.[1129]

In a separate memo the next day he repeated his view that the Wood Plan did not go far enough;[1130]it did not begin to reach the standard agreed to in hearings in March 1979. It did not contribute to upgrading the quality of ongoing facilities while the number of seats to be eliminated did not even match the projected decline in elementary students from 1979 to 1981.The acceptability of the plan depended upon court approval of the Linkage concept, which, as he had previously advised, was constitutionally and educationally undesirable. [1131]

On January 21 1980 for the purpose of establishing a "starting point for analysis" the court issued a procedural order to record its understanding of assignable capacity, enrolment, surplus,excess and one-half excess seats in the elementary schools and ordered objections to these figures with supporting reasons to be filed by January 28.[1132]

1127 Dentler, January 9 1980 *Summary Statement on Excess Seats in 1979.*

1128 *Id.*

1129 Dentler, 10 January 10 1980 *Why the Wood Plan Elementary Closings Are Insufficient* (90 Garrity XXXVIIf. f29).

1130 *Id.*

1131 *Id.*

1132 Morgan v. McDonough, Procedural Order as to Excess Seats 72-911-G (D.Mass. Jan.21 190)

E. Fighting on Two Fronts: The Equalization Issue

At the same time as the court was endeavoring to gain an accurate estimate of the number of projected excess seats, the joint plaintiffs (ie the black plaintiffs and the Hispanic parents' group El Comite) led by attorney Johnson were urging the court in December and January hearings to order the equalization of facilities and programs, to the extent of requiring that ancillary programs available in one district elementary school be made available in all elementary schools in the same district.[1133] A joint filing of March 5 1980 asserted that many facilities failed to meet appropriate standards and that the school closures proposed by Dr Wood would result in the "sacrifice" of ancillary program spaces. [1134] In a lengthy memo Dentler advised that whilst the deficiencies deserved "close analysis and planning" most of them related to facilities identified for closing for that very reason by "every official and independent expert."[1135] Keeping them open would not solve any problem, short-term or long:

> None of the ten schools proposed by school defendant can be brought up to plaintiff's standard by other than inordinate outlays of public funds.[1136]

Similarly the joint plaintiffs' argument regarding loss of ancillary places failed to consider that most of the schools to be closed had never had those spaces in the first place.[1137] Moreover the decline in absolute numbers of elementary students to be enrolled annually from 1980 to 1985 would outpace the capacity to develop new ancillary programs or maintain old ones. As the elimination of seats by closings would not match the projected surplus for the coming years by virtue of shrinking numbers there was ample capacity to accommodate ancillary spaces identified or to be identified in space matrix planning. Contrary to the claims of the joint plaintiffs, state and federal regulations did not require a separate room for Title I classes.[1138] There

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1133 *See* Morgan v. McDonough, Memorandum of Decision 72-911-G, (D.Mass. April 2 1980) at 6.

1134 Dentler, March 11 1980 *The Case for Denying the March 6 Motion of the Joint Plaintiffs* 90 Garrity XXXVIIf. f29).

1135 *Id.*

1136 *Id* (underlining in the original).

1137 *Id.*

1138 Title 1 of the Elementary and Secondary Education Act (ESEA)1965 made available federal funding for programs materials and facilities to help schools overcome the effects of poverty on student learning. For the impact in Boston *see generally* Nelson *supra* note 1113 at 42-59.

would be ample spaces for reading programs and library collections by September 1981; "The number of schools lacking [these] for one year will be seven at most, after 20 years in which at least 40 schools lacked them." [1139]

Finally the joint plaintiffs had raised concerns that the new UFP would result in a utilization rate of about 88 percent, when that rate should not exceed 80 percent. [1140] This, commented Dentler, would be true a) if the school system were stable, but in a shrinking system "88 percent can become 80 percent within a year just by watching the shrinkage", b) if the 25 per- cent buffer which guaranteed that the utilization rate could not exceed 75 percent did not exist, or c) if overcrowding were a real possibility which was not the case here. On the contrary "[w]e are now so far from that circumstance as to make the entire concept of utilization rates irrelevant."[1141]

In conclusion, his recommendation was that the motion should be denied but that the judge should include the requirement that the establishment of standards for advancing equalization of facilities should be built into the long-term UFP.[1142]

F. Cutting the Gordian Knot

On March 11 four days before the scheduled hearing Dentler sent a summative advisory recommending 1) that the ten facilities proposed for closing for 1980 by Wood should be approved at once but the court should require a revised UFP for a date such as November 15 1980 to show plans for closing the 15 other substandard facilities which would become excess between 1980 and 1985 and which had appeared "on virtually every list ever prepared" or for "upgrading them at inordinate expense to the city," 2) that a revised geocode plan limited to what was required to achieve compliance with racial/ethnic guidelines should be approved, 3) the joint plaintiffs motion should be denied and 4) permission to prepare 1980-81 assignments should be announced.[1143]

1139 *Id.*
1140 *Id.*
1141 *Id*
1142 *Id.*
1143 Dentler, March 11 1980 *School Closings* (90 Garrity XXXVIIf f.29).

On March 21 the judge announced his decision.[1144] The court's order he said was not a rejection of a UFP because no such plan had been filed. Enormous progress had been made but Dr Wood's November 30 1979 report implied wholesale amendments to previously unchallenged court orders and had changed the planning process radically. The purpose of the order was to rule on the implied amendments so that UFP planning could resume and a UFP be filed by July 1 1980.[1145]

The order added two additional schools to the list of ten scheduled for closing, rejected conditionally the assignment plan for 1980-81 and rejected outright the space/program matrix and the "beacon" and "linkage" proposals. Attorneys for the school and city defendants moved for a stay and appealed the orders. Attorney Larry Johnson on behalf of the black plaintiffs opposed the stay initially but subsequently changed his mind.[1146] On May 2 1980 the district court entered the stay of its school closing orders, opposed only by the state board.[1147]

G. Desegregation and Educational Planning: The First Circuit's Warning

The appeal took two years to reach the First Circuit by which time the joint planners' had produced new proposals to close some 26 elementary schools so that the issues relating to school closings were mooted.[1148] However, the fact that the linkage and beacon proposals could be resubmitted entitled the appellants to review of these aspects of the decision.[1149] Regarding the beacon proposals Judge Garrity's April 2 Memorandum had suggested three main reasons for rejection: 1) by favoring selected schools only they "would more likely create educational gaps and inequities within a community district than eliminate the perceived gap between community district and citywide district elementary schools, 2) the beacon program would be "top- heavy with administrators and awash in paperwork and would accomplish very little not presently attainable under extant court orders" and 3) the beacon concept which was essentially a transfer plan "was misleading in that it appeared to offer parents choices

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1144 *See* Morgan v. McDonough, Memorandum of Decision 72-911-G (D.Mass. April 2 1980).

1145 *Id.*

1146 Morgan v. McDonough, 689 F.2d 265, 273 n.11 (1st Cir. 1982).

1147 *Id.*

1148 *McDonough*, 689 F. 2d 265, 272-274. The delay was due largely to "inexcusable delays in transcript preparation." *Id.* at 274 n.14.

1149 *McDonough*, 689 F.2d at 273.

that would often be unavailable and magnet programs that don't exist and are not planned."[1150] In the First Circuit's words, the judge was "simply skeptical that the proposal would succeed."[1151]

Bearing in mind the last minute nature of the proposals which were on key points incomplete the First Circuit was prepared to be supportive of the judge who, they said, could reasonably take the view that the proposals were a "distraction" from the school closings essential to the desegregation remedy.[1152] However, it fired a shot across his bows; the decision was open to the interpretation that the judge was rejecting the proposals simply because he disliked them on educational grounds.[1153] If this were correct, the judge would have erred; remedial orders must be narrowly tailored and courts must be deferential whenever possible to the "reasonable proposals" of school system officials.[1154] In particular, it warned,

> [a] court has no constitutional mandate to dismiss a program merely because it believes the program would be "awash in paper work" or "top-heavy with administrators." Nor may it reject a program on the ground that all schools must be of equal quality (or mediocrity). Desegregation is not a mandate to equalize schools except insofar as inequality reflects racial bias.[1155]

In relation to the linkage plans a similar case could be sustained. The district court's stated reasons for rejection were that the proposals undermined key provisions of the desegregation plan, specifically the requirements that schools have uniform grade structures and be supervised by a principal located on the premises, and the geocode as a method of desegregative student assignment.[1156] Underlying the court's analysis was a concern that in a context of declining birth-rates and proliferating special programs the linkage proposals would "introduce an element of rigidity into student assignments" with negative consequences for implementation of the the desegregation plan in future years [1157] but as school department appellants argued and the First

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580 Morgan v. McDonough, Memorandum of Decision 72-911-G (D.Mass. April 2 1980).
1151 *McDonough*, 689 F.2d at 276
1152 *Id.*
1153 *Id.*
1154 *Id.*
1155 *Id.*
1156 Morgan v. McDonough, Memorandum of Decision 72-911-G (D. Mass. April 2 1980).
1157 Morgan v. McDonough, 689 F.2d 265, 278 (1st Cir. 1982).

Circuit sympathized, the court's fears in this respect were "simply not supported" by the evidence:

> The linkage proposal [...] explicitly provides for a principal at each linked school as required in the desegregation plan. Uniform grade structures [...] are preserved within each pair of linked schools, as are geocodes since the geocodes for each school are simply combined to achieve the geocode for each linked pair of schools Factors such as a declining birthrate and the growth of special programs [...] will affect any proposal to close schools [...][1158]

On this occasion due to the late emergence of the linkage proposals and the failure of the school defendants to comply with "repeated district court requests" to support the proposal with specific motions to modify the court plan the judge would be upheld but ultimately the appellants had raised a substantial issue; judgments concerning the likely effect of the proposals on matters such as student recruitment or stabilization were for city and state officials and not the judge whose sole concern must be with desegregation.[1159] School closings were necessary for this purpose but, said the First Circuit,

> [t]he particular method or formula used to accomplish such closings [...] if developed in good faith and in the absence of record evidence that desegregation would be impaired, may be an occasion for deferring to the local authorities' interest in "managing their own affairs."[1160]

What the judge himself had conceded to be a "well-intentioned" proposal should not be overturned simply on the basis of speculation concerning the effect of demographics and the proliferation of special needs programs which were "beyond anyone's ability to control and do not appear to be of constitutional moment." [1161] Were the proposals to reappear, the First Circuit would expect the judge to re-examine them in a manner consistent with these views.[1162]

1158 *Id.*
1159 *McDonough*, 689 F.2d at 278-279.
1160 *McDonough*, 689 F.2d at 278 (citing Milliken v. Bradley, 433 U.S.,267 280-81 (1977)).
1161 *Id.*
1162 *McDonough*, 689 F.2d at 279.

III. The Aftermath: Equalization versus Integration

Following Judge Garrity's memorandum of decision of April 2 1980 the joint planners resumed their discussions as the judge directed but the school year 1980-81 became "the most crisis-ridden since the implementation of desegregation"[1163] as an acute financial crisis compounded by the effects of Proposition Two and a Half limiting property taxation to two and a half per cent of the market value and passed overwhelmingly by the Massachusetts electorate in November 1980 threatened the viability of the Boston public school system.[1164]

In court filings and hearings Attorney Johnson continued to oppose proposals for school closings and reductions in the teaching force. Dentler's advice was dismissive; the filings had become "so fragmented and so thin on the use of reason" that he despaired of the future.[1165]

Johnson's argument was that staff reductions at two particular middle schools reflected "the classical syndrome of segregated, unequal education" whereby under-enrolments of predominantly black students, are followed by staffing reductions and lead to over-crowding and cuts in the numbers of programs, which in turn lessen the attractiveness of the school to students and parents (particularly whites).[1166] The result is a denial of equal education to the black students assigned to the school.[1167] Dentler accepted this as a "powerful closing argument" but disputed its applicability. There was no "trend" here he advised; the schools had been in violation of the racial, ethnic guidelines since 1975: "These are facilities where whites have not reported or withdrawn every year". Both were poor facilities in serious need of replacement. Keeping staff at these schools out of context with others, would mean adopting the Derek Bell-Ron Edmonds (sic) (equalization) policy.[1168] The motion was

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1163 *See* Ross & Berg *supra* note 1006 at 693-4.

1164 At the beginning of the school year, an estimate that the budget of $195 million would run out in March, threatened the prospect of schools closing after the next payroll date in mid February. *See* Ross & Berg at 708-719. 52% of the school department budget came from state funds –*Id* at 716.

1165 Dentler, Jan. 8 1981, *Larry Johnson Notice of January 2 to Disallow Lewis and Thompson Staff Reductions* (90 Garrity XXXVIIf. f31).

1166 *Id.*

1167 *Id.*

1168 *Id.*

diversionary. "At this rate of decline," he asserted "the court will be deliberating on virtual nonsense claims by June of 1981."[1169]

Three days later, his advice was even more direct. In a preparatory to the January hearings into the new occupational resource center ordered by the court Dentler advised the judge not to dodge the equalization issue.[1170] The Court, he wrote has "taken on" educational issues correctly and necessarily. [...][1171] and must "yield no portion of its urgently appropriate jurisdiction, which extends to the 'expression of a deep educational concern.'"[1172] Forthrightly he summed up the dangers of Johnson's position:

> We cannot allow the defendants to weasel out of this realm, and we cannot allow misguided plaintiffs or intervenors to twist *Brown* into an argument for "separate and equal." There is far more than one sentence in the 1975 order at stake. There is a question of constitutional law at the base of this debate. Desegregation must come to mean racial justice that operates affirmatively to improve the learning environment of black, white, and other minority students above all else.[1173]

On March 13 1981 the joint planners filed another UFP but this was simply an interim plan for school closings and consolidations for the 1981-82 school year necessitated by the city's fiscal crisis and was rejected by the court as a partial UFP only. Thereafter, facilities planning became part of negotiations among the parties, sponsored by the State Board, designed to arrive at a consent decree which would terminate the litigation.[1174]

Attorney Johnson participated in the initial stages but by the fall of 1981 his attendances had fallen off and in February 1981 he walked out of the consent decree negotiations which he claimed were "unresponsive to his clients' needs" and did "not

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1169 *Id.*

1170 Dentler, January 11 1981, *Import of the ORC Hearings: Some Views* (90 Garrity XXXVIIf. f31).

1171 *Id.*

1172 *Id.*

1173 *Id.*

1174 Morgan v. Nucci, 617 F. Supp. 1316, 1321 (D. Mass. 1985).

afford Plaintiffs equality of bargaining power with the School Defendants."[1175] Thereafter he announced that he was abandoning the integration endeavor in favor of an alternative "education plan" which would be based upon freedom of choice.[1176] On Sept 9 1982 he filed a motion for a freedom of choice desegregation plan which he claimed was "but one component of a broader proposal" but the latter never materialized and the court was unable to consider it.[1177] When Judge Garrity gave NAACP counsel Thomas Atkins permission to appear as co-counsel for the plaintiffs to argue the integration case, the tension between "race" and "education" which had been at the heart of desegregation jurisprudence since *Brown I* and was still unresolved was plain for all to see.

IV. Conclusion: Law, Race and Education in Boston

In the politics of school closings in Boston we see clearly the conflicting interpretations of the connection between the desegregation endeavor and educational opportunity that was inherent in the landmark decision in *Brown*.[1178] For integrationists like Dentler and Scott[1179] racial mixing was the necessary condition for enhancement of the educational opportunities of African-Americans but as the white population of the nation's major cities declined and urban public school systems became increasingly black, the NAACP/LDF strategy of prioritizing integration over educational enhancement came increasingly into question.

In his personal memoir published in 2002, Derrick Bell, looking back on a lifetime committed to fighting racism by both professional and academic means, recalled a meeting which had taken place in Boston in the aftermath of the *Morgan* liability decision between the civil rights lawyers handling the case and black community leaders representing parents who were skeptical of the benefits of busing when the

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1175 Cited in Marsha Murninghan, Court Disengagement in the Boston Public Schools: Toward a Theory of Restorative Law, 109 (unpublished Ed D. Thesis, Harvard University)(on file with Kenrick Library Birmingham City University).

1176 *Id.*

1177 Morgan v. McDonough, Order Denying Plaintiffs' Motion for Freedom of Choice No.72-911-G (D. Mass. Nov. 12 1982) (90 Garrity XLd. f72).

1178 Brown v. Bd. of Educ. 347 U.S. 483 (1954).

1179 Interview with Marvin B Scott, Butler University, Indianapolis, Ind. Sept. 25 2007 (hereinafter "Scott 2007") (on file with the author).

white schools to which they would be sent were of poor educational quality and situated in low-income areas of the city where hostility to blacks was deep-seated. [1180]

> "The lawyers" he wrote " – most of them black – listened politely, then told the community leaders that the law required and they would seek orders sending their children to white schools whether or not parents wished them to go. As the community leaders feared, the desegregation that followed was both dangerous and traumatic for the black children who were bused to white schools. [...] [A] generation of children paid the price for that error."[1181]

As Bell recalled, his anger at the lawyers' "rigidity" and "insensitivity" was tempered by the realization that as NAACP Legal Defense Fund counsel he himself had given similar advice to black parents.[1182] However, a growing perception that the symbolic value of integration was not worth the costs and disruption of busing had led him to advocate an about turn in desegregation planning. Communities, he argued, should focus less on racial assignment and more on issues of substantive educational benefit.[1183]

The Boston plan was essentially a racial balance plan but in a situation of declining enrollments and excess capacity pupil integration could not be achieved without school closings with corresponding increases in busing and reductions in the numbers of teaching and administrative staff which the system could support. Thus a racial balancing strategy came to polarize in opposition to each other two prima facie complementary goals of desegregation: pupil integration and equal employment opportunities for school faculty and administration.

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610 *See* DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH (2002).

1181 Id. *at 155.*

1182 *Id.* "I too was committed to achieving racial balance as the best means to desegregate schools. And I too was insufficiently sensitive to how much would be lost when black schools were closed with most of the black teachers and principals dismissed. Worst of all, I knew that black children and their parents would have to seek the equal educational opportunity we lawyers promised them in often hostile and always alien schools that remained dominated by whites. I rationalized that this was the necessary price for moving school systems away from their long-held 'separate but equal' policies." *Id.*, at 156-157.

1183 Derrick Bell, *Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases* in RACE AND SCHOOLING IN THE CITY, 200, (Yarmolinsky et al. eds. 1981) His attack on the unwillingness of civil rights attorneys to recognize 'the increasing futility of "total desegregation"' was first made in a seminal article published in 1976. See Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation* 85 YALE L. J.470, 488(1976).

These problems were not unique. In Atlanta, GA, where the pupil ratio had declined from approximately 70% white and 30% black to 17% white and 83% black, and enrolments had declined from a peak of about 115,000 students to 87,900, the system losing about five to seven thousand students a year, the bulk of the departing students being white, a coalition of forces led by a court-appointed bi-racial committee approved a settlement or compromise plan which seemed to abandon the goal of "integration" on the pragmatic grounds that there simply weren't enough white students to go round. Where the preponderance of blacks throughout the system was a function of patterns of residence rather than de jure segregative policy, continued insistence on pro-rata distribution of white minority students ran the risk of fatally compromising the biracial character of the city.[1184]

The apparent gains of the Atlanta settlement which had traded student and staff redistribution in return for an increased role for black leaders in relation to administrative and staff assignments found resonance in Boston with a black community which had grown weary of compulsory busing and re-assignment. [1185] When, attracted by the ideas of Bell, Attorney Johnson, on behalf of the *Morgan* plaintiffs, joined the alliance of Hispanic parents and teachers and administrators who had come together in coalition to oppose school closings and withdrew opposition to the school defendants' motion for a stay of Garrity's school closing orders, Dentler suspected that he hoped for a similar trade-off[1186] but by then he was too late; as the Fifth Circuit observed, "[t]he need for elimination of 'half-empty' schools to promote

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1184 *See* Calhoun v. Cook 332 F. Supp. 804, 808 (D.C.Ga. 1971): "Of paramount significance, however, is the obvious result. Atlanta now stands on the brink of becoming an all-black city. A fruit-basket turnover through bussing to create a 30% white-70% black uniformity throughout the system would unquestionably cause such a result in a few months time. Intelligent black and white leadership in the community realizes and fears it. Responsible citizens both in and out of the school system are deeply concerned with preservation of the biracial identity of the city. Without it, the ultimate goal of equality in all its aspects is doomed and Atlanta's position of leadership is severely threatened."

1185 For the Atlanta Settlement Plan *see* Calhoun v. Cook, 487 F. 2d 680 (5th Cir. 1974) (discussed in Barbara L. Jackson, *Desegregation from a Black Perspective*, in Yarmolinsky *supra* note 1183 at 209-216.). *Cf.* Charles V. Willie, *The Future of School Desegregation* in Willie *supra* note 1179 at 55-56 and Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History in the Salience of Interracial Conflict* 151 U. PA. L. REV 1913,1915 (2003) (arguing that desegregation suits require analysis in terms of class as much as race: "The Atlanta narrative demonstrates, in particular, the social agency of black middle-class decision makers who rejected the integration-oriented remedy favored by LDF over the objections of a group of working-class and poor plaintiff class members.")

1186 *See* Dentler & Scott, *supra* note 997 at 93: "Our informed but unproven assumption is that Wood achieved a trade-off with Johnson: in exchange for supporting or not blocking a stay, the Joint Plaintiffs were promised a full share in 'educational planning'."

desegregation [...] is so far ingrained in the history of this case – both at its liability and remedial stages – as to be effectively 'the law of this case.' Absent an affirmative showing by appellants that this tool is without desegregative utility, we will not disturb district court orders premised on this theory."[1187]

Moreover the issue of school closings crystallized a tension over how educational planning should be carried out and what educational professionalism did or should require. For Superintendent Wood and his MIT-trained professionals, the court and its experts were out of their depth. For Judge Garrity and his advisors educational planning was governed by the desegregation mandate the scope of which was entirely a matter of law and determined by reference to precedent.

Thus in the politics of school closing in Boston we find juxtaposed in relation to one goal, the educational enhancement for African-American children, two differing conceptions of how and by whom educational enhancement was to be achieved. The Boston desegregation plan was designed on the premise that only a comprehensive remedy addressing not only the social segregation of students and teachers but also those other deficiencies in "curriculum, instruction, materials, administration, financial operations, transportation, and facilities" by which public school systems failed minority children would achieve a worthwhile educational result[1188] For Dentler, it followed that remedies that failed to "deal deeply enough" in the sense of failing to tackle head on the issue of implementation would generate new disputes and turn out to be self-defeating. In Boston, as he later reflected, "we did not carve deeply enough. We made strong structural but not operating reforms"[1189]

In Dentler's model, social scientists and educators who wished to make enduring contributions to desegregation should pay attention to the fundamentals of educational planning which meant putting in place proper school management information systems, undertaking professional fiscal planning and cost/benefit analyses and ultimately paying attention to learning outcomes as an aspect of inequity.[1190] While

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1187 *See* Morgan v. McDonough 689 F.2d 265,278, n22 (1982).
1188 Dentler, Nov. 26 1980 *Reflections on Themes for Williamsburg.* (90 Garrity XXXVIIf. f 30).
1189 *Id.*
1190 *Id.*

desegregation meant "integration" the connection with "educational improvement" for him was clear:

> Desegregation works to lift the rock of custom that ordinarily covers the realm of public schooling. As the rock is lifted and the sunlight of litigation and judicial review shines beneath, the twisted creatures of administrative corruption and venality, program mediocrity, racial, ethnic and socio-economic deprivation and public neglect, teacher despair and burnout, parental impotence and ignorance, building dilapidation and filth, and learning failures all crawl out and scuttle about in clear public view. [...]In this respect, desegregation becomes a process through which a city or a suburb [...] reconsiders its history and revisualizes its future.'[1191]

What he failed to factor in was the character of the jurisprudential matrix within which the desegregation process was operating. In particular, in urging a "comprehensive remedy" he failed to appreciate two important things about the nature of the constitutional process in which he was caught up. In the first place the inherent unsuitability of the courtroom for designing and monitoring the planning activities that Dentler required lent support to the claims of the school professionals that court interference was undermining their work. In the second place the indeterminate nature of the desegregation remedy rested upon what proved to be a fragile fault line concerning the relationship between race and education. The two came together when desegregation was conceptualized in terms of integration but unraveled when support for the latter fell away.

In the final chapter of this work the fragility of the relationship between race and education is explored first empirically by reference to the "problem" of the Latin schools and then theoretically by reference to the so-called "limits" of rights discourse.

[1191] *See* Robert A. Dentler, *Elementary and Secondary Education and Desegregation* in THE EDUCATION OF AFRICAN-AMERICANS, 44 (Charles V. Willie et al. eds. 1991).

The Limits of Rights Discourse in Boston: Toward a Theory of the Court Expert in Schools Desegregation Suits

I. Introduction: Was it all Worthwhile?

Thirty years after Judge Garrity ordered Boston's city schools to desegregate, researchers reported that "[d]espite growing racial and ethnic diversity in the region, high levels of segregation exist between minority groups and whites"[1192] and "school segregation continues to be a major obstacle to equal opportunity for minority children in the Boston metropolis."[1193] The problem, they claimed, is the city/suburb divide and is compounded by poverty. According to their figures, almost 90% of public elementary schoolchildren in the region's suburbs are white, compared with 13.6% in Boston itself where 50% of the total number of public elementary school enrolments is black and 30% are Hispanic.[1194] Moreover, "racial and ethnic minorities attend schools with higher levels of poverty and live in worse neighborhoods, while whites reap the benefits of more privileged schools and residential areas".[1195] With figures like these the questions must be "was it all worthwhile?" or "where did it all go wrong?"

The answer this time does not lie in school committee policies. When the First Circuit vacated all outstanding court orders in the area of student assignments, it did so in part because it was satisfied that school committee default was no longer an issue. As Judge Garrity himself had confirmed, the defendants had "proved in many ways their commitment to desegregation and intention to complete implementation of the student desegregation plan".[1196] Shortly after the First Circuit's decision, Mayor Raymond Flynn hired two consultants, both of whom had been closely associated with the district court desegregation plan, to develop a new student assignment plan for the

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1192 John R. Logan et al. Segregation in Neighborhoods and Schools: Impacts on Minority Children in the Boston Region 1, (2003) (available at http://www.civilrightsproject.ucla.edu/research/.../BostonSegregation.pdf).

1193 *Id.*

1194 *Id. See* Summary at 1.

1195 *Id.*

1196 Morgan v. Nucci, 831 F.2d 313,321 (1st Cir. 1987) (quoting Morgan v. Nucci, 620 F. Supp. 214, 228-29 (D. Mass. 1985).

Boston public schools.[1197] Their Controlled Choice Plan (CCP) was approved by the Boston school committee (BSC) on February 27 1989 with the intention to preserve and continue the desegregation project clearly stated in the preamble:

> A well-designed and implemented Controlled Choice plan will work to eliminate all vestiges of unlawful segregation, prohibit future discriminatory assignment practices and will create a more equitable framework within which parents, students and educators can operate an educationally diverse and distinguished system of public schools [...] Controlled Choice is a constitutionally defensible and permissible strategy because it guarantees equitable school desegregation.[1198]

As part of the strategy to preserve the desegregation legacy, the BSC voted to continue in place the examination school admission policies and racial percentage guidelines established in 1975 by the district court plan which reserved 35% of admissions for black and Hispanic students.[1199] At the time that this figure was set, it corresponded demographically with the racial balance of the city's student population but since then the percentages of black and Hispanic students in the system had steadily increased to 65% for the school year 1987-88, rising to 71% by school year 1995-96.[1200]

In that year, Judge Garrity granted to Julia McLaughlin, a white student denied a place at the Boston Latin School (BLS) because of the operation of the set-aside, a preliminary injunction on the basis that her challenge on equal protection grounds was likely to succeed. [1201] As Supreme Court jurisprudence then stood, the plan was almost certainly insufficiently narrowly tailored to withstand the strict scrutiny which

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1197 McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1006-1007 (D. Mass. 1996). The consultants were Michael Alves, a Project Director for Boston Desegregation Assistance at the State Board of Education and Charles V. Willie who had been one of the four Masters who had designed the court plan. *Id.* at n.8.

1198 *Id* at 1007 (quoting from the preamble to the CCP).

1199 Morgan v. Kerrigan, 401 F. Supp. 216, 258 (D. Mass.1975).

1200 McLaughlin v. Boston Sch. Comm. 938 F. Supp. 1001,1008 n.11 (D. Mass. 1996).

1201 (noting that the set-aside had been voluntary since Sept. 28 1987; *See* Morgan v. Nucci, 831 F.2d 313, 326 (1st Cir. 1987)).

racial classifications required.[1202] On the basis of illustrative predictions, the judge commented that within the next six years, the effect of abandoning the set-aside would be to "convert BLS into an overwhelmingly white and Asian-American school with a black and Hispanic enrollment of about 15%".[1203] By corresponding effect several district middle schools would become overwhelmingly black and Hispanic.[1204] "By such a change" he predicted," the system-wide *de jure* segregation of the 1970s would probably be succeeded, at least in the middle schools, by runaway *de facto* segregation in the 1990s and beyond."[1205]

Predictions that the elite schools would disrupt the desegregation endeavor were not new. As the judge observed, the First Circuit in 1987 had been aware that findings of compliance in state monitoring reports were directed to the assignment process rather than to actual enrollments.[1206] It had been the opinion of the State Board however, that remaining deficiencies were not necessarily within the school defendants' control. With regard to the middle schools in particular, it considered that non-compliance was "inevitable": "The impact of admissions to [exam schools] Boston Latin School and Latin Academy at the 7th grade is such that compliance cannot be achieved for white enrollment in all district middle schools."[1207]

Interviewed in 2005 Robert Dentler commented:

> We have had deep difficulties with the Latin School – and it was the last order to be entered in the case. The racial set-aside was eliminated by the judge's own orders and the number of black and Hispanic students has just plunged towards zero. So we're back where we were when I came in.[1208]

1202 McLaughlin, 938 F. Supp. 1008-1010 (citing Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1993),; Wygant v. Jackson Bd. Of Educ., 476 U.S.267, 274 (1986) and United States v. Paradise, 480 U.S. 149,(1987)).

1203 *McLoughlin*, 938 F. Supp. at 1008.

1204 *Id.*

1205 *Id.*

1206 *McLoughlin*, 938 F. Supp.at 1008 (citing *Nucci*, 831 F.2d at 323)

1207 Morgan v. Nucci 831 F.2d 313, 323 (1st Cir. 1985) (quoting Massachusetts Board of Education *Report No. 4 on Boston School Desegregation*, at 16).

1208 Robert A. Dentler, Sept 15 2005 University of Massachusetts, Boston, MA (hereinafter "Dentler 2005").

Given the opportunity by the judge to "prune" the memos he had written on the Boston schools case before they went on deposit with the University of Massachusetts and thus came into the public domain, Dentler retrieved and destroyed a memo which for him represented a mistake: "I recommended and wrote at length to try to document my case, that we eliminate the Boston Latin School." [1209] Back in 1975 when the masters tasked with fashioning a permanent remedy retired after six weeks, they recommended that schools should be closed but "[w]e never got to the fine grain of which schools to close- that was left to Scott and me. The only shocker on the list was Boston Latin School."[1210] The Boston Latin School represented for him a personal failure and one which taught him "what the limits were;" it taught him important lessons about the nature and limits of what judicial process could achieve.[1211]

II. The Latin Schools and the Limits of Judicial Process

As Dentler recounted, he formed a view of the "relative academic mediocrity" of the Boston Latin School as a member of the Boston Secondary Education Commission formed in 1973 and funded by the Ford Foundation on which he served for two years:[1212]

> I had been on a city commission appointed by Mayor White to look at secondary schools and I had been on the sub-committee to look at the Boston Latin School and I had learned from that that it was an educational relic. It was, by modern schooling [...] a piece of junk.
>
> So, I said, "it's a piece of junk – totally segregated. It doesn't perform its historic function (which was to feed gifted students to Harvard and, later, to MIT). "it doesn't do that any more – that's been preempted by superior suburban high schools where the privileged had moved anyway. I can't assign people to go there." "I can't even make it a magnet in which people volunteer and apply in order to desegregate it.

1209 *Id.*

1210 *Id.*

1211 *Id.*

1212 ROBERT A.DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE, 143 n.5 (1981).

So I don't know how to fit it into a permanent plan. And so, we should scrap it."[1213]

The judge's response was to float Dentler's proposal in court hearings which lasted two days.[1214] The transcript of the hearing of April 23 1975 records what John Coakley, Senior Officer for Implementation, later called Judge Garrity's "gratuitous comments".[1215] From the bench the judge expressed his surprise to learn "that the performance of the graduate of the Latin Schools is not that remarkable when compared to the performance of graduates from public schools elsewhere in Massachusetts."[1216] He had been informed, (he did not say by whom) that on a comparison of the SAT (Scholastic Aptitude Test) scores of Latin School graduates with those of graduates from all of the Greater Boston area, "you do not find that the Latin School students excel. They do just about as well. They are just about on a par with the SAT scores of public high schools generally." [1217] If that were true, and the Latin Schools' graduates were that much superior to the average high school graduates in the city, it must follow, he suggested, that that the SAT scores of the latter were below the average obtaining in the Greater Boston area. If the statistic were valid, the conclusion must be that the Latin Schools generally were overrated.[1218]

As the judge went round the parties, it became obvious that, despite the fact that, in Dentler's words, the case was "fairly airtight," the closing suggestion was unacceptable.[1219] As he later recognized, Dentler had displayed "insufficient understanding of the place of that school in New England's imagination. This was Benjamin Franklin's school – it was an unthinkable thought that I had had."[1220]

As he recalled, the parties united in opposition to the proposal; seven of the nine attorneys were graduates of the Boston Latin School and their "loyalty was

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1213 Robert A.Dentler, Interview Sept. 21 2006, Lexington, MA (hereinafter "Dentler 2006").
1214 *Id.*
1215 Coakley, June 22 1984,(letter to Robert A. Dentler), (90 Garrity XXXVIIf. f34.)
1216 Transcript of Hearing of April 23 1975, 36, Morgan v Kerrigan, No. 72-911-G (D. Mass. 1975).
1217 *Id.*
1218 *Id.*
1219 Dentler 2006 *supra* note 1213.
1220 *Id.*

impeccable".[1221] Even the plaintiffs were opposed; "Tom Atkins" (NAACP counsel for the black plaintiffs)" was an intellectual giant and he made the case for keeping Boston Latin alive." "[T]he plaintiffs said "we didn't bring this case to close the most prestigious school in New England, we brought this case so that more of *us* could go there."[1222]

The proposal was dropped; as the judge explained to Dentler, the logic of his proposal was consistent with the other orders but he could not, in a case with nine attorneys, support a proposal that had no-one to speak for it:[1223] "[t]he judge said, 'Nobody's running with you. Sorry Dean, but what we do in an equity case when no-one is there is we dump the idea'".[1224]

Dentler explained the lesson that he had learned:

> I learned about the constraints from this process. I learned the judge's necessary dependency upon the offices of the Bar and I realized there wasn't anything that we were going to do that left no-one in the Court's corner. [...][1225]

The episode left Dentler as a "nameable enemy"[1226] whom the judge excluded from immediate discussions concerning the future of the Latin School:

> So, I spent a lot of misplaced energy pressing that cause and when the judge came to prepare the remedy, he didn't discuss it [i.e. how to desegregate the school] with me at all – he kept it to himself and he sought the counsel of an old friend and colleague who was then president of the Boston Latin alumni – and he certainly never mentioned that to me. I saw the man go in to his office and wondered what on earth that was – but the judge kept his advisors quite separate.[1227]

In the years to come the Latin schools continued to feature on the list of desegregation problems. Not only were they overpopulated by white students but by creaming off

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1221 Dentler 2005 *supra* note 1208.
1222 *Id.*
1223 *Id.*
1224 Dentler 2006 *supra* note 1213.
1225 *Id.*
1226 Dentler, 2005 *supra* note 1208.
1227 *Id.*

the dwindling number of white students within the public school system they also served to frustrate the desegregation endeavor. Moreover the schools "continued to resist change at every turn."[1228] The following narratives focus on two episodes. The first concerns the treatment of the examination schools in the desegregation plan and the problem of reconciling "integration" in the sense of racial balance, with retention of the principle of selectivity which might operate to disadvantage minority students. The second concerns the proposal made by the school department in 1985, just as the judge was attempting to conclude the *Morgan* case, to add a sixth grade to the Latin Schools. The aim of the proposal was to facilitate access to the Latin schools by students from within the Boston public school system but the net result was to increase the number of white students. Both narratives reprise the theme of "influence" as developed in Part I and from that point of view the first which features the role of Dr Scott is of particular interest. However this is not their main purpose and the focus on the Dentler and Scott memos is correspondingly reduced.

The main function of the narratives is rather to herald the theme of limits which is the primary focus of this chapter. When Robert Dentler spoke of "limits" as constraints, he was referring to the conventions of adversarialism which put the litigation parties in the driving seat of common law process and allocate to the judge as umpire a role of passive response. Judge Garrity's oversight of the Boston schools case tested the limits of that response in a political context willing to tolerate deviations from judicial norms but the problem of reconciling educational elitism and equal opportunity which the Latin schools represented is primarily the dilemma concerning the place of affirmative action in rights-based constitutional arrangements. When the desegregation mandate can no longer be regarded as compelling justification for race-conscious policies, arguments resurface that competition between rights-holders will be determined by considerations of political power. The rapidity with which the gains of the desegregation era were seen to be lost or overturned when court supervision was withdrawn undermined not only the NAACP tactic of constitutional litigation as a mechanism for social change but confidence generally in the norms of liberal theory. The final part of this chapter returns to this debate which becomes then the context for

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[1228] Dentler & Scott, *supra* note 1212 at 30.

the outline of a theory of the role of the court expert in a desegregation suit with which this work concludes.

III. The Desegregation Plan: the Set-Aside and the Problem of Selection

Under the desegregation plan the exam schools became magnets but the proposals regarding grade structure, desegregation requirements and selection criteria generated new controversy. The masters had recommended phasing out grades seven and eight at the Latin Schools to create a 9-12 grade program in conformity with the grade structure in the rest of the public school system and that the three exam schools be desegregated in the same way as the other magnets i.e. that their student populations be in line with citywide racial/ethnic composition.[1229] Moreover the schools were selective and the masters had recommended retention of the SSAT scores currently in use together with grade point averages or percentiles on grade point standings as selection criteria.[1230] Dentler and Scott however were opposed in principle to selective examination and were skeptical of the value of the SSAT [1231]scores then in use. There were no studies of the predictive value of the SSAT; the examination schools had adopted it only recently and the Harvard Law and Education Center had complained to the Massachusetts Commission Against Discrimination that its use was racially biased and unvalidated.[1232] Once again attorneys for the plaintiffs joined in the chorus of opposition, revealing as Dentler and Scott later wrote, "their belief and that of at least some black parents in the desirability of strictly academic selectivity. It became evident within a few weeks that many Bostonians believed devoutly in the efficacy of elite schools."[1233]

In the event, the judge adopted a compromise designed by his clerk Terry Seligman and the Latin School Alumni Associations as amicus curiae. [1234] The sixth grades at the Latin Schools were to be phased out after one year but the seventh and eighth grades were preserved. At least 35 per cent of the intake at the three examination

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1229 *See* Morgan v. Kerrigan 401 F. Supp. 216, 244 (D. Mass. 1975).
1230 Dentler & Scott, *supra* note 1212 at 128.
1231 Secondary Schools Aptitude Test.
1232 Dentler & Scott, *supra* note 1212 at 128.
1233 Dentler & Scott, *supra* note 1212 at 128.
1234 *Id. See* Morgan v. Kerrigan 401 F. Supp.216,244 (D. Mass. 1975).

schools, Boston Latin School, Boston Latin Academy and Boston Technical High, was to be composed of black and Hispanic students, (as opposed to the requirement for other citywide schools to enroll at least 44% black and other minority students, plus or minus 10%) but desegregation was to be confined to the entering classes "in order to preserve the strengths of the schools' sequential curriculum."[1235] "A gradual desegregation of the entering classes," recorded Judge Garrity, "will allow the school department the opportunity to identify and recruit increasing numbers of black and Hispanic students who are qualified to attend and succeed at the examination schools".[1236]

In relation to selection criteria the School Department was permitted to use SSAT scores alone or in combination with grade point averages or standings "so long as the criteria chosen result in entering 7th and 9th grade classes at least 35 percent black and Hispanic"[1237]. The court invited the school department to develop racially neutral admissions criteria which could be shown "to identify accurately students who can benefit from the examination schools' programs."[1238]

The order was approved by the First Circuit as a temporary expedient but the district court was instructed to take special care "to safeguard the elite character of the examination schools" in future. [1239] "With this instruction" wrote Dentler and Scott, "the stakes of our tent of opposition were pulled and we fell into compliance."[1240]

Four months later, the district court approved a 50th percentile cut off point for accepting applications.[1241] This had been a traditional cut-off point for admission to the examination schools and was approved by the judge on the basis that continuing validation studies indicated, at least preliminarily, that the test had some predictive validity[1242] but a year later Dentler and Scott mounted one last challenge. Scott's briefing memo for the judge indicated that the school committee had failed to take

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1235 Kerrigan, 401 F. Supp. at 243-4.
1236 *Id.*
1237 *Id.*, at 258.
1238 *Id.*, at 244.
1239 Morgan v. Kerrigan, 530 F. 2d 401,425 (1st Cir. 1976).
1240 Dentler & Scott, *supra* note 1212 at 128.
1241 Morgan v. Kerrigan, Order and Memorandum Modifying Desegregation Plan, 12, No 72-922-G (D. Mass. May 3 1976).
1242 *Id.*

verifying action.[1243] The study previously undertaken, he said, was unsatisfactory because a) the sample size was too small and b) it compared test scores with grade point averages (GPAs) obtained at approximately the same time and thus was a study of concurrent validity rather than a study of predictive validity.[1244] Moreover, both the GPAs and the test itself raised serious issues. Regarding the former, the manner in which they were achieved was "less than adequate". [1245]

> The student's principal is sent a form and asked to fill it out with the student's grade point average and the Testing Bureau at the school department does not verify the submission. If a principal fails to submit a GPA, then the school's computing center assigns the student a mean GPA of all the students who had their average submitted.[1246]

Scott's review of results suggested that the test itself had systemic flaws:

> [Out] of a possible total of one hundred and twenty to one hundred and thirty questions, it appears students that have answered approximately half of the questions correctly tend to fall at the means for those taking the test. However, the difference between a student's getting one more question right at this crucial means can result in an eventual ranking of twenty to thirty places advanced in the ranking. A student who misses one additional question can drop as low as thirty places in the ranking [...][1247] It is my feeling that something has to be done concerning this matter and as usual we have been out done by the school committee in that the only way to get information on the SSAT or other matters is to pry and spy.[1248]

His briefing and recommendation ("that the school committee be ordered to have the Educational Testing Service, (ETS of Princeton N.J., the originators of the test) under court supervision, either validate the test as a predictor or recommend another test to be administered which will determine which students are to be assigned to the examination schools in Boston")[1249] formed the basis for the judge's order when it

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1243 Scott, April 11 1977, *SSAT Examination School*, (90 Garrity XXXVIIf. f39).

1244 *Id.*

1245 *Id.*

1246 *Id.*

1247 Interviewed by the author Professor Scott explained that the questions which the black students kept missing were not culturally neutral: "One was [...] 'Identify this god in the picture' and it was a picture of Shiv. Now how many inner city kids are going to know Shiv if they saw it on their milk carton?" Professor Marvin B. Scott, Sept. 25 2007, Butler University, Indianapolis, IN. (hereinafter "Scott, 2007").

1248 *Id.*

1249 *Id.*

came a month later.[1250] Announcing that the court would explore "in the months ahead concerns that the basis data underlying the criteria for admission might not have predictive validity for successful work at the exam schools. [...]," Judge Garrity referred to Scott's memorandum directly:

> [...] [A] preliminary review of this year's examination results by the court experts shows [...] that a large number of students have scores on the SSAT clustered at or near the mean score for the examination. As a result, a difference of one correct answer out of the approximately 125 questions on the one exam can affect a student's ranking by 20-30 places. When a difference of a few correct answers out of so many questions can determine admission or non-admission for a relatively large percentage of those students who took the exam, it would appear questionable that the test is accomplishing the purpose for which it is purchased by the school committee, i.e. to indicate probable success at the examination schools.[1251]
>
> Nor does it appear that the possible arbitrariness of the SSAT is ameliorated to any large extent by the use of GPAs [...] because as was noted in the same memorandum, the same GPA weight is given to grades of doubtful equivalency, eg, a grade of P (for "pass") in a pass-fail grading system is deemed equivalent to an A-minus in a traditional grading system.[1252]

The judge ordered the city defendants to take steps to validate the test or propose some other test for selecting candidates for admission to the examination schools[1253] but as Dentler and Scott later recounted the Department filed a "perfunctory justification" and "[n]o-one at the Latin schools or in the Department of Implementation ever moved to devise a better selection procedure."[1254]

IV. Court Withdrawal and the Latin Schools

On December 20 1984 attorneys for the school committee filed with the court two separate motions to modify the student assignment plan. The first motion contained ten separate proposed modifications and the second requested leave to create a

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1250 Morgan v. McDonough, Memorandum and Orders Modifying Desegregation Plan 19-20, No. 72-911-G (D. Mass. May 6 1977).

1251 *Id.*

1252 *Id*

1253 *Id.*

1254 Dentler & Scott, *supra* note 1212 at 130.

neighborhood school assignment pattern in districts 3 and 4 with desegregation accomplished only through voluntary transfers.[1255] Subdivision 4 of the first motion sought a modification of the court's orders governing the computation of the racial/ethnic percentages which guided student assignments and provided a measure of compliance. The proposal was to exclude from the formulation certain groups of public school students including the examination school students. [1256] Subdivision 6 of the first motion was a proposal to add grade six to the examination schools.[1257] Both proposals represented aspects of the school defendants' response to the problems of achieving compliance with court desegregation orders in a context of dwindling numbers of white students. Neither proposal had been through the negotiation process set up by the court in the Orders of Disengagement of December 1982[1258] with the result, as the court noted, agreements had to be worked out in open court.[1259] Moreover, the defendants' proposals lacked detail and provided "only the most cursory analysis of their desegregative impact."[1260]

Judge Garrity dealt with the grade six proposal first. The primary objective of the school department seemed to be to enable public school students to compete with private school students without having to undergo the adjustment to a new middle school in the sixth grade. It was hoped that more public school students would then be admitted to the Latins but as the plaintiffs, plaintiff-intervenors and State Board all pointed out, assuming that the current racial percentages of those entering the schools remained unchanged, the effect would primarily benefit white students, ie a disproportionately greater number of white students would be drawn from the public middle schools.[1261] This could impede meaningful desegregation at non-exam middle schools and accelerate the current trend toward concentration of white students in the Latin schools, counsel for the plaintiffs pointing out that "if the proportion of white students making up the Latin schools' population remains constant, 43% of all white seventh through twelfth graders in the public schools will be attending these two

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1255 *See* Morgan v. Nucci, 602 F. Supp. 806 (D. Mass. Feb. 20 1985).

1256 *See* Morgan v. Nucci, Further Memorandum and Orders on Proposed Modifications of Student Assignment Plan,2, No. 72-911-G (D. Mass. April 2 1985).

1257 *See Nucci,* 602 F. Supp. at 808.

1258 *Id.*

1259 *Id.*

1260 *Id.*

1261 *Id.*, at 810.

schools by 1988."[1262] Moreover, plaintiffs argued that the addition of a sixth grade would exacerbate the disproportionately low rate of retention of black and Hispanic students at the Latin schools which, together with "the inadequacies of the school defendants' response" was well-documented in all four of the State Board monitoring reports.[1263]

Emphasizing that the court would not interfere with educational quality issues, the judge deferred a decision pending submission of a factual analysis of the desegregative impact of the proposals. He did, however, indicate that the school committee might "want to address further the extensive list of criticisms of the proposal which have been filed with the court by the citywide and school parent councils, individual parents, the Latin Schools Associations, the headmaster of the Latin School and other concerned members of the community."[1264]

V. Modifying the Racial/Ethnic Assignment Guidelines

The proposal to modify the guidelines was dealt with first by Judge Garrity in April 1985.[1265] Explaining that the plaintiffs and plaintiff-intervenors opposed the proposals to exclude magnet students from the computations on the basis that the effect would be to skew the composition of community district schools and permit them to become racially identifiable, the judge recognized that there was a case for revision; "dramatic increases" in bilingual programs and the "very uneven racial/ethnic distribution" in some districts, rendered strict compliance with the guidelines difficult to achieve.[1266] Obviously assignment guidelines should take into account the limitations on student assignment possibilities but he suggested that instead of artificially excluding segments of the student population parties should focus on the original aims as formulated in the court's June 5 1975 order: "first to make sure that schools are not identifiably one race, and second, to assure that no racial/ethnic group [...] is

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1262 *Id.*

1263 *Id.*

1264 *Id.*

1265 *Nucci,* Further Memorandum and Orders on Proposed Modifications of Student Assignment Plan *supra* note 1256.

1266 *Id.*

disproportionately isolated in any school"[1267] To that end the judge presented his own proposals in the form of a draft order on the modification of the guidelines, proposing first an 80% cap on the percentage of each racial/ethnic group which could be assigned to a school and second to reflect the changes in the demographic make-up of the city's student population by grouping other minority with white students as opposed to the original grouping with black students.[1268]

In the course of the hearings which followed, whilst the school defendants maintained that unitary status regarding student assignments had been achieved and challenged the courts' continuing authority in this area, the plaintiffs raised again the disproportionate enrollment of white students at the Latin schools which they claimed detrimentally affected desegregation elsewhere and counter-proposed a modification of the 35% set-aside for black and Hispanic students to bring the exam schools into line with the other magnets where enrolment was determined by citywide racial/ethnic percentages plus or minus 5 %.[1269]

At the hearing of April 22 1985 Mr. Atkins for the black plaintiffs acknowledged the uniqueness of Boston Latin which was celebrating its three hundred fiftieth anniversary but asserted that the exam schools ought not to be exempted from the racial guidelines that applied to all the other magnet schools. Moreover, there were a number of additional issues which he said were outstanding.[1270] The first was the recurring problem of the extremely high dropout rate for minority students. There was some suggestion in State monitoring reports that insensitive staff comments, conduct, or a combination of the two might be exacerbating factors.[1271] The second issue was that of funding; the need to address the problems faced by students coming into the exam schools including but not limited to the non-white students had been acknowledged but the appropriate funds had not been forthcoming.[1272] Funds were

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1267 *Id.*, (quoting Morgan v. Kerrigan, 401 F. Supp. 216, 240 (D. Mass. 1975)).

1268 *Nucci*, Further Memorandum and Orders on Proposed Modifications of Student Assignment Plan *supra* note 1256.

1269 Morgan v. Nucci, Memorandum and Further Orders Modifying Student Assignment Guidelines (D. Mass. May 24 1985).

1270 Transcript of Hearing of April 22 1985, 7 Morgan v. Nucci, No. 72-911-G (D. Mass. 1985).

1271 *Id.*, at 8.

1272 *Id.*

also needed for staff development and student support and the advanced work classes which prepared students in the public school system for the exam schools, should be brought under the supervision of the schools' heads.[1273] Ms Playter for El Comite echoed the concerns regarding attrition rates then standing at 75-80% for hispanic students though system-wide the rate was 60% and the attitude of the teaching staff.[1274] Overall, she maintained, the orders regarding support services had never been implemented properly and hispanic students continued to be heavily under-represented, enrolments standing at 6% for Boston Latin and 4% at the Latin.[1275]

VI. Disengagement and Final Orders

In the event, the judge refused an order pending such time as the parties should have pursued the negotiation procedure required by the disengagement orders of December 1982[1276] but for the judge and his advisors the priority for 1985 was disengagement. Dentler himself had been supportive of the 6th grade proposal and had prepared a preliminary draft order in "draft decision language" after discussion with the judge's law clerk Michael Barrett in February 1985.[1277] He did not accept the arguments that the Latin schools were disrupting the desegregation project preferring instead to stress the magnetic role of the schools in attracting white students back into the public school system:

> Plaintiffs' argument that the examination schools draw off too many white students in a time of declines in white enrollments overall is rejected:
>
> The two Latin schools now enroll 395 white 7th graders or 31% of all white 7th graders in the system. The three examination schools combined enroll 346 white 12th graders or 35% of all white 12th graders in the system. Nearly half of these white students at both grade levels are cross-overs from nonpublic schools, however. Taking the 7th graders as an illustration, if 45% of those entering whites came from nonpublic schools, and if this number were subtracted from the Latins

1273 *Id.*, at 10.
1274 *Id.*, at 19.
1275 *Id.*
1276 *Nucci,* Memorandum and Further Orders Modifying Student Assignment Guidelines, 5 (D. Mass. May 24 1985).
1277 *See* Dentler Feb. 6 1985, *Recommendations on Remaining Issues Pertinent to Facilities, Uses and Student Assignments.* 90 Garrity XXXVIIf. f35; Dentler, Feb.8 1985 *Preliminary Draft of Decisions on Several Outstanding Issues.* (90 Garrity XXXVIIf. f35).

> in the numerator and from system enrollments in the denominator, the Latins would now enroll only 20% of the 7th grade whites overall. Thus, the magnetism of the examination schools improves desegregation by enlarging opportunities for black and hispanic students to enroll in racially de-isolated schools.[1278]

As for the 6th grade proposal, he could not resist pointing out the inconsistencies of the plaintiffs' opposition:

> Plaintiffs urged continuation of the exam schools as such and with grades 7-8 in 1975. It is contradictory to now seek to prevent adding grade 6 within a framework which continues and does not expand the seating scope of competitive selection.[1279]

Dentler also supported raising the set-aside requirement from 35% to 40%. The Latin Academy had already achieved this and the Latin School could easily do so "by admitting a higher ration in grade 6 and then adopting faculty practices of support and assistance in place of the 'sink or swim' tradition."[1280] He did not however, support the proposals to exempt subgroups of students from computing compliance with the guidelines writing on February 20 that he could "think of no legal as distinguished from educational reason why any subgroup of students should be set aside".[1281] The court never intended to exempt exam school students from the guidelines and the Masters' report envisaged that there would be some clustering of special needs' students.[1282] The provision for a plus or minus 0.25% variance was intended to facilitate a flexible response. His advice therefore

> leads from the assumption that the problem with the current rules governing racial/ethnic guidelines and with the calculation of compliance per school spring from two sources, demographic and relational between magnets and community schools, and should be resolved accordingly – not by exempting subgroups from any count.[1283]

1278 Dentler, Feb. 8 1985 *supra* note 1277.
1279 Dentler, Feb. 6 1985 *supra* note 1277.
1280 *Id.*
1281 Dentler, Feb.20 1985 *Revision of Approach to Racial/Ethnic Guidelines and Calculating Annual Compliance* (90 Garrity XXXVIIf. f 35).
1282 *Id.*
1283 *Id.*

In a "tentative schedule for full disengagement" dated February 11 Dentler had envisaged an incremental withdrawal with February and March given over to facilities and student assignments, with a final court order on March 25 and a final comprehensive court order by June 25.[1284] The fact that exam school issues were still under discussion in April threatened serious slippage from the schedule and the Unified Facilities Plan (UFP) was still outstanding. Moreover, as Dentler reported, the latest proposals for the latter envisaged an expenditure in the next three years of $435 million on the Latin schools as opposed to a total of $12.8 million on 63 other facilities, measures indeed of the hold the elite schools continued to exercise on the school committee's imagination. [1285]

The judge's draft order came in July[1286] and final orders on September 3 1985. [1287] Dentler had briefed the judge that neither plaintiffs nor defendants were facilitating court withdrawal.[1288] The plaintiffs wished to preserve what they termed the "helpful assistance" of state board monitoring but "as one who has done more monitoring in this case than have attorneys for the plaintiffs" Dentler found this misconceived:

> There comes a time in any public service bureaucracy when external monitoring impedes both effectiveness of service delivery and the quality of adaptive change. That time has been reached in this case, in my opinion.[1289]

In their "Reply to Comments of Other Parties" the school defendants had asserted "Plaintiffs simply do not want this case to end".[1290] Dentler agreed with this view but added that it was clear from the defendants' objections and comments that the latter wanted termination to be on their terms: "in a way that embraces no safeguards and restores absolute and unconditional regularity laced only with good intentions."[1291]

1284 Dentler Feb 11 1985 *A Tentative Schedule for Full Disengagement* (90 Garrity XXXVIIf. f35).

1285 Dentler, April 3 1985, *Review of the Unified Facilities Plan filed March 26 1985* (90 Garrity XXXVIIf. f 35).

1286 Morgan v. Nucci, 612 F. Supp. 1060 (D. Mass. 1985).

1287 Morgan v. Nucci 620 F. Supp.214 (D. Mass. 1985)

1288 Dentler, Aug. 6 1985 *Review of First Filings from Parties to Draft Final Judgment and Termination of Jurisdiction (*90 Garrity XXXVIIf.f35).

1289 *Id.*

1290 *Id.,(*quoting attorneys Simon and Dinger for the school defendants).

1291 *Id.*

In the event the final orders did not return full control over student assignments because, as the judge asserted, full compliance had never been achieved.[1292] What they did do however was to implement the spirit of Dentler's recommendations made back in February concerning the need for simplification on the one hand and leadership from the court on the other.[1293] The existing guidelines, he advised, were "no longer congruent with social reality or logically consistent with the principles that have become the law of this case."[1294] Change was essential but could not be a matter for negotiation amongst the parties:

> No change will dishonor the court in the long term and change by negotiation is inappropriate where one is dealing with standards essential for justifying the closing of the case.[1295]

His memo of August 9 summarized for the judge the rationale for a revised student assignment requirement.[1296] The racial/ethnic compositions of the eight community districts, originally fairly uniform across the city, now differed widely, their autonomy had been undermined by a centralization of control in the office of superintendent, evident in matters such as curriculum, a reduction in the number of community superintendents from eight to four, and a decline in the influence of principals' councils and community district advisory councils.[1297] Geocode unit lines had no logical or substantive relation to school sites or residential population concentrations but no revisions had taken place. The number of special needs students had multiplied beyond expectation and the uniform grade structure imposed by the court plan had broken down.[1298]

His recommendation that a permanent provision which matched assignments to the racial/ethnic composition of the student population as a whole plus or minus 0.25% would be "simpler, easier to comprehend and more universalistic than current

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1292 Morgan v. Nucci, 620 F. Supp. 214, 222 (D. Mass. 1985).

1293 Dentler, Feb.28 1985 *Further Remarks on Racial/Ethnic Guidelines Proposal* (90 Garrity XXXVIIf.f35).

1294 *Id.*

1295 *Id.*

1296 Dentler, Aug. 9 1985 *Student Assignment Requirement in Final Judgment* (90 Garrity XXXVIIf.f35).

1297 *Id.*

1298 *Id.*

assignment rules"[1299] found its way into the judge's orders. [1300] The set aside for the examination schools however, was preserved and continued in place for thirteen more years until it finally received its quietus in a First Circuit decision forming part of a series of cases culminating in the recent cases from Seattle and Kentucky in which the Supreme Court seriously restricted the extent to which school boards supportive of integration can put in place race-conscious admissions policies designed to achieve a student population which is racially diverse. [1301] For some commentators these cases mark the limits of so-called rights discourse, or the ability of the law to bring about lasting social change.[1302]

VII. The Limits of Rights Discourse

"Exactly what people don't need is their rights"[1303]

Individual rights, asserts Ronald Dworkin,[1304] are "the zodiac sign under which America was born."[1305] The ideological commitment to the value of "rights

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1299 *Id.*

1300 *See* Morgan v. Nucci, 620 F. Supp.,214, 222 -223 (D. Mass. 1985).

1301 Wessmann v. Gittens 160, F.3d 790 (1st Cir. 1998) *See now* Parents Involved in Cmty Sch. v. Seattle Sch. Dist.No.1, 127 S.Ct.2738 (2007). For earlier cases see *eg.* Regents of Univ. of Cal. v. Bakke, 438 U.S.265 (1978); Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996); Wessmann v Gittens, 160 F.3d 790 (1st Cir. 1998). See also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Adarand Constructors Inc. v. Pena, 515 U.S. 200, 224 (1995) (concluding that government must "justify any racial classification subjecting [a]person to unequal treatment under the strictest judicial scrutiny"); City of Richmond v. J.A.Croson Co., 488 U.S. 469 (1989) and discussion *supra* Part II Chapter II.

1302 *See eg.* Derrick Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 10 (1985): " The reason that the Civil War amendments failed to produce equality for blacks remains an all-too-familiar barrier today: effective remedies for harm attributable to discrimination in society in general will not be granted to blacks if that relief involves a significant cost to whites. Even in northern states, abolitionists' efforts following the Revolutionary War were stymied by this unspoken principle. Today, affirmative action remedies as well as mandatory school desegregation plans founder as whites balk at bearing the cost of racial equality."

1303 Peter Gabel & Duncan Kennedy, *Roll Over Beethoven* 36 STAN. L.REV. 1 (1984): "Exactly what people don't need is their rights. What they need are the actual forms of social life that have to be created through the building of movements that can overcome illusions about the nature of what is political, like the illusion that there is an entity called the state, that people possess rights. It may be necessary to use rights argument in the course of political struggle, in order to make gains. But the thing to be understood is the extent to which it is enervating to use it..." *Id.*, at 33.

1304 *See* in particular TAKING RIGHTS SERIOUSLY (1977) A MATTER OF PRINCIPLE (1985) LAW'S EMPIRE (1986).

1305 RONALD DWORKIN, *'Introduction: The Moral Reading and the Majoritarian Premise'* in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION,31 (1966).

discourse"[1306] which reaches a high point in his work underpinned the strategy of the National Association for the Advancement of Colored People (NAACP) to pursue social change by constitutional litigation. *Brown v. Board of Education* represented the vindication of an early vision. [1307] More than fifty years later, the opposition of the political right to perceptions of excessive judicial interference in social policy issues has been paralleled on the left by growing doubts concerning the long-term value of this rights-based litigation. Specifically, the perceived resegregation of the nation's schools[1308] has induced skepticism on the part of former civil rights attorneys and activists concerning the traditional claims and assumptions of liberal political theory.[1309]

The work of so-called Critical Race Theorists shares with their predecessors in the Critical Legal Studies movement the intuition that litigation for social change is at best an unruly horse but at worst an instrument for perpetuating the status quo.[1310] In the concepts of ideology and legitimation they find a language for analyzing the fear that the "promise of *Brown*"[1311] has proved to be a chimera.[1312] From this perspective the conceptual framework of legal rights discourse expressed in terms of equality,

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1306 By which I mean a commitment to view that the state should offer its citizens individual guarantees expressed by reference to statements of values or moral principles which are formulated in universal terms.

1307 Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*).

1308 *See* GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION (2006) available at http://crab.rutgers.edu/~ccoe/courses/soe/Readings/Racial_Transformation.pdf. *See also* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION,53-71(1996).

1309 *See* Michael J. Klarman, Brown, Racial Change and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994)

1310 *See* Richard Delgado and Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox,* WM & MARY L. REV. 547,567 (1995) (arguing that *"Brown's* relatively slight effect is part of a broader form of social response- the reconstructive paradox-which holds that the greater the evil, the greater the need for reform; the greater the reform effort, the more unprincipled and unjust the effort will seem, and the greater the resistance it will call up.").

1311 "Brown promised a truly equal education for black children in integrated classrooms throughout the nation. More, it offered the real beginnings of a multi-racial democratic society. Brown heightened the aspirations and expectations of Afro-Americans as nothing ever had before. Nearly a century after their professed freedom had been stalled, compromised and stolen, blacks confidently anticipated being free and equal at last". H. SITKOFF, THE STRUGGLE FOR BLACK EQUALITY: 1954-198, at 23 (1981).

1312 *See* Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay* 23 HARV.C.R.-C.L. L. REV. 295, 313-15 (1988) (explaining that the effect of a "new array of insights" derived from Marxist thought was to give him the "intellectual equipment" to express his frustrations concerning the direction of anti-discrimination law and practice.).

objectivity and neutrality and the apparent formalism of the doctrine of stare decisis upon which it claims to depend become mechanisms for ignoring and thereby legitimating the economic and social inequalities which represent the structural causes of minority oppression. [1313] Apparent successes such as *Brown* [1314] become possible at specific moments of so-called political interest convergence[1315] but the indeterminacy of constitutional rights which gain meaning only in the translation from the universal to the particular and the fluid nature of legal reasoning render these gains unstable and vulnerable to erosion in terms of both scope and principle once the political consensus which gave them birth has changed or broken down. [1316] From a position tantamount to legal nihilism, rights-based litigation is just another forum in which prevailing political and cultural assumptions operate to entrench the fact of white dominance; "Law is simply politics by other means". [1317]

Not all writers are prepared to discard the rhetoric of rights. Patricia Williams for example has responded movingly to those who criticize the African-American pursuit of rights; "the mythology" of rights discourse, with its "pantheon of possibility", she asserts, is not a "dry process of reification" but "the story of phoenix; the

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1313 *See eg* Delgado & Stefancic's critique: "Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests." Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly,* 82 CALIF. L. REV. 851, 861 (1994).
For critical legal theory *see eg* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, (1987) ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).
For critical race theory *see eg* RICHARD DELGADO R & JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE (1995); RICHARD DELGADO R & JEAN STEFANCIC CRITICAL RACE THEORY: AN INTRODUCTION(2001); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993); For critical race theory in education *see eg* RACE IS ... RACE ISN'T (Lawrence Parker et al. eds 1999); CRITICAL RACE THEORY IN EDUCATION: ALL GOD'S CHILDREN GOT A SONG (Adrienne D. Dixon & Celia K. Rousseau eds. 2006).
For critical legal theory attack on legal method *see eg* David Kairys, *Legal Reasoning* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed.1982).

1314 Brown v. Bd of Educ., 347 U.S. 483 (1984) (*Brown I*).

1315 When the interests of the black minority converge with those of the white majority.

1316 *See* Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma,* 93 HARV. L. REV.518 (1980) (hereinafter "Bell 1980") and Mary Dudziak, *Desegregation as a Cold War Imperative,* 41 STAN. L. REV. 61, 106-13 (1988)(hereinafter "Dudziak 1988") (both arguing that the decision to declare segregated public schools unconstitutional was influenced by Cold War political imperatives which required the United States to be able to present itself as the home of liberty, human rights, and racial justice by comparison to unfree Soviet societies.) These ideas are further developed IN MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2001) (hereinafter Dudziak 2001).

1317 Kairys, *supra*, note 1313 at 17.

parthenogenesis of unfertilized hope." [1318] However, the connection between theory and practice continues to be problematic. In the work of writers such as Bell and Delgado and Stefancic we see an attempt to harness the transformative potential of rights discourse by the use of narrative to give voice to social experience which has been excluded from the mainstream.[1319] The intention may be termed an attempt to fight hegemony with a counter-hegemony[1320] by providing a framework within which new claims can be conceptualized but as they themselves recognize, they have a struggle on their hands.[1321] Delgado and Stefancic in their Critical Race Primer invite a thought experiment:

> As a thought exercise, the reader is invited to consider how many of the following terms and ideas, mentioned in this book and highly relevant to the work of progressive lawyers and activists, are apt to be found in standard legal reference works: intersectionality, interest convergence, anti-essentialism, hegemony, language rights, black-white binary, jury nullification. How long will it take before these concepts enter the official vocabulary of law?[1322]

One has only to pose the question to grasp the magnitude of the task. The theoretical complexity that is demanded engenders both a perception of impenetrability and a

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1318 PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991) "It is also true that blacks always believed in rights in some larger mythological sense –as a pantheon of possibility. It is in this sense that blacks believed in rights so much and so hard that we gave them life where there was none before; held onto them, put the hope of them into our wombs, mothered them, not the notion of them; we nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round, but its opposite. This was the story of phoenix; the parthenogenesis of unfertilized hope." *Id.*

1319 *See eg* the work of Derrick Bell; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative,* 87 MICH. L. REV. 2411, 2414 (1989)writes:
"Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live."

1320 In the work of Antonio Gramsci the notion of hegemony is conceptualized to refer to the network of attitudes and beliefs which permeate popular values and political ideology and operates to convince both dominant and dominated classes that existing social relationships represents the natural order. *See* SELECTIONS FROM THE PRISON NOTEBOOKS, 195-196,246-47 (Quinton Hoare and Geoffrey Nowell-Smith eds. and trans. 1971)

1321 *See* RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION xvi, 243 (1994) (hereinafter "Delgado & Stefancic, Failed Revolutions").

1322 RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY; AN INTRODUCTION, 27 (2001) (hereinafter "Delgado & Stefancic, Critical Race Theory").

despair that what Catharine MacKinnon has termed a "discourse unto death"[1323] has little to offer outside the academy: "Theory begets no practice, only more text."[1324]

A debate about what is or should be the relationship between theory and practice takes place in a context of what may be seen as a growing alienation between academic lawyers and practitioners who see little value in "abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner."[1325] Calls for the development of "theoretics"[1326] or a "critical race praxis,"[1327] to "bridge the gap between the theoretical and the practical in law"[1328] represent both a commitment to the power of theory as a vehicle for change and a conceptualization of theory as practice which may find its antecedents in African-American political and literary traditions[1329] but the task of combining "critical pragmatic socio-legal analysis with political lawyering" [1330] does not fit easily within the ethical constraints of the lawyer/ client relationship, nor does deconstructive analysis of "rights discourse" with its underlying pessimism concerning the extent to which racism in American society can be overcome resonate with day to day intuitions of practicing attorneys.[1331] Lawyers are practical people

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1323 Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991).

1324 *Id.*

1325 *See eg* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34, 35 (1992) (writing as a federal circuit judge and discussing the view that "significant contingents of 'impractical' scholars' in 'elite' law schools who are 'disdainful of the practice of law' produce 'abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner." *Id.* "As a consequence," he asserts "it is my impression that judges, legislators and practitioners have little use for much of the scholarship that is now produced by members of the academy." *Id.*).

1326 *See* Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 753 (1992).

1327 Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Praxis in Post-Civil Rights America,* 95 MICH. L. REV. 821,882 (1997). By "praxis" Professor Yamamoto means "antisubordination action with reflection", *Id.*, at n.249.

1328 *Id.*

1329 Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 753 (1992).

1330 Yamamoto *supra*, note 1327 at 875.

1331 *See* Derrick A. Bell Jr. *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J 470 (1976) (pointing out that to litigate a law reform case, the lawyer needs a flesh and blood client but the social reform interests of the lawyer and the personal goals of the client may not always coincide.).
See more recently, Professor Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?* 5 MICH. J. RACE & L. 201,205(1999) responding to Professsor Yamamotu's call for a 'critical race praxis' (Yamamoto *supra* note 1318) (observing that the scope for political lawyering is necessarily limited; in undertaking to act for a particular client an attorney undertakes to promote the client's best interests which are not necessarily those of the

with practical skills which they seek to deploy and constitutional rights are the tools of their trade. If the "tradition of Louis Boudin and Clarence Darrow"[1332] is to speak to the progressive impulse as it has always done, the theory which informs the vision must be capable of inspiring practice. "Good theory", suggests Catherine MacKinnon, come out of practice which is "socially lived and engages with the social practices of oppression."[1333]

Delgado's work and that of Bell has always been "activist" in focus and both continue to exhort "activists" to soldier on.[1334]. The preoccupation with theory comes out of acceptance of the limits of law as a vehicle for social change. Litigation is expensive, and its unpredictable outcomes mean that in strategic terms it is best employed to maximize success; this is most likely to happen when social attitudes have been changed.[1335] Delgado's more recent work however demonstrates impatience with theory which pays too much attention to issues of attitude formation and the social construction of race to the neglect of the material factors which determine minority-group access to economic, social and political power.[1336] "The study of 'race' has supplanted the study of race" he asserts and issues a challenge to theory to return to a "racial realism" of an earlier generation.[1337] In his return to ideas of "interest convergence", the thesis pioneered by Derrick Bell that the majority group tolerates advances for racial justice only when it suits its interest we see not only a tool of

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group Moreover, in an increasingly multiracial minority population opportunities for conflicts arise: 'Although minority groups may appear homogenous to the outside observer, this is far from the case. Internal schisms can prove as troublesome as conflicts between groups'. *Id.*

1332 *See* Victor Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 318 (David Kairys ed.1982).

1333 Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991).

1334 *See* RICHARD DELGADO& JEAN STEFANCIC – FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION(1994) at 145 'It is important to us that [law students] not see this book as a counsel of despair, for that is not how it is intended'.– and DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).

1335 For a political scientist's analysis of the limits of the ability of the courts to bring about long-lasting social policy reform *see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1991)(concluding: "American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naïve and romantic belief in the triumph of rights over politics. And while romance and even naivite have their charms, they are not best exhibited in courtrooms.")*Id* at 343.

1336 Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 12, 122-123 (2003)(hereinafter Delgado (2003) (reviewing FRANCISCO VALDES, JEROME MCCRISTAL CULP & ANGELA P. HARRIS, CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (2002).

1337 *Id*

analysis [1338] but the basis of a response to the activist practitioner's query: what's a *lawyer* to do?[1339] If the key to success lies in the forging of alliances the concept becomes not merely an explanation as to why certain claims succeeded at certain times, but a continuing tool of practice for the activist lawyer.

The view has recently been expressed that, after more than half a century of attempts to enhance the educational opportunities of African-Americans, the obstacles that continue to thwart the promise of *Brown* depend upon variables which are so deeply embedded inside the process of teaching and learning that they are for the time being at least beyond the reach of legal process.[1340] This may be so but if in legal incrementalism, that is to say, "the slow, painstaking process of establishing and refining precedent" we find the tool of the lawyer's trade, the history of the search for educational equity via the courts has been testament to the view that the open-texture of constitutional rights represents both limit and opportunity in the task of providing substance to the rhetoric of the doctrine that we call "the rule of law".[1341] This was the path that led to *Brown* but the story of schools desegregation that followed teaches that the success of incrementalism is as much a matter of the implementation of rights as of their elaboration and in a schools case the key to the former has had to be found in an institutional engagement which has taken lawyers out of their comfort zone. In other words, the successful implementation of rights to educational equity has required not only the identification and conceptualization in legal terms of specific constitutional infringements but also that solutions be devised which were practical and thus capable of commanding respect. Both tasks have demanded close attention to matters of educational and pedagogical complexity but as the Boston experience has

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1338 *See* Delgado (2003) supra note 1336 at 121, 138. On 'interest convergence' *see* Derrick Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 76 Cal. L. Rev,3 (1979), Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma* 93 HARV. L. REV.518 (1980) (hereinafter Bell (1980)): "Translated from judicial activity in racial cases both before and after Brown, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites." Bell (1980) at 523.

1339 Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer To Do?* 5 MICH. J. RACE & L. 201(1999).

1340 *See* Michael Heise, *Litigated Learning and the Limits of Law* 57 VAND. L. REV. 2417,2450 (2004).

1341 Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARV. C.R.-C.L. L. REV. 301, 319 (1987) (hereinafter "Delgado 1987").

demonstrated, it has been at the implementation stage in particular that the task of devising an effective legal remedy has required lawyers to undertake a specific engagement with norms and practices of another discipline in a way which only became possible because of the assistance provided by experts who were themselves professionals in the educational field.[1342]

Interviewed in 2006, Robert Dentler recounted a conversation with Judge Garrity which showed his understanding of the importance of solutions in defining the limits of what he could achieve:

> On one occasion I said "we've got to call a deputy marshal or marshals – we're being defied. I can't stem it and – am I correct - you can order the marshals in." He said " I can order a platoon of marshals – about 50 years of age each, haven't fired a gun in years, most of them have a pot belly – and that will be my force." He said "I don't like the image of that. Don't you understand that a judge is a wizard? As in the Wizard of Oz – I'm behind a curtain and orders are obeyed if the parties believe in your judicial authority. That's my power – and my power is under intense contest here. You've got to come up with solutions that don't have to do with you telling me to put the marshals on the streets please."[1343]

In effect, South Boston High School (SBHS) head Winegar made the same point when he observed on the record that "[l]awyers and judges are only occasionally educators. To decide [the *Morgan* case] on legal grounds only denies us the opportunity to share the students' educational needs in the legal forum."[1344]

Winegar was complaining about the lack of bilingual teachers at his school; "[s]urely", he asked "educational quality still has some validity in the District Court?"[1345] For Dentler who had advised the judge in 1975 right at the very beginning of the case that where desegregation efforts focused primarily on student and teacher reassignments and where orders were limited to these matters plus safety and transportation, the effects on equalizing teaching and learning were likely to vary

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1342 *See* David. M. Engstrom, Civil Rights Paradox? Lawyers and Educational Equity 10 J.L. & Pol'y 387 (2002) (reviewing LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY (Jay P. Heubert ed., 1999).

1343 Dentler (2006) *supra* note 1213.

1344 Winegar to Dentler, Sept 26 1988, (90 Garrity XXXVIIf. f36).

1345 Winegar, *supra* note 1344

"from negligible to damaging,"[1346] the issues of remedial design and implementation were the key factors that could make or break the effort to achieve quality desegregated education in urban school districts.[1347] As the Coleman report had warned, lawyers neglected these matters at their peril.[1348] The outcome was likely to be a gap "that is the equivalent of that between curriculum theory and the practical development of instructional practice". [1349]

VIII. Towards a Theory of the Court Expert in Schools Desegregation Suits

In *Brown v Board of Education* the Supreme Court established a constitutional basis for the moral responsibilities of the nation in racial matters.[1350] The decision represented a defining point in the development of race relations in the United States, but the principles upon which it rested were ambiguous and the process of schools desegregation which it inaugurated depended for success upon political processes which the Court could command but not control. The constitutionalization of the desegregation mandate ensured that the political struggles which it spawned were played out in the courts, but the inherent ambiguity upon which it rested produced an open textured jurisprudence in which the requirements of desegregation have changed, and the link between racial isolation and educational opportunity which had underpinned NAACP demands for integration could no longer be assumed. Fifty years after *Brown,* a Court in retreat from an activist model of adjudication was unwilling to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.[1351]

For Judge Garrity and the lawyers involved in the Boston case at the time, the immediate answers to the question of what desegregation required were determined

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1346 Dentler, April 11 1975, *Race Case or Education Case*, (90 Garrity XXXVIIf. f17)

1347 Robert A. Dentler, *Desegregation Planning and Implementation in Boston*, 17, THEORY INTO PRACTICE, 72 (1978)

1348 *Id.*at 74 (quoting James S. Coleman. *"Racial Segregation in the Schools: New Research with New Policy Implications"* 1975 PHI DELTA KAPPA, 75-78:[o]ne of the peculiarities of the whole desegregation period has been the lack of interest by advocates on both sides in making a desegregated system work successfully".)

1349 *Id.*

1350 Brown *v* Board of Education, 347 U.S. 483 (1954)(*Brown I*)

1351 Parents Involved in Cmty Sch. 127 S.Ct. 2738,2776-2781 (2007) (Thomas J., concurring).

by reference to contemporary desegregation jurisprudence which constituted the parameters of the judge's constitutional mandate but as Forbes Bottomley, himself a former superintendent of schools in Seattle, Washington, has pointed out, an effective desegregation plan for a complex public school system such as that of Boston is more than a matter of jurisprudence. [1352] Lawyers may be comfortable with standards couched in terms of "reasonableness" and "adequacy", but educational planners need more.[1353] Translation from constitutional guidelines to specific proposals of design and implementation requires both professional expertise and a working relationship with the educational planners and school officers whose job it is on the ground to give effect to the orders of the court. Where, as in Boston, school officials are recalcitrant, and administrative default forces the judge to take over, the relationship can become "complex and frustrating".[1354] The appointment of court experts in Boston extended the reach of the judge beyond the courtroom and the confines of the adversarial process and, to that extent, their role was part of the machinery of implementation. But to the extent that they took on the task of supervising and supplying the educational planning expertise necessary to devise and implement a workable plan, they shaped and gave content to the desegregation process in Boston and, to that extent, their role was more fundamental.

1352 Forbes Bottomley, *The Professional Educator in the Desegregation Suit*, *in* LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION, 621 (Howard I. Kalodner, & James J. Fishman, eds., 1978).

1353 *See* Bottomley, *supra,* note 1352 at 633: "as an educational planner I would appreciate having a clear definition of adequacy in at least the following areas:1) the tenable limits within which students may be assigned to schools to achieve constitutionally acceptable desegregation; 2) the degree to which optional attendance zones, neutral sites, magnet schools, and alternative programs fit the law; 3) the variance, if any, from the tenable limits which will be allowable for special education for the handicapped, for the gifted, for kindergarten children, for athletic and other extracurricular programs; 4) the definition of desegregation within a school as well as within a school system, such as prohibition against tracking ability groupings and other segregative assignment; 5) a definition, with tenable limits, of a desegregated staff, including teachers, administrators, and non-teaching employees; 6) a guide for the equitable distribution of resources among the schools, including the use of Elementary and Secondary Act Title I funds; 7) a meaning of 'burden' – that is the measure to which desegregation may be achieved through the burdening of minority students and minority communities with school closures, one-way assignments, busing distances and other inconveniences more than the majority pupils and communities; 8) a definition of 'reasonable' transportation times and distances; 9) the extent to which metropolitanization may be considered in a remedial plan; 10) other instructions such as a timetable for submission of the plan or plans; target date, at least, for implementation; a description for an appeal procedure for hardship cases; and a process for monitoring the plan, once implemented".

1354 *Id.*

In identifying the importance of educational enhancement in a desegregation remedy, Judge Garrity's plan went further than any of his predecessors in federal desegregation suits and became the prototype for a new type of desegregation planning in which educational concerns were ostensibly as important as issues of student assignment. Ultimately, the educational component fell victim to a desegregation jurisprudence conceptualized in terms of "race" and not "education". "Desegregation", said the First Circuit, "is not a mandate to equalize schools".[1355]

Taking the failure of outcomes as a focus, this work now takes the indeterminacy of the term "desegregation" as a starting point towards a theory of the role of the court expert in schools desegregation litigation. If the term "desegregation" is seen as inherently indeterminate, or, to borrow a term from discourse theory, an empty or floating signifier whose meaning crystallizes only as the general is translated into the particular, then a framework for analysis emerges. The desegregation process becomes a forum for a negotiation between representatives of two professional discourses with differing and sometimes conflicting understandings and conceptualizations of what the process might require.

From this perspective, the court expert operates at the interface between two discursive imperatives: the so-called "harm-benefit thesis" of social science which seeks integration as a solution to "the Negro problem" and the legal imperative which prioritizes "legitimacy" and permits "integration" only as an aspect of remedial process. The two imperatives came together in the context of education, and both sets of professionals sought enhanced educational outcomes for African-Americans; but, for lawyers, the harm which shaped strategy was racial discrimination whilst for social scientists the harm was racial separation.

In the forum of the federal courtroom, the discourses of law and the social sciences do not meet on an equal footing. The authority of the modern liberal state is defined in legal terms, and answers to questions of legitimacy are sought by reference to the concepts and rhetoric of legal discourse. Thus, in terms of an interaction between the rival discourses of the law and of the social sciences, it is the former which is

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[1355] Morgan *v.* McDonough,, 689 F. 2d, 265, 277. (1st Cir.1982).

dominant and hegemonic. The discourse of the social sciences acquires political legitimacy only to the extent that it has been subsumed within the discourse of law. The role of the court expert can be theorized in terms of mediation or translation, the task being to give to the federal judge the content that he needs to give meaning to the otherwise indeterminate signifier "desegregation". The voice of legitimacy is the voice of the federal judge and his attempts to articulate the boundaries of the term represent so-called nodal points for the crystallization of meaning.

In this context, the relationship between the judge and the expert is dialectical: the judge has to guide the expert on "the law". This requires identification of the general legal principles which regulate the exercise of the judicial function, and the specific principles of constitutional liability and relief which have been provided by the Supreme Court and Circuit Courts in previously-decided cases. These give the judge his "road map"; from these he identifies his imperatives and sets an agenda. Translation of these imperatives into proposals for practical changes in educational policy and practice is the task of the expert, who may be a testifying witness or may be a specially appointed court adviser. Either way, these proposals are acceptable only to the extent that they can be justifiable in terms of legal discourse. In other words, the practical proposals of the social scientist must be capable of translation into the language of the law and justifiable by reference to the legal signifiers to which they give content. The measure of accomplishment is the scrutiny of the wider legal community as represented in the first instance by the appellate judges to whose authority appeal might lie. Ultimately, however, the effect is to bring about a transfer of power from elected school officials to the wider group of academic and practicing lawyers and the politicians and representatives of business interests with whom they interact who collectively make-up the hermeneutic community which Dworkin has identified as the community of legal discourse.[1356]

[1356] RONALD DWORKIN, LAW'S EMPIRE (Fontana, London 1991).

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Anne Richardson Oakes

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FROM PEDAGOGICAL SOCIOLOGY TO CONSTITUTIONAL ADJUDICATION: THE MEANING OF DESEGREGATION IN SOCIAL SCIENCE RESEARCH AND LAW

*Anne Richardson Oakes**

In the United States following the case of Brown v. Board of Education *(1954) federal judges with responsibility for public school desegregation but no expertise in education or schools management appointed experts from the social sciences to act as court advisors. In Boston, MA, educational sociologists helped Judge W. Arthur Garrity design a plan with educational enhancement at its heart, but the educational outcomes were marginalized by a desegregation jurisprudence conceptualized in terms of race rather than education.*

This Article explores the frustration of outcomes in Boston by reference to the differing conceptualizations of desegregation in law and social science. It argues that whereas social scientists see desegregation in terms of social change requiring integration, for lawyers desegregation is a remedy the content of which is shaped by the nature of the litigation. The imperatives of law and social science have in the past coincided in a jurisprudence of affirmative action but the recent school assignment cases demonstrate the extent to which they have now diverged. This divergence underlies the indeterminacy of the desegregation mandate and provides an analytical framework for a theory of the role of the court expert in schools desegregation.

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INTRODUCTION

In the United States, in the years following the case of Brown v. Board of Education,[1] the federal judiciary assumed direct responsibility for supervising the desegregation of the nation's schools. In the *Brown* case itself, however, the term "desegregation" is never used, and its meaning has changed over time. Whereas the issue in *Brown* was the legality of state laws mandating educational apartheid, under a sympathetic political regime in the 1960s the Supreme Court extended the requirement to affirmative "integration" and set performance indicators couched in terms of "racial balance."[2] By the 1990s, however, it was clear that absent state fault racial identifiability per se did not offend the Constitution, and judges were encouraged to disengage from the desegregation process.[3] Affirmative action policies designed to perpetuate "integration" rather than to remedy past discrimination fell victim to the Court's dislike of judicial intervention in social policy matters.

It is commonly asserted that the *Brown* Court was influenced by social science concerning the "harm" of segregation and the benefits of integration. In the 1970s, social science research became central to desegregation litigation in the North where segregation was a function of residential patterns rather than overt legislative discrimination.[4] Designing

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1. Brown v. Board of Educ. (Brown I), 347 U.S. 483 (1954). Technically there were four cases which were consolidated on appeal to the Supreme Court: Belton v. Gebhart, 87 A.2d. 862 (Del. Ch. 1952) (on appeal from Delaware); Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (on appeal from Kansas); Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) (on appeal from South Carolina); and Davis v. Sch. Bd., 103 F. Supp. 337 (E.D.Va. 1952) (on appeal from Virginia).

Following the Supreme Court's ruling that the provision of "separate but equal" education was a violation of the Fourteenth Amendment, the case was adjourned for the Court to hear argument concerning the remedy. The remedial ruling came one year later in Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). In this text, references to "*Brown*" should be taken as references to both *Brown I* and *Brown II*.

2. Green v. County Sch. Bd., 391 U.S. 430, 437–438 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 1279–80 (1971).

3. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 92–93 (1995); Freeman v. Pitts, 503 U.S. 467, 489–491 (1992).

4. *See infra* Part II.B.

a desegregation plan in urban centers such as Detroit, MI, required an analysis of the relationship between school policies,[5] faculty assignments and other administrative practices that the state was responsible for, and other causes of segregation, notably patterns of residence and demographic factors for which it was not.[6] Social science evidence on these matters became a standard feature of desegregation litigation and the use of social science "experts" at both liability and remedy stages was routine.[7]

In cities such as Boston, MA, where elected school officials actively opposed the desegregation orders of the federal court, district judges who assumed direct responsibility for desegregation planning appointed social science experts as their personal advisers, raising due process questions of legitimacy and transparency in an adversarial context.[8]

In Boston itself, Judge W. Arthur Garrity Jr., facing opposition on a scale unprecedented outside of the South,[9] saw desegregation as an opportunity to restructure the decayed public school system and chose advisers who shared his commitment to "educational enhancement."[10] His involvement continued for twenty years, but the educational outcomes were frustrated by the countervailing imperative of "racial balance." In terms of desegregation jurisprudence, the case was a "race case," not an "education" case.[11]

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5. For example construction, boundary changes, grade level and feeder pattern changes

6. *See infra* Part II.B.

7. *See infra* Part II.B.

8. *See generally* Anne Richardson Oakes, Legitimacy and the Court Expert: Narratives of Impropriety in a Schools Desegregation Case (Nov. 2008)(unpublished draft manuscript, on file with the author).

9. *See* RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 1960S AND 1970S (1991). The extent of the violence invited comparisons with Little Rock, Arkansas: "Some observers, recalling a dramatic outburst of Southern opposition to desegregation in 1957, now called Boston 'the Little Rock of the North.'" *Id.* at 1. On September 2, 1957 Governor Orvil Faubus deployed the National Guard to prevent nine black children from attending Little Rock Central High School, requiring President Eisenhower to send in Federal troops to protect them and place the National Guard under federal control. *See* Cooper v. Aaron, 358 U.S. 1, 8–10 (1958).

10. In *Morgan v. Hennigan*, 379 F. Supp. 410, 480–81 (D. Mass. 1974), Judge Garrity found that the Boston public school system was unlawfully segregated and announced his Court desegregation plan in *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401, 423 (1st Cir. 1976). He appointed as "court experts" Dr Robert Dentler and Dr Marvin Scott, respectively Dean and Associate Dean of Education, Boston University. *Id.* at 227.

11. Transcript of Hearing of April 10 1975, Morgan v. Kerrigan, 401 F. Supp. 216 (1975)(No. 72–911–G)(on file with the University of Massachusetts, Healy Library Archives & Special Collections, Center for Law & Education Papers, Morgan & Hennigan Case Records 1964–1994). Judge Garrity observed from the bench that "this is a race case, not a school case primarily" and stated the issue that was going to give him the most difficulty in formulating an order: Supreme Court jurisprudence protects equality not education. He stated:

A. *The Paradox of Desegregation Jurisprudence: Integration and Discrimination*

In 1979 after a decade of urban school desegregation, Judge Harvie Wilkinson wrote that

> The problem is that we are no longer certain what kind of question public school desegregation really is. Twenty years ago we were convinced it was a matter of showing southern school segregation to be morally wrong. But with busing, good moral arguments exist on both sides. To the extent that desegregation has become less a moral question, or at least more a moral standoff, it is also less clearly a constitutional requirement the Supreme Court is entitled to impose.[12]

The loss of faith with the desegregation process that took place in Boston in the 1980s was underpinned by confusion about what exactly the process of desegregation was intended to achieve. It raised questions about what the Constitution might or might not require: how does a right not to be discriminated against turn into a requirement for racial balance? What is wrong with freedom of choice and the neighborhood school? Why must children be bused and schools closed? The Boston plan incorporated specific provisions for educational enrichments, but the Court refused to consider matters of teaching and learning or to take into account disparities in academic outcomes.[13] When the burdens of busing, school closures and teacher lay-offs appeared to fall disproportionately upon the black community, their leaders returned to the issue *Brown* had supposedly resolved and asked once again: what exactly is the relationship between racial isolation and educational opportunity for African Ameri-

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"What is protected? Equality is protected. The right to equal education. What that means is that once the state undertakes to supply education, well, then it must be available without discrimination among the races. There is a constitutional right to equal education. That is what this case is all about." *Id.*

12. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–78 132 (1979).

13. *See* Transcript of Hearing, *supra* note 11. Boston's prestigious examination schools were not required to achieve the same degree of integration as the city's other magnet schools although their selection policies, progression rates and teaching and learning methods were thought to disadvantage black students. *Kerrigan*, 401 F. Supp. at 243–244. Robert Dentler took the view that the schools were educationally poor and recommended to the judge that the schools be closed on educational grounds, but general opposition forced him to withdraw his recommendation. He removed his advice to the judge before the chambers papers went into the public domain, deposited with the Archives and Special Collections at the University of Massachusetts Healey Library in Boston one year after the Morgan litigation was formally closed in 1997. Interview with Robert Dentler in Boston, MA. (Sept. 14, 2005). Garrity's comments, noted *supra* note 11, were typical of his approach to these issues.

cans?[14] To seek answers to these questions in key aspects of this branch of Equal Protection jurisprudence is to discover what desegregation analyst David J. Armor has termed "the desegregation dilemma,"[15] namely the apparent paradox that *Brown v. Board of Education*, the case which declared the constitutional incompatibility of racial discrimination, came itself to require purposive racial discrimination as an aspect of effective relief.[16]

As Professor Lino A. Graglia suggests, the history of the law of race and schools since *Brown* has seen the Supreme Court convert a prohibition of segregation into a requirement of integration.[17] In the process, he argues, a decision that stood as authority for a prohibition on all forms of racial discrimination became the basis for a new form of racial discrimination.[18] Public schools were required to conform to requirements of racial balance.[19] Access to schools was once again controlled by reference to considerations of race.[20] A constitutional mandate to desegregate to prevent discrimination became the affirmative requirement to discriminate to secure integration, despite the assurance given contemporaneously with *Brown I* that the Constitution did not require integration.[21]

Most commentators have concluded that it was the need to provide an effective remedy that pushed the Court in the direction of affirmative action.[22] Two challenges in particular required an effective response. The first was the attempt by elected officials in Southern states to subvert the effect of *Brown*, initially by outright opposition and then by adopting policies that were overtly race-neutral but which operated in practice to perpetuate segregation.[23] Freedom of choice assignment plans fell into that category.[24] By 1968, noting that ten years after *Brown* a "freedom of

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14. *See infra* Part III.B.

15. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 3 (1995).

16. *Id.*

17. *See* Lino A. Graglia, *From Prohibiting Segregation to Requiring Integration: Developments in the Law of Race and the Schools since Brown*, *in* SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 69 (Walter G. Stephan & Joe R. Feagin eds., 1980)[hereinafter Graglia, *Developments*]. *See also* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS (1976)[hereinafter Graglia, DISASTER BY DECREE].

18. *See* Graglia, *Developments*, *supra* note 21 at 69–96.

19. *Id.*

20. *Id.*

21. Briggs v. Elliot, 132 F. Supp. 776, 777 (E.D.S.C. 1955)("Nothing in the Constitution or in the decision [in Brown I] takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination.").

22. *See* Graglia, *Developments*, *supra* note 17 at 75; *see also* Armor, *supra* note 15, at 27–28.

23. Practices included the pupil placement laws and freedom of choice plans explained in Green v. County Sch. Bd., 391 U.S. 430, 431–33 (1968).

24. *See infra* note 26 and accompanying text.

choice" policy had made virtually no changes to the racial composition of the schools of New Kent County (VA),[25] a unanimous court declared that "such delays are no longer tolerable" and emphasized that school boards had a duty to take affirmative action to take "whatever steps might be necessary" to establish a "unitary non-racial system."[26]

The second challenge was the need to respond to segregation in urban areas where racially identifiable schools reflected residential segregation coupled with neighborhood school policies. In a case from North Carolina, the Court had accepted racial balance as a criterion of desegregation and compulsory busing as an appropriate response to this kind of situation.[27] By the time that Judge Garrity came to order his remedial plan for Boston, compulsory reassignment of pupils to secure racial balance in the public schools had become the norm in northern school desegregation planning, despite its unpopularity with white parents whose withdrawal to the suburbs made racial balance in urban schools virtually impossible to achieve.[28]

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25. Under a Virginia pupil placement law adopted after *Brown*, students were automatically reassigned to schools previously attended unless they specifically applied for permission to change. *See Green*, 391 U.S. at 433.

26. *See Green*, 391 U.S. at 437–438. The court further noted the following:

> The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in the light of other courses which appear open to the board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

See id. at 441–42.

27. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22, 30 (1971).

28. *See generally* Robert A. Dentler, *School Desegregation Since Gunnar Myrdal's American Dilemma* in THE EDUCATION OF AFRICAN AMERICANS, 27–49 (Charles Vert Willie et al. eds., 1991); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* 80 MINN. LAW REV. 825,825–873 (1996). The precise nature of the relationship between mandatory desegregation plans and so-called "white flight" has been contested since Coleman et al.'s 1975 study asserting a causal link. *See* JAMES S. COLEMAN ET AL., TRENDS IN SEGREGATION 1968–73 76–80(1975)(cited in Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* 80 Minn. Law Rev. 825, 830 (1996)); *see also Charles Vert Willie & Michael Fultz, Comparative Analysis of Model School Desegregation Plans, in* SCHOOL DESEGREGATION PLANS THAT WORK, 197–213 (Charles Vert Willie 1984).

IN SCHOOL DESEGREGATION PLANS THAT WORK 163–173 (Charles Vert Willie ed.1984); DAVID J. ARMOR, WHITE FLIGHT AND THE FUTURE OF SCHOOL DESEGREGATION IN SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 187–226 (Walter G. Stephan and Joe R.

Whatever the justification, it is undeniable that the objective of racial integration as a mechanism for enhancing the life opportunities afforded to African Americans is, or ought to be, a social policy objective requiring political decisions involving the allocation of public resources and judgments as to what results could thereby be achieved. This is exactly the kind of decision in respect of which politicians turn to the work of social scientists, but it is not normally one within the purview of the federal judge. In *Brown v. Board of Education*, the Court appeared to require federal judges to take on the task of implementing social policy objectives for reasons which were not clear and in a manner which was not directly articulated.[29]

In this Article, I explore the meaning of desegregation for both lawyers and social scientists and its consequences for desegregation planning. I argue that, whereas for social scientists desegregation was a process of social change and required integration, for lawyers desegregation was a remedy, its content shaped by the nature of the litigation process. That the two conceptions of social science and law came together for a period of twenty-five years or so following the *Brown* litigation should not divert attention from the fundamental underlying differences containing within themselves the basis for divergence and underpinning the reluctance of current members of the Supreme Court to sanction race-conscious remedies which are not directly linked to issues of constitutional fault.[30]

In Part One I outline the general argument by reference to what I term the "underlying imperatives" of social science and law. By this I refer to the values of social policy reform and remedial process that underpin these respective disciplines and which determine the disciplinary boundaries within which solutions legitimate to that discipline must be framed. The disciplines of law and social science were brought together as a matter of conscious policy on the part of the National Association for the Advancement of Colored People (NAACP),[31] the organization formed in

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Feagin eds. 1980). For a recent overview, see Christine Rossell, *The Effectiveness of Desegregation Plans, in* SCHOOL DESEGREGATION IN THE 21ST CENTURY 67 (Christine H. Rossell et al. eds., 2002). For the decline in numbers of white students in Boston public schools see Robert A. Dentler, *The Boston School Desegregation Plan* in SCHOOL DESEGREGATION PLANS THAT WORK 60–67 (Charles Vert Willie ed.1984) and ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 26 (1981).

29. *See* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 18–19 (2004).

30. *See, e.g.*, Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995)(Thomas, J., concurring).

31. Technically, the NAACP Legal Defense Fund Inc., later known as the LDF set up as a separate organization headed by Thurgood Marshall in 1939, achieved financial independence in 1957 and finally broke with the NAACP in 1978 following an unsuccessful lawsuit by the NAACP to compel the LDF to drop the NAACP initials from its name. For a personal account see JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 517–24 (2004). For a history of the NAACP

1909 which became the nation's premier civil rights organization, largely because it recognized and harnessed the power of litigation to initiate social change.[32] Two issues relating to NAACP litigation strategy have particular significance for the development of desegregation jurisprudence: the decision to litigate for integration as opposed to educational equity and the strategic use of social science statements to lobby the US Supreme Court.

In Part Two I consider the main contours of this strategic use by reference to four such statements. Sociologists Mark Chesler, Joseph Sanders and Debra Kalmuss[33] have drawn on the influential work of Harvard professor Abram Chayes[34] to argue that the effect of social science in schools desegregation litigation has been the development of "new legal theory," in the course of which the remedial imperative may be said to have moved from a "private law" conception of litigation as assertion of individual rights in favor of a "public law" conception of litigation as correction of social grievance.[35] I consider whether social science conceptualizations of the harm of segregation and the benefits of integration can be said to have influenced the Court's desegregation jurisprudence. I argue that, whereas some of the earlier decisions may be consistent with such a view, in later years this is no longer the case. With the benefit of hindsight I argue that the earlier cases represent the aberration and that, with the disengagement cases of the 1990s, we see a reversion to a private law model which probably never really went away and in respect of which the capacity of social science to influence legal content is necessarily circumscribed.[36]

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and its involvement in school desegregation cases see MINNIE FINCH, THE NAACP: ITS FIGHT FOR JUSTICE (1981); LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP (1962); CHARLES F. KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (The Johns Hopkins Press 1973) (1967). The LDF played no part in the Boston case but NAACP General Counsel Nathaniel Jones acted for the black plaintiffs in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), with his successor Thomas Atkins taking over from Harvard Center for Law and Education counsel Larry Johnson in the later stages of the litigation. For an account of the dispute between attorneys Johnson and Atkins in the *Morgan* consent decree negotiations see Marsha Murninghan, Court Disengagement in the Boston Public Schools: Towards a Theory of Restorative Law (1983)(unpublished Ed D. thesis, Harvard University)(on file with Birmingham City University Library, Birmingham City University).

32. ROBERT J. COTTROL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE AND THE CONSTITUTION 51 (2003).

33. MARK. A. CHESLER ET AL., SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES (1988).

34. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

35. *See* CHESLER ET AL., *supra* note 33, at 27–61.

36. For the "disengagement cases," see Freeman v. Pitts, 503 U.S. 467 (1992) and Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995). *See also* discussion *infra* Part II.C.

I deal with the decision to press for integration as opposed to educational equity in Part Three when I return to this Article's opening questions and consider the claim that *Brown* should have been decided differently.

Whatever the impact of social science on the content of legal doctrine, in practical terms the remedial imperative inherent in the litigation process required judges and social scientists to interact at the district court level to construct a desegregation remedy.[37] I return to the relationship between social science and law in my conclusion. In the uncertain content of the term "desegregation" itself I identify a framework for analysis that sees the court expert as fundamental to the process by which federal district judges gave meaningful content on a pragmatic basis to the task of desegregating the nation's schools.

I. LAW AND SOCIAL SCIENCE IN SCHOOLS DESEGREGATION

Much has been written about the underlying ambiguities of the *Brown I* reasoning and the difficulty of identifying a constitutional justification for the decision.[38] In over-ruling the decision in *Plessy*[39] which underpinned the racial segregation laws of the South, the Supreme Court made clear that, in the field of education, the doctrine of "separate but equal" had no place[40] but failed to make clear the nature of segregation's harm. Although, as Professor Ronald Dworkin has suggested,[41] the scope for reliance in constitutional adjudication upon matters of empirical evidence is necessarily limited, the reference in footnote 11 of *Brown I* to the research of seven social scientists on the social and psychological effects of segregation upon black children has inaugurated a debate about the impact of social science which continues to characterize school selection jurisprudence to this day.[42] Since *Brown I* lawyers have continued to argue, with varying degrees of success, that the federal judiciary should take notice of social science research regarding the causes and consequences of

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37. *See infra* Conclusion.

38. *See* Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971); *see also* Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57 (1978); James S. Liebman, *Desegregating Politics: "All-out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wilkinson, *supra* note 12.

39. Plessy v. Ferguson, 163 U.S. 537 (1895).

40. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 294 at 495 (1955).

41. Ronald M. Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, *in* EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS: AN INTERNATIONAL SYMPOSIUM 19 (Ray C. Rist & Ronald J. Anson eds., 1976).

42. *See* Parents Involved in Community Schools v. Seattle School District No. 1 127 S, Ct. 2738 (2007)(discussed *infra* Part II.B).

racial isolation and its impact upon the psychological and educational development of African American children.[43]

The result has been the emergence of what Judge John Minor Wisdom has referred to as a "love match" between social science and law.[44] Lawyers have relied upon social science research to substantiate claims of constitutional harm and the effectiveness of the desired relief; social scientists have provided the empirical bases upon which schools cases have been fought.[45] Social scientists have addressed federal courts on matters such as the changing demographic patterns of cities, the causes of "white flight," the relationship between state policy, patterns of residence and the racial identifiability of schools[46] and the extent to which the underachievement of African American children constitutes a "lingering vestige" of discrimination.[47] In this kind of litigation more than almost any other, lawyers have looked to social science to translate issues of social fact into constitutional issues and constitutional requirements into social remedies.

As Charles T. Clotfelter[48] points out, however, it is important to bear in mind that lawyers and social scientists have different conceptions of what constitutes segregation and what the process of desegregation might require.[49] In social science research, the term "segregation" is used descriptively. Segregation occurs when black children are educated separately from white children. In this sense, the terms "segregation" and "racial isolation" are synonymous and integration is the appropriate social policy response.[50] For lawyers, however, segregation refers to state-mandated or sponsored discrimination on the grounds of race, accordingly violating the Fourteenth Amendment equal protection guarantee. To be successful, a plaintiff must establish an element of fault on the part of the state or state actors and seek a remedy specifically tailored to respond to harm that is a direct consequence of the constitutional violation.[51] It is

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43. *See infra* Part II.

44. John M. Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-making Process in School Desegregation Cases*, 39 LAW AND CONTEMP. PROBS. 134, 142 (1975).

45. *See* discussion *infra* Part II.

46. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

47. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995).

48. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 201 (2004).

49. *Id.*

50. *Id.*

51. See Justice O'Connor on equal protection analysis in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995)("All racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). *See also* Grutter v. Bollinger, 539 U.S. 306, 308–09 (2003).

the legal emphasis on issues of causation that ties this branch of Equal Protection jurisprudence to the empirical evidence afforded by social science research.

A. *The Differing Imperatives of Social Science and Law*

Although the term does not appear in either case, desegregation following the *Brown* decisions came to represent the American commitment to deliver on the promise of equal opportunity for all. The process of public school reform brought together social scientists and lawyers with different understandings of what the word meant and what the purpose of the exercise might be. I argue here that these differences reflect the fundamentally different imperatives of social science and law.

As education professor Diane Ravitch points out,[52] the way in which words are defined "is far more than a semantic exercise" but reflects important underlying assumptions concerning values and policy goals.[53] To that extent, the act of definition becomes in itself a statement of policy with the capacity to have important strategic consequences. I argue that, whereas both professionals speak in terms of desegregation as process, for social scientists the underlying imperative is one of social change requiring integration measured in terms of racial balance[54] and inter-racial exposure.[55] The integration imperative is underpinned by what Armor has termed the "harm-benefit thesis of social science," i.e. the thesis "that school segregation is harmful and desegregation is beneficial to the educational and social outcomes of schooling."[56] On this view, full integration in terms of student population, faculty and educational programs, and also of resource allocation, addresses the psychological and educational harm of segregation and enables African American children to compete on an equal footing not just in the classroom but also in terms of wider life opportunities. In social policy terms, integration was the way to respond to the disparity between the condition of "the Negro"[57] in American society

52. Diane Ravitch, *Desegregation: Varieties of Meaning, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 31 (Derrick Bell ed., 1980).

53. *Id.*

54. This ties the racial mix of a school to that of its surrounding district within specified permissible limits of deviation. See Armor, *supra* note 15, at 159 (noting that what is important is the possibility of "meaningful interracial contact"); *see also* Clotfelter, *supra* note 48, at 201.

55. This measures the extent to which white children and black children are able to mix with each other in the same school or classroom. *See* Christine H. Rossell, *The Effectiveness of School Desegregation Plans, in* SCHOOL DESEGREGATION IN THE TWENTY-FIRST CENTURY 75 (Christine H. Rossell et al. eds., 2002).

56. Armor, *supra* note 15, at 4.

57. I use this term self-consciously to reflect contemporary usage.

and the American ideal of equal opportunity for all, which Gunnar Myrdal had identified as representative of the "American dilemma."[58]

For lawyers, however, the process of desegregation is remedial and governed by what are well-understood constraints concerning the nature and limits of remedial relief. The underlying imperative is that of legitimacy, the need to keep within the proper compass of the law and of judicial process that ultimately must tie judicial intervention to the remedial process.

The judicial function in constitutional litigation is to declare the nature and extent of constitutional rights and to provide a remedy that must be tailored to the nature of the right. Attention to the requirement of legitimacy in constitutional adjudication must also require a court to pay due respect to the limitations that considerations of federalism and the separation of powers place on the nature and extent of the judicial role, issues I deal with elsewhere.[59] In this Article, I refer primarily to those aspects of legitimacy arising out of the nature of the remedial process which can be expressed by reference to the maxim *ubi ius ibi remedium* (Where there is a right there must be a remedy).[60] The principle has two related ideas: the existence of an actionable right which will usually require the identification of fault on the part of a defendant, and the requirement for a remedy which must address the fault either by giving effect to expectations which have been aroused or, more usually, by providing recompense or restitution in respect of loss which has been sustained.[61]

In lawyers' terms, desegregation is a remedy for a constitutional violation. The action is usually couched in terms of the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, which provides that "no state shall . . . deny to any person within its jurisdiction

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58. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xlvii (1944).

> The ever-raging conflict between on the one hand, the valuations preserved on the general plane which we shall call the "American creed," where the American thinks, talks and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of persons or types of people; and all sorts of miscellaneous wants, impulses and habits dominate his outlook.

Id. at xii.

59. *See* Oakes, *supra* note 8.

60. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803).

61. *Id.*

the equal protection of the laws."[62] The question then is: what constitutes the violation and what must be done for the purpose of affording relief?

In *Brown I*, the Court's declaration was clear but its reasoning ambiguous. State-mandated separate provision of schooling for black and white children must cease because a) separation offends the Constitution *per se*;[63] b) governmental discrimination by race causes psychological damage to black children[64] and c) governmental discrimination by race deprives black children of the educational benefits of mixing with white children.[65] *Brown II* directed federal courts to supervise the implementation of the remedial process but was similarly vague as to how this was to be done.[66] The Court invoked the exercise of equitable discretion but gave little guidance to federal judges as to how that discretion was to be exercised.[67]

Since then the Court has attempted to provide remedial guidelines that, at times, have been couched in the very widest terms. It has authorized desegregation plans for racial balance,[68] compulsory busing,[69] magnetic schools and programs[70] and even programs of educational enhancement,[71] apparently on the basis that it shared the social science view of the curative effects of racial integration although it has never made this clear. The Court has, however, continued to assert, as it did in *Swann*, the remedial imperative that "the nature of the violation determines the scope of the remedy."[72] In other words, the issue of fault as defined in legal terms remains central to the definition of the remedy. Thus in the absence

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62. U.S. CONST. amend. XIV, § 1.

63. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 294 at 495 (1955)(stating that "Separate educational facilities are inherently unequal.").

64. *Id.* at 494. "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 494.

65. *Id.* at 493 (citing Sweatt v. Painter, 339 U.S. 629 (1950) and McLaurin v. Okla. State Regents for High Educ. Et al., 339 U.S. 637, 438 (1950)) (discussing the "intangible" benefits for a law student of mixing with white students, i.e "his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession.").

66. Brown v. Bd, of Educ. (*Brown II*), 349 U.S. at 300 (1955).

67. *Id.*

68. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23–25 (1971).

69. *Id.*

70. Missouri v. Jenkins (*Jenkins II*), 495 U.S. 33 (1990). "'Magnet schools' as generally understood, are public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." *Id.* at 40.

71. Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977).

72. *Swann*, 402 U.S. at 16.

of fault, as the Court made clear in *Swann*[73] and again in *Keyes*,[74] issues of racial isolation or the under-performance of African American children are simply not the Court's concern.[75]

In legal process of this kind it is, of course, the plaintiff who seeks relief and the role of the court to that extent is passive; it either grants or refuses to grant the relief sought. In this connection and with the benefit of hindsight, the decision of the NAACP to abandon claims for "equal education" and press for "racial integration" has been criticized.[76] Professor Derrick Bell goes so far as to offer an alternative response to *Brown* which would have upheld the legality of *Plessy*, specifically for the purpose of giving full effect to its premise of "equality."[77] I offer a brief outline of NAACP strategy and deal with Bell's arguments below.[78]

My argument in general terms is that, for a period of twenty-five years or so following *Brown*, the social science imperative of integration and the legal remedial imperative coincided in the identification of racial balance or integration as the appropriate remedy for segregated schools. Desegregation during this period meant integration, and integration could justify race-conscious action. The coincidence was, however, temporary and was undermined as demographic changes coupled with white flight frustrated the attempt to integrate and cast doubt upon the assumptions that racial integration *per se* was a necessary aspect of equal education. New questions were asked concerning the extent to which the continuing academic under-achievement of African Americans should be regarded as a "vestige" of discrimination sufficient to warrant the adoption of affirmative action policies and the retention of court supervision. As social scientists argued amongst themselves, the causal value of their research in legal terms was correspondingly reduced. Reluctant to act on the basis of an inconclusive "pedagogical sociology"[79] and anxious to set limits to the duration of the remedial process, the Rehnquist Court turned to those other aspects of legitimacy, federalism (or states' rights) and the separation of powers to justify federal court disengagement.[80]

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73. *Id.* "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Id.* at 28.

74. Keyes v. Sch. Dist. No.1, Denver, Colo., 413 U.S. 189 (1973).

75. *Id.*

76. Notably by law professor and former NAACP counsel Derrick Bell. For an overview of his contribution to the literature of so-called "Critical Race Scholarship" *see* James R. Hackney Jr., *Derrick Bell's Re-Sounding: W.E.Du Bois, Modernism and Critical Race Scholarship*, 23 LAW & SOC. INQUIRY 141 (1998).

77. BELL, *supra* note 29, at 20.

78. *See infra* Part I.B.

79. Jenkins By Agyei v. Missouri, 19 F. 3d 393, 404 (8th Cir. 1994)(Beam, J., dissenting).

80. *See infra* Part II.D.

The result was that the jurisprudence of schools desegregation returned to the more familiar territory of the "color-blind Constitution"[81] and the negative imperative of non-discrimination by reference to race.[82] No longer prepared to accept that integration *per se* constituted a legitimate constitutional goal, the Court struck down affirmative action policies unlinked to official segregative action.[83] The re-appearance of racially-identifiable schools in a way that reflects demographic issues, as opposed to intentional state discrimination, has been termed "resegregation" and the accusation made that the Court has betrayed the legacy of *Brown*.[84]

B. *Resegregation and Race-Conscious Policies*

The issue of so-called resegregation perpetuates the dialogue between social science and law by posing new constitutional questions about the harms of racial isolation and the benefits of integration.[85] In cities where active court supervision of the desegregation process has ceased, school boards which have voluntarily adopted race-conscious assignment policies or quotas have been challenged in the courts by white students denied a place at over-subscribed schools on the grounds of their race.[86] The ensuing litigation once again raises the social policy questions concerning the educational purpose of racial integration which were not answered in *Brown I*: is integration a necessary ingredient of equal education? Or conversely: what is the harm of racial isolation and how will integration advance the educational opportunities of minority children?

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81. *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896)(Harlan, J., dissenting); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2782 (2007)(Thomas, J., concurring).

82. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Milliken v. Bradley, 418 U.S. 717 (1974).

83. *Adarand*, 515 U.S. 200; *City of Richmond*, 488 U.S. 469.

84. *See, e.g.*, GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: the Court's Role*, 81 N.C. L. REV. 1597 (2003).

85. See *infra* Part II.

86. *See* McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001 (D. Mass. 1996) (discussing Boston School Committee policy); *see also* Wessmann v. Gittens, 160 F. 3d. 790 (1st Cir.1998); Anderson v. City of Boston, 375 F.3d 71 (1st Cir. 2004); Boston's Children First v. Boston Sch. Comm. (*BCF IV*), 260 F. Supp. 2d 318 (D. Mass. 2003); Boston's Children First v. Boston Sch. Comm. (*BCF III*), 183 F. Supp. 2d 382 (D. Mass. 2002); Boston's Children First v. City of Boston (*BCF II*), 98 F. Supp. 2d 111 (D. Mass. 2000); Boston's Children First v. City of Boston (*BCF I*), 62 F. Supp. 2d 247 (D. Mass. 1999).

II. LOBBYING THE SUPREME COURT: THE "HARM-BENEFIT THESIS" AS LITIGATION STRATEGY

The two affirmative action cases from Seattle and Kentucky that have recently come before the Supreme Court represent the latest attempt in the endeavor to link social science research with constitutional or legal imperative.[87] The court was asked to test the issue of constitutionality of race-conscious admissions policies by reference to the harm prevented and the goal achieved.[88] The school boards argued that racial balance is necessary in order to enhance the educational opportunities of African American children.[89] The white parents' groups, the petitioners in these cases, opposed this on the grounds of unconstitutional racial preference.[90] At issue, once again, was the alleged "harm" of racial isolation and the educational benefits of integration. The court was asked to consider exactly what the constitutional relationship was between racial integration and the equal opportunities of African American children.[91]

As has become typical in schools cases, the litigation set expert against expert. The school authorities' argument that race-conscious policies promote educational benefit was supported by an *amicus curiae* brief submitted by 553 social scientists who testified to the educational benefits of racially integrated schools and the harmful educational implications of racial isolation.[92] In a rival brief for the plaintiffs, social scientist and desegregation expert Armor together with the academics Thernstrom and Thernstrom critically reviewed the research in the field, concluding that evidence of either a short-term or a long-term benefit of integration is simply lacking.[93] There is, in their view, "no evidence of a clear and consistent relationship either between desegregation and academic achievement" or "between desegregation and such long-term outcomes as college attendance, occupational status, and wages. . . ."[94] In terms of social outcomes such as "racial attitudes, prejudice, race relations and inter-racial

87. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, 127 S. Ct. 2738 (2007).

88. *See id.*

89. *Id.*

90. *Id.* at 2746.

91. *Id.*

92. Brief for 553 Social Scientists as Amici Curiae Supporting Respondents at 1–2, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05–908, 05–915).

93. Brief for David J. Armor et al. as Amici Curiae Supporting Petitioners at 5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05–908, 05–915).

94. *Id.*

contact," they suggest that the impact of racial balancing policies on white students is likely to be negative.[95]

The Seattle and Kentucky brief represented the fifth in a series of statements submitted to the Supreme Court in schools cases, starting with *Brown I* where Earl Warren's footnoted reference to the work of social scientists began a debate concerning the influence of social science on Supreme Court jurisprudence in school desegregation cases.[96]

A. *The Topeka Brief and the Harm of Segregation*

The NAACP argument as set out in the Appellate Brief submitted to the Supreme Court on behalf of the Plaintiffs made two assertions claimed to represent the consensus of social scientists: 1) Distinctions or classifications based upon race or color reflect a myth of Negro inferiority which has no basis in fact, and 2) State-enforced segregation harms the psychological development of African American children who interpret separation as connoting inferiority and are deprived of the benefits of an integrated education.[97]

Attached to the brief in the form of an appendix was a social science statement with 32 signatories who claimed to be "some of the foremost authorities in the area of American race relations,"[98] representing a spectrum of expertise from sociology and anthropology to psychology and psychiatry.

The decision of NAACP lawyers to use social science to mount a direct attack on the constitutionality of segregated education has been well-documented.[99] The so-called "Jim Crow" laws[100] of the South were legitimated by the Supreme Court decision in *Plessy*[101] which held that

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95. *Id.*

96. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 n.11 (1954).

97. Brief for Appellants at 5, Oliver Brown, et al., Appellants, v. Bd. of Educ. of Topeka, KS et al., 349 U.S. 294 (1955) (No. 1).

98. *Id.*

99. *See, e.g.*, HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE (1955); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 555–557 (1975)(describing fissures within NAACP over the use of social science data); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987)(describing early stages of litigation that led to the 1954 decision in *Brown*); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 197–205 (1998)(describing NAACP's decision to submit psychologist Kenneth Clark's "doll study" as evidence of segregation's harmful effect on black children); Louis Menand, *Civil Actions: Brown v. Board of Education and the Limits of Law*, NEW YORKER, Feb. 12 2001, at 91.

100. *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2001)(classic account of these state laws).

101. Plessy v. Ferguson, 163 U.S. 537 at 544 (1895).

separate facilities for blacks were not inherently objectionable: "laws permitting, and even requiring, [racial] separation ... do not necessarily imply the inferiority of either race to the other."[102] Moreover, the Court held that while the purpose of the Fourteenth Amendment was to enforce equality before the law, "it could not have been intended to abolish distinctions based upon color, or to enforce social, as opposed to political equality."[103] Enforced racial separation connotes black inferiority only because "the colored race chooses to put that construction upon it."[104]

Early NAACP challenges had had some success in requiring states to eliminate substantial disparities in the provision of facilities and educational opportunities, but left intact the racist assumptions upon which *Plessy* rested.[105] Under the leadership of Thurgood Marshall, NAACP lawyers worked with social scientists to develop a strategy which would disrupt these assumptions by demonstrating a) that the biology of race and racial inferiority was unsound, b) that the causes of racial inequality were social and economic, and c) that segregative practices reflecting scientifically unsound assumptions reinforced the psychological perceptions of young black children concerning their own inferiority and so operated as a structure of subordination.[106]

The "sociological argument" that they developed drew heavily upon the work of sociologists such as Kenneth and Mamie Clark, whose "doll studies" indicated the negative effects of racism on young children,[107] and Gunnar Myrdal, whose *American Dilemma* (1944) had done much to familiarize the American public with sociological arguments concerning the connection between race and social oppression.[108] In sociological terms, the argument went, equalization of resources and materials in a dual system would not of itself provide black children with an equal education because black schools, however well-resourced, would continue to

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102. *Id.* at 544.

103. *Id.*

104. *Id.*

105. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). The Gaines court believed that the "separate but equal" doctrine rested "wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Id.* at 349. Missouri's failure to provide a law school for blacks constituted a manifest denial of equal protection, even though the State offered the black applicant a scholarship to attend a law school in an adjoining State. *Id.* at 345. "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color." *Id.* at 349.

106. *See sources* cited *supra* note 99.

107. *See, e.g.*, Kenneth B. Clark & Mamie K. Clark, *Segregation as a Factor in the Racial Identification of Negro Pre-school Children: A Preliminary Report*, 8 J. EXPERIMENTAL ED. 161 (1939). For further discussion *see* COTTROL ET AL., *supra* note 32, at 124. *See also* Kluger, *supra* note 99.

108. Myrdal, *supra* note 58.

be regarded as inferior.[109] Calculation of the "harm" of segregation was more than a matter of resources; the intangible social and economic consequences rendered a dual system inherently discriminatory.

The Topeka arguments were trialed in two cases (*Sweatt* and *McLaurin*[110]) which preceded the *Brown* litigation and reached the Supreme Court in 1950. NAACP lawyers assembled expert testimony from social scientists, sociologists, psychologists and educators, all testifying to the potential of segregation to cause psychological harm.[111] The novelty of the approach was recognized in the opening words of the *Sweatt* Petitioner's Brief:

> This case is believed to present for the first time in this Court a record in which the issue of the validity of a state constitutional or statutory provision requiring the separation of the races in professional schools is clearly raised. It is the first record which contains expert testimony and other convincing evidence showing the lack of any reasonable basis for racial segregation. . . .[112]

The argument had some success. Both *Sweatt* and *McLaurin* were "equalization" cases and the Court was not required to address directly the constitutionality of *Plessy*.[113] Nevertheless, by emphasizing the importance of "intangible" benefits as an aspect of equality, the Court signaled its receptiveness to the sociological argument. In *Sweatt*, where a black applicant was denied access to the University of Texas Law School, the court referred to qualities "which are incapable of objective measurement but which make for greatness in a law school", and included matters such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige", as aspects of equal educational opportunity.[114] In *McLaurin*, Chief Justice Vinson for the Court laid particular emphasis upon the need for black students to mix with their white counterparts.[115] Thus when

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109. *See* sources cited *supra* note 99.

110. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma, 339 U.S. 637, 641 (1950).

111. *See* Kluger, *supra* note 99, at 256 (discussing the trial court evidence). In *Sweatt v. Painter*, the court received evidence on the psychological effects of segregation from Robert Redfield, Chair of the Department of Anthropology at the University of Chicago. An *amicus* brief submitted on behalf of a group of 187 law professors (The Committee of Law Teachers Against Segregation in Legal Education) made the argument that racial segregation was unconstitutional *per se*. See Kluger, *supra* note 99, at 275; *see also* Tushnet, *supra* note 99, at 70, 82, 105.

112. Petition for Writ of Certiorari, Sweatt v. Painter, 339 U.S. 629 (1950)(No. 2).

113. Sweatt v. Painter, 339 U.S. 629, 636 (1950).

114. *Id.* at 634.

115. McLaurin v. Oklahoma, 339 U.S. 637, 641 (1950). "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case

shortly afterwards the NAACP Board of Directors announced its resolution to seek desegregation in all future education cases, the structure of the arguments which were later deployed in *Brown* I was largely in place.[116]

Whether the decision of the Supreme Court was thereby influenced is a matter of some debate.[117] The words of Chief Justice Warren are well-known: "to separate [children] from others of a similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[118] His quotation of the lower court[119] and the famous footnote eleven which referenced the work of seven social scientists[120] to support his rejection of *Plessy* invited an affirmative conclusion from which he himself subsequently backtracked[121] and which

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represents the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained." *Id.*

116. In July 1950 following a conference of lawyers convened by Marshall to "map . . . the legal machinery for an all-out attack" on segregation. *See* Tushnet, *supra* note 99, at 136.

117. *See* Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

118. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 494 (1954).

119.

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

Id.

120. *Id.* at 495, FN11. (citing Kenneth B. Clark, ADDRESS AT THE MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH: THE EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950); PERSONALITY IN THE MAKING (Helen Leland Witmer & Ruth Kotinsky eds., 1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J.PSYCHOL. 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT'L J. OPINION AND ATTITUDE RES. 229 (1949); THEODORE BRAMELD, EDUCATIONAL COSTS IN DISCRIMINATION AND NATIONAL WELFARE 44–48 (MacIver ed., 1949); FRANKLIN E. FRAZIER, THE NEGRO IN THE UNITED STATES 674–681 (1949); and GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1949)).

121. Kluger, *supra* note 99, at 706 (stating "it was only a footnote, after all.").

has garnered opposition from both contemporary and subsequent academic commentators.[122]

As Dworkin and others have commented, the task of constitutional adjudication is a search for values that should not depend on matters of empirical research, particularly when researchers themselves do not agree.[123] The validity of the "doll studies" upon which the Topeka brief had drawn was itself challenged more or less immediately by subsequent researchers,[124] while the Coleman Report of 1966 sponsored by the U.S. Office of Education failed to find either the expected resource disparities between black schools and white schools or a discernible relationship between distribution of resources and academic achievement.[125] Its conclusion, that the major causes of under-achievement of both blacks and whites lay not in segregation but in the socio-economic class of their parents, undermined the harm-benefit thesis which produced the Topeka argument and brought about a split in the social science community.[126] In the years that followed, social scientists were no longer necessarily prepared to testify that racial separation constituted a denial of equal educational opportunity.[127]

Nevertheless, the Topeka statement set a strategic precedent that was followed in the years after *Brown* as the focus of desegregation moved to the north where there was no overtly discriminatory legislation. Here the NAACP needed social scientists to establish the causal connections between official policy and school and faculty composition required for a finding of constitutional violation.

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122. *See* Mody, *supra* note 117 (discussing the literature).

123. *See* Dworkin, *supra* note 41, at 24; *see also* Edmond Cahn, *A Dangerous Myth in the School Desegregation Cases*, 30 N.Y.U. L. Rev. 150, 157–58 (1955)("[I] would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records"); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

124. *See* ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 70 (3rd ed. Carolina Academic Press 2005) (1950) (discussing research critical of the "doll studies"). The "doll studies" conducted by Professor Kenneth Clark and his wife and fellow psychologist Mamie, claimed that black children in New York when given a choice of playing with a black or white doll showed a clear preference for the white doll. When asked to draw "the nice doll" the children again opted for the white. The Clarks drew the conclusion that black children in a segregated school system suffered from a sense of self-rejection and a loss of self-worth. *See generally* Kluger, *supra* note 106, at 317–18.

125. Armor, *supra* note 15, at 66. (discussing James.S Coleman et al., Equality of Educational Opportunity (1966)).

126. Professor Coleman himself refused to testify from this data in support of desegregation. *See* Chesler et al., *supra* note 33, at 41–43.

127. *Id.*

B. *Social Science and Desegregating the North: The Columbus Brief and "The Web of Institutional Discriminations"*

The hope that the Supreme Court would extend recognition of the social science harm-benefit thesis to the schools of the North, where racial identifiability reflected the heavy concentrations of the black urban population rather than state-mandated racial separation, evaporated after the Court ruled in *Keyes* that *de facto* segregation was not a constitutional violation *per se*.[128] Chesler *et al.* describe *Keyes* as "the last nail in the coffin of the harm theory of northern school desegregation."[129] Although, as Justice Powell pointed out, social science research confirmed that segregation in biracial metropolitan areas is largely a function of residential patterns,[130] the Supreme Court majority was not prepared to accept that racial separation *per se* offended the Constitution.[131] What was required was an officially mandated or produced dual system, involving proof of two things: segregative purpose causing segregative effect.[132] Causal analysis assumed central importance in northern schools desegregation jurisprudence: "where Plaintiffs proved that the school authorities had carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of a dual school system."[133] Following the Detroit schools case[134] which was the immediate predecessor for the Boston case, social science testimony on the causes and effects of racial separation and particularly the interrelationship between schools and their surrounding neighborhoods became a standard feature of NAACP—LDF litigation

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128. Keyes v. Sch. Dist. No. 1, 413 U.S 189, 208 (1973).

129. Chesler et al., *supra* note 33, at 46.

130. *Keyes*, 413 U.S. at 222–23 (Powell, J., concurring in part and dissenting in part)("[T]he familiar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws.").

131. *Keyes*, 413 U.S. at 205.

132. *Id.* at 205, 208 (stating that "the essential elements of *de jure* segregation [are] stated simply, a current condition of segregation resulting from intentional state action . . . "[w]e emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate."). *See also* Washington v. Davis, 426 U.S. 229, 240 (1976).

133. *Keyes*, 413 U.S. at 201.

134. Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971) was decided at the district court level on September 27, 1971. It reached the U.S. Supreme Court for the first time in 1974 in Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974).

strategy, not simply in relation to issues of liability but also to support a claim for a system-wide remedy.[135]

The *Keyes* court had been generous in one respect: the Court held that a finding of intentional discrimination in one part of the school system gave rise to a presumption that the discrimination is system wide, shifting the burden to the school authorities to prove that segregated schools were not "the result of intentionally segregative acts."[136] However, when the Detroit case reached the Supreme Court in 1974, causal analysis moved centre-stage as the Court refused a metropolitan solution to a city-district problem.[137] The plan, which involved busing from the (black) city to the (*White*) suburbs, was not acceptable because the out-of-district suburbs were not implicated in the urban-district violation.[138] A remedy which involved desegregation across district lines was only permissible where the plaintiffs could show "a constitutional violation within one district that produces a significant segregative effect in another district."[139]

Two cases from Ohio in which the Court was asked to sanction system-wide remedial plans were the occasion for the second social science statement submitted to the Supreme Court.[140] In *Dayton I* the court, while emphasizing the importance of tying relief to acts of discrimination, was prepared to recognize the existence of an "incremental segregative effect" which might justify a system-wide remedy.[141] When *Dayton II* and *Columbus*[142] reached the Supreme Court on the remedy issue, the Social Science Statement attached as an appendix to the *Columbus* Respondents' Brief[143] had 38 signatories, whose background was not psychology or social psychology as in *Brown*, but who were primarily identifiable as sociologists, or political or educational scientists.[144] The purpose was to

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135. *See supra* note 106 and accompanying text.

136. Keyes v. Sch. Dist. No. 1, 413 U.S 189, 208 (1973).

137. *Milliken I*, 418 U.S. at 744–45.

138. *Id.*

139. *Id.*

140. Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

141. Dayton Bd. of Educ. v. Brinkman (*Dayton I*), 433 U.S. 406 (1977) (Rehnquist, J., dissenting). Rhenquist stated that "[When a constitutional violation has been found] the District Court [. . .] must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a system wide remedy." *Id.* at 420 (citing *Keyes*, 413 U.S. 526 (1979)).

142. *Dayton II*, 443 U.S. 526; Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

143. Brief for Respondents, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)(No. 78–610).

144. *See* Chesler et al., *supra* note 33, at 25. The list of signatories included Robert A. Dentler.

lend support to the NAACP claim for a system-wide remedy by asserting the cumulative effect of a "web of institutional discriminations" as the basic cause of school and residential segregation.[145] The statement recast the "harm-benefit" thesis into three basic claims: 1) that patterns of residential segregation were attributable to the actions of public authorities, including school boards; 2) that the relationship between school segregation and residential segregation was interdependent, and 3) that neighborhood school policies and attendance zones which produce racially identifiable schools can and do contribute to residential segregation and thus can be regarded as discriminatory.[146] In a section headed "Conclusions Social Science Can and Cannot Supply," the social scientists set out two important caveats: 1) the cumulative effect for which they were arguing was not susceptible to a "but for" test (i.e. would the segregation have occurred "but for" the discriminatory acts complained of),[147] and 2) there was an absence of consensus about matters such as the terms of the debate, the appropriate measurement techniques and theoretical formulations and the trustworthiness of empirical results.[148]

The assertion of "an emerging consensus" concerning a preference for system-wide relief was apparently enough for the *Dayton II* and *Columbus* majorities[149] (there is no direct or indirect reference to the statement in the majority opinion in either case), but not for Justice Rehnquist whose criticism of the district court's "cavalier approach to causality and purpose" continued to emphasize the importance of a "but for" approach to issues of violation and remedy.[150] Thus awareness of a likely segregative effect should not be regarded as intentional discrimination, and remedies must be tailored to the violation. In his view "the fundamental mission of [desegregation] remedies is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct."[151]

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145. Brief for Respondents, *supra* note 148, Appendix at 13a.

146. *See id.* at 3a, 7a, 10a-14a.

147. *Id.* at 18a. The brief argues: "[s]ocial scientists cannot answer such questions with precision. The questions can be rephrased to call for stating what the present would be like if the past had differed in certain specified respects. This is reminiscent of the grand 'what if' games of history [...] The present state of empirical knowledge and models of social change does not permit precise specification of the effects of removing particular historical actions. Although many of the causes of segregated outcomes are known, this knowledge is not so thoroughly quantified as to permit precise estimates of the effects of specific discriminatory acts on general patterns of segregation." *Id.* at 19a.

148. *Id.* at 25a.

149. *Id.* Research indicated that system-wide desegregation plans which minimize the possibility of "white-flight" were more successful at establishing stability in student enrolments and thus more likely to succeed than plans which were limited "to the immediate vicinity of a ghetto or barrio." *Id.* at 25a-26a.

150. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 515 (1979).

151. *Id.* at 524 (Rehnquist, J., dissenting).

C. *The Harm-Benefit Thesis and Unitary Status: The Freeman and Jenkins Briefs*

The inability of social science to provide precise answers to questions concerning the exact relationship between specific discriminatory acts and their alleged lingering effects significantly limited the utility of the "harm-benefit" thesis in the termination cases of the 1990s. In *Brown II* the Court directed school boards "to effectuate a transition to a racially non-discriminatory school system" and directed district judges to maintain jurisdiction during the transition.[152] The *Green* Court recast the goal of desegregation in terms of "unitary status": "the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about."[153] In the case of *Board of Education v. Dowell*,[154] the Court required a two-part inquiry for unitary status and federal court withdrawal: 1) had the school district complied in good faith with the court order, and 2) had the vestiges of past discrimination been eliminated "to the extent practicable"?[155] In considering the latter point, the District Court should consider not only student assignments but "every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities."[156] The question in *Freeman* was whether the District Court could relinquish jurisdiction incrementally even though full compliance with a desegregation order might not have been achieved.[157]

The Social Science Statement submitted by way of an *amicus* brief[158] in support of continuing jurisdiction re-articulated the "harm-benefit thesis" in terms of the benefits of desegregation: "desegregation is generally associated with moderate gains in the achievement of black students and the achievement of white students is typically unaffected."[159] "Its benefits extend beyond the classroom to the larger issues of integration in employment, higher education, and housing."[160] It acknowledged the association with "white flight" but asserted that the relationship between school segregation and residential segregation is reflexive; desegregated schools can influence housing choice, and desegregation plans, including

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152. Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 301 (1955).

153. Green v. County Sch. Bd., 391 U.S. 430, 436 (1968).

154. Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

155. *Id.* at 249, 250.

156. *Id.* at 250 (citing *Green*, 391 U.S. at 435).

157. Freeman v. Pitts, 503 U.S. 467, 471 (1992).

158. Brief for NAACP et al. as Amici Curiae Supporting Respondents, Freeman v. Pitts, 503 U.S. 467 (1991) (No. 89–1290). *See generally* Armor, *supra* note 15, 71–76.

159. Brief for NAACP et al. , as Amici Curiae Supporting Respondents, *supra* note 162, at 51 (quoting Willis D. Hawley & Mark A. Smylie, The Contribution of School Desegregation to Academic Achievement and Racial Integration in Eliminating Racism: Profiles in Controversy 284–285 (Phyllis A. Katz and Dalmas A. Taylor eds. 1988)).

160. *Id.* at 58.

extensive court-ordered plans, can foster long-lasting demographic stability.[161] At its best, it concluded, desegregation is not simply a process of placing black and white children together in a school but is a matter of developing techniques, including those of educational innovation that will further the goals of racial integration.[162]

However, as Armor suggests, the acknowledgement that effective desegregation is dependent upon certain conditions, without which the promised benefits will not necessarily be delivered, weakened the impact and deprived the "harm-benefit" thesis of some of its moral authority.[163] Upholding the power of the District Court to withdraw from supervision incrementally, the Supreme Court was not to be deflected from strict causal analysis.[164] In a rare unanimous decision, the Court affirmed what it said was implicit in its earlier ruling in *Pasadena Bd. of Educ. v. Spangler*[165]: "racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."[166] Justice Scalia in a concurring opinion noted the difficulties of attributing the existence of racially imbalanced schools to constitutional violations "dating from the days when Lyndon Johnson was President or earlier."[167]

The inclination of the Court to move its jurisprudence to a post-desegregation climate was the occasion for the fourth social science statement to be submitted to the Court, this time in a case that considered the harm-benefit thesis in terms of educational under-achievement. In *Jenkins III*, the issue was whether the State of Missouri should be required to continue to fund quality education programs established to compensate for the reduction in achievement levels of minority children attributable to prior *de jure* segregation.[168] The *Milliken II* Court had accepted the argument that the harms of unconstitutional segregation could include educational harm as well as racial isolation.[169] The remedial plan ordered into effect in Missouri had been described as the most ambitious and expensive remedial program in the history of school desegregation.[170]

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161. *Id.* at 44–50.

162. *Id.* at 72–73.

163. Armor, *supra* note 15, at 73.

164. Freeman v. Pitts, 503 U.S. 467 (1992).

165. Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). In *Spangler* the Court held that once a unitary system had been achieved there was no duty to maintain racial balance where the imbalance was the result of demographic forces rather than constitutional violation. *Id.* at 435–37.

166. *Freeman*, 503 U.S. at 494.

167. *Id.* at 506 (Scalia, J., concurring). *See also id.* at 503 (Scalia, J., concurring) ("Racially imbalanced schools are hence the product of a blend of public and private actions and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of these factors is guesswork.").

168. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 74–80 (1995).

169. Milliken v. Bradley (*Millken II*), 433 U.S. 267, 287–288 (1977).

170. *Jenkins III*, 515 U.S. at 78.

The total cost for the quality education programs alone exceeded $220 million.[171] The class plaintiffs now opposed a partial termination order, arguing that the fact that student achievement levels as measured by annual standardized tests were still "at or below national norms at many grade levels" constituted a vestige of discrimination which had yet to be fully eliminated.[172]

Submitted as an appendix to a Social Science amicus brief and entitled *Educational Remedies for School Segregation: A Social Science Statement*, the purpose of the statement was to caution against application of a crude causal analysis in relation to the vestiges of segregation.[173] The documented under-achievement of minority children, it argued, reflects a culture of low expectations on the part of teachers and students alike and is associated with the high concentration of economic poverty in urban school districts. Both of these factors have their origins in decades of racial segregation and continue to affect behavior and achievement patterns long after the unconstitutional discriminatory practices have ceased.[174] To be effective, the scientists argued, remedial programs need to be long term and the educational components should be rigorously monitored and evaluated by recognized indicators which include standardized testing of student outcomes.[175]

D. *Does the Court Take Note? The Harm-Benefit Thesis and a Public Law Remedial Model*

The extent to which desegregation jurisprudence at the Supreme Court level has, or indeed should, take account of social science has generated considerable debate.[176] Apart from Footnote Eleven in *Brown* it is difficult to identify any clear evidence that social science submissions have had a direct impact on the jurisprudence of the Court.[177] However, as Professor James Ryan points out, in a political climate supportive of the goal of integration, the Court was apparently prepared to accept the remedial benefits of integration for minority students more or less without

171. *Id.* at 76.

172. *Id.* at 72.

173. Brief of Anderson et al. as Amici Curiae Supporting Respondents, Missouri v. Jenkins, 515 U.S. 70 (1995)(No. 93–1823), *reprinted in* Mark A. Smylie et al., *Educational Remedies for School Segregation: A Social Science Statement to the U.S. Supreme Court in Missouri v. Jenkins*, 27 Urb. Rev. 207(1995).

174. Smylie, *supra* note 173, at 212.

175. *Id.* at 220–24.

176. For a recent review of the literature regarding Brown see Mody, *supra* note 117. For a recent discussion of later case law see James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. Rev. 1659 (2003).

177. Ryan, *supra* note 176.

question.[178] Indeed, the relaxed approach to issues of causation evident in the presumptions of *Green*,[179] *Swann*,[180] and *Keyes*[181] more or less assumes the "web of institutional discriminations" which the later Columbus social science statement argued made education a "pervasive governmentally organized activity."[182]

There is, however, no doubt that in the termination cases of the 1990s the Court accorded higher priority to disengagement than to social science-based arguments concerning the continuing harms of segregation. In *Dowell* the Court upheld a finding of unitary status even though, as the dissent pointed out, the conditions likely to inflict the "stigmatic injury condemned in *Brown I*" persisted and there remained "feasible methods of eliminating such conditions."[183] In *Freeman*,[184] the Court sanctioned partial and incremental withdrawal from desegregation supervision and in *Jenkins III* it permitted termination of remedial programs which had been in place for seven years on the basis, despite the findings of the district judge to the contrary, that "white flight" and the continuing disparities between the achievements of minority and majority students must be attributable to "external factors, beyond the control of the [school committee] and the State."[185] The Social Science statement was more or less ignored. Justice Thomas, concurring, was overtly dismissive of the value of social science evidence generally in schools cases: "[T]he judiciary is fully competent to make independent determinations concerning the existence of state [dis-

178. *Id.* at 1666.

179. Green v. County Sch. Bd., 391 U.S. 430 (1968).

180. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

181. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

182. Brief for Respondents at 7a, 13a, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)(No. 78–610). *See also Green*, 391 U.S. 430; *Swann*, 402 U.S. at 26 (establishing the presumption that any present segregation is the result of prior acts of segregation); *Keyes*, 413 U.S. at 208 (establishing the presumption that a finding of intentional acts of discrimination in one part of a school district warranted a presumption that other parts of the district were similarly affected).

183. Bd. of Educ. v. Dowell, 498 U.S. 237, 252 (1991).(Marshall, J., dissenting).

184. Freeman v. Pitts, 503 U.S. 467 (1992).

185. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 102 (1995). The trial court had specifically found that *de jure* segregation "caused a system-wide reduction in student achievement" in the Kansas City, MO schools and developed a remedial plan. Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D.Mo.), *aff'd* Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986). The Eighth Circuit upheld the district court's later decision denying the school district's motion for a finding of unitary status. *See* Jenkins v. Missouri, 19 F.3d 393, 404 (8th Cir. 1994). Dissenting from the denial of a request for rehearing en banc and objecting to the district court's establishment of a student achievement goal gauged by results from standardized tests, Judge Beam wrote "in my view, this case as it now proceeds, involves an exercise in pedagogical sociology not constitutional adjudication." *Id.* at 404 (Beam, J. dissenting). The Supreme Court ordered the district court to "sharply limit, if not dispense with, its reliance on" student achievement as measured by test scores. *Jenkins III*, 515 U.S. at 101.

criminatory] action without the unnecessary ... assistance of the social sciences."[186] Lower courts "should not be swayed by the easy answers of social science, nor should they accept the findings and the assumptions of sociology and psychology at the expense of constitutional principle."[187] The Civil Rights Project has these remarks in mind when it attributes the decline in the momentum of desegregation to changes in Supreme Court jurisprudence. "Since the Supreme Court changed desegregation law in three major decisions between 1991 and 95, the momentum of desegregation for black students has clearly reversed in the South, where the movement had by far its greatest success." In consequence, it charges, federal courts have changed from being "on the leading edge" of desegregation activity to become "its greatest obstacle."[188]

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186. *Jenkins III*, 515 U.S. at 121 (Thomas, J., concurring).

187. *Id.* at 122–23.

188. Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 5–6 (2003), *Available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf. *See, e.g,* Little Rock Sch. Dist. v. Pulaski County, 237 F. Supp. 2d. 988 (E.D. Ark. 2002)(for Jenkins-induced skepticism regarding social science testimony in termination cases); *see also* Davis v. Sch. Dist. of Pontiac, 95 F. Supp. 2d. 688, 697 (E.D. Mich. 2000)(dismissing social science information).

In Pulaski the district court, holding that plaintiffs had not come forward with evidence to attribute the achievement gap to unconstitutional conduct of the school board, commented:

> Sociologists and educators have recognized for over a decade that there are a host of factors, completely unrelated to the effects of *de jure* segregation, that also are responsible for the minority student achievement gap. Some of these other factors include low birth weight, poverty, whether the student is raised by a single parent, parental interest and involvement, and peer influence. Complicating this issue still further is the fact that the achievement gap "exists across the country in prior segregated school districts and school districts that have not discriminated against minority students."

237 F. Supp.2d. at 1037 (quoting Jenkins v. Missouri, 959 F. Supp. 1151, 1158–64 (W.D. Mo. 1997)).

The court continued,

> How does a trial court go about determining, with *any* degree of precision, the percentage of the achievement gap (assuming there is any) that is causally related to *de jure* segregation (which ended many decades earlier)-after somehow excluding the host of other socioeconomic factors that are universally recognized as also contributing to the achievement gap? Reviewing the reported cases in which brave souls have undertaken this task puts one in mind of trying to nail jelly to a wall."

Id.

In *Davis* the court was dismissive of the information value of social science evidence:

> Even now, with the perspective of almost three decades, historians, sociologists and legal scholars vigorously disagree over the socio-economic, demographic and educational impact busing has had on our communities. As

Chesler *et al.*[189] have suggested that school desegregation remedial jurisprudence evidences a tension between two models of adjudication described in Chayes' much-cited article published in 1976.[190] Chayes argued that the traditional conception of the civil lawsuit as a vehicle for settling disputes between private individuals about private rights does not fit class action suits in constitutional matters which are primarily concerned with grievances about the operation of public policy.[191] In the traditional conception, the "private law model," the focus of judicial inquiry is on issues of intent (intentional infringement of plaintiffs' rights) and the remedial purpose is restitution or compensation.[192] The orientation is retrospective; the court asks "what are the consequences for the parties of specific past instances of conduct?" and tailors relief to remedy those consequences. In the school desegregation class action, however, issues of intent lose their centrality and the orientation of inquiry becomes essentially forward-looking. The relief sought is usually injunctive, and fashioned by reference to the likely consequences of policy implementation and official behavior.[193] The consequence is that in a public law model, remedial outcomes depend upon a process of fact-evaluation more akin to legislative than judicial process as traditionally conceived:

> The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief," existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.[194]

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in so many areas of debate, current perspectives on the impact of busing appear divided along the lines of the old adage, "Where you come in is where you go out."

Davis, 95 F. Supp.2d. at 695.

Accord Wessmann v. Gittens, 160 F. 3d. 790, 804 (1st Cir.1998) (finding that a post-termination race-conscious admissions policy for the Boston Latin schools was not justified by the prior history of *de jure* segregation, and criticizing the experts' testimony: "we do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena.").

189. CHESLER, *supra* note 33.

190. CHAYES, *supra* note 34.

191. *Id.* at 1302.

192. *Id.* at 1285.

193. The court is asked "to enjoin future or threatened action, or to modify a course of conduct presently in train or a condition presently existing." *Id.* at 1296.

194. *Id.* at 1297.

E. *Pedagogical Sociology and Judicial Activism: The Search for Legitimacy*

Brown II required the federal judiciary to step outside a traditional role of adjudication and assume responsibility for tasks of management and supervision. The widespread expansion of the process described by Chayes[195] into fields such as prisons, housing and mental health, underpinned by a widespread cynicism verging on nihilism concerning the autonomous nature of legal reasoning, has generated what Professor Mark Yudof has described as a "crisis of legitimacy" in relation to judicial activity.[196] In this context, the attraction of social science evidence is its capacity to defuse arguments concerning the irrational nature of judicial reasoning; if processes of legal reasoning could not themselves be described as "scientific," they could at least claim to be of social benefit, as determined by the objective processes of "scientific" disciplines.[197]

In desegregation litigation, the submission of sociological information and data for the judge's information became unremarkable to the point of routine; yet, as Cahn[198] points out, the so-called Brandeis brief,[199] when used as a strategy of attack, is a two-edged sword.[200] In an adversarial process, "shrewd, resourceful lawyers can put a Brandeis brief together in support of almost any conceivable exercise of legislative judgment."[201] The politicization of social science research in schools desegregation cases did much to undermine faith in its claims of objectivity and maturity and engendered a growing perception of a crisis of legitimacy on the part of the social sciences themselves.[202] The dissent's dismissal of "pedagogical sociology" in *Jenkins III* articulates the growing mistrust on the part of the

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195. Chayes, *supra* note 34.

196. Yudof, *supra* note 38, at 67.

197. *Id.*

198. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 154 (1955).

199. LOUIS D. BRANDEIS, ASSISTED BY JOSEPHINE GOLDMARK, WOMEN IN INDUSTRY: DECISION OF THE UNITED STATES SUPREME COURT IN CURT MULLER VS. STATE OF OREGON: UPHOLDING THE CONSTITUTIONALITY OF THE OREGON TEN HOUR LAW FOR WOMEN AND BRIEF FOR THE STATE OF OREGON (1908), *available at* http://ocp.hul.harvard.edu/ww/organizations-ncl.php. The brief was filed by future Supreme Court Justice Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908), and argued the need for special protection for women on health and safety grounds in support of an Oregon statute that purported to restrict women's working hours. The Brandeis brief contained two pages of legal argument accompanied by approximately 100 pages of sociological and economic data. The style was replicated in the NAACP's brief in *Brown I*. *See generally* PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 75–101, 134–172(1972).

200. *See* Cahn, *supra* note 198, at 154.

201. *Id.* at 154. *See generally* ROSEN, *supra* note 199, at 75.

202. Yudof, *supra* note 38, at 71.

judiciary concerning the value of testimony from the "soft sciences" in constitutional matters.[203]

Chesler *et al.* suggest that school desegregation cases represent a battle over a point of view: what kind of a problem is racial inequality?[204] It was also a battle about responsibility. The NAACP/LDF use of social science evidence in school desegregation cases was a strategy designed to persuade the Court to conceptualize desegregation in terms of outcomes rather than intentions.[205] From this point of view, the affirmative action requirement of *Green*[206] and the racial balance criterion of *Swann*[207] represent public law models of adjudication whereby the Court, apprised of a social problem requiring address, sanctioned orders that required policy formulation and implementation.[208] In the northern cases, however, the Court drew back from the logic of this approach. By preserving the *de jure /de facto* distinction and refusing to accept the social science based argument that segregation was a "harm" *per se*, the Court returned to a private-law model at least as far as issues of liability are concerned.[209] Milliken *II*, in which the Court refused to sanction a metropolitan remedy for an intradistrict violation, is fully consistent with this approach.[210] In remedial terms, however, as the Ohio cases demonstrate, the Court continued to sanction system-wide remedial decrees characteristic of a public law results-oriented approach[211] until the 1990s termination cases, by which time the priority of the Court was no longer social change but legitimacy and the propriety of continuing judicial supervision of state affairs.[212]

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203. Jenkins v. Missouri (*Jenkins III*), 19 F.3d 393, 404 (8th Cir. 1994).

204. CHESLER ET AL., *supra* note 33, at 203.

205. *Id.* at 37.

206. Green v. County Sch. Bd. of New Kent, 391 U.S. 430 (1968).

207. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

208. *See also* Fiss, *supra* note 38.

209. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

210. Milliken v. Bradley, 418 U.S. 717, 744, 746, 748, 752 (1974).

211. *See* Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)("Where a racially discriminatory school system has been found to exist, Brown II imposes a duty on local school boards to 'effectuate a transition to a racially non-discriminatory school system. Brown II was a call for the dismantling of well-entrenched dual systems' and school boards operating such systems were 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.")(quoting Brown v. Bd. of Educ., 347 U.S. 294, 301 (1955) and Green v. County Sch. Bd., 349 U.S. 430, 437–38 (1968)).

212. *See* Freeman v. Pitts, 503 U.S. 467 (1992). *See also* Missouri v. Jenkins(*Jenkins III*), 515 U.S. 70 (1995).

F. *The Changing Priorities of Constitutional Adjudication*

The Court has never articulated a theory of desegregation which can adequately explain either the contradictions inherent in the above account or the role that social science should play in constitutional adjudication.[213] In an attempt to do both, Dworkin has distinguished between what he terms the causal and interpretive judgments of social sciences.[214] The former, he argues, derive from observation and, without a mechanical model of causation, rest upon statistical correlations which are susceptible to fluctuation and have no resonance in the normal vocabulary of constitutional adjudication.[215] However, judgments about the nature of a community's response to a particular social phenomenon or practice—such as segregation—are interpretive judgments of the kind regularly employed by the judiciary in constitutional adjudication:

> "Interpretive judgments are not foreign to the judge; they don't draw on a kind of technology that is for him arcane. On the contrary, they draw upon the same kinds of skills, and are indeed identical in their structure, with the judgment that a judge makes when he draws from a line of precedent a characterization that seems to him a more sensitive characterization of the precedents than any other."[216]

If, as Dworkin argues, the Equal Protection guarantee of the Constitution is a commitment that the government, in making political decisions, will treat each individual with equal concern and respect, and the judicial decision to require government to take affirmative action to desegregate reflects the Court's judgment that the political process at any particular time cannot be relied upon to secure that guarantee,[217] then two things become clear and an explanation for the changing attitude of the Court emerges. Interpretive judgments of social science may have done much to convince the federal judiciary first of the social consequences of "the Negro problem" and the value of integration as an appropriate response and then of the "web of segregation" that renders political process an unreliable mechanism of change. Justice Thomas's comments in *Jenkins III*, however, reflect a clear perception that forty years after *Brown* the

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213. Yudof, *supra* note 196, at 87 ("Indeed it has done all that is within its power to obfuscate the underlying bases of its decisions."). *See also id.* for a discussion of theoretical models; James S. Liebman, *Desegregating Politics: "All-out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO.L.J. 1355, 1357 (1991) (stating that "The remedial process in public law litigation is a practice in search of a theory.").

214. Dworkin, *supra* note 41, at 20–26.

215. *Id.*

216. *Id.* at 21.

217. *See id.* at 24–26.

interpretive assumptions of "Negro inferiority" which underpinned the judicial mandate for affirmative action were outdated, while the causal judgments concerning segregation's lingering effects were no longer sufficiently reliable to warrant continuing departure from the norms of federalism and judicial deference to elected legislatures that otherwise set limits to the legitimacy of judicial interference with state and federal affairs.[218]

In the schools affirmative action cases that came before the Supreme Court in the 2006–2007 Term,[219] hopes that the Court would afford a favorable reception to social science submissions, as it had in the case of the University of Michigan Law School admission policies, were dashed.[220] Despite extensive social science submissions on both sides, the plurality chose not to enter the debate, basing their decision upon the primacy of the "color-blind constitution" in a non-desegregation situation.[221]

The affirmative action cases differ from the desegregation cases in that they do not as yet directly engage the question of remedy. At issue is the legitimacy of policies of racial preference in the pursuit of racial diversity and the extent to which, more than fifty years after *Brown*, a Court in retreat from an activist model of adjudication should be willing to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.[222] For the Seattle Court, the distinction be-

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218. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 114, 138 (1995)(Thomas, J., concurring)("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior.").

219. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

220. Grutter v. Bollinger, 539 U.S. 306 (2003). The majority opinion accepted the testimony of *amici* who included business and military leaders as well as social scientists concerning the educational benefits of racial diversity. "The Law School's claim of a compelling interest is further bolstered by its *amici* who point to the educational benefits that flow from student body diversity" *Id.* at 333. "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints" *Id.* at 333–34. "High-ranking retired officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience, a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security" *Id.* at 331.

221. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2755–8, 2765–68.

222. *Id.* at 2778–9 (Thomas, J., concurring)(stating that the constitutionality of the school boards' race-conscious policies should not be left "at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt [such an approach] would be to abdicate our constitutional responsibilities.").

The Grutter majority had been careful to bolster its reliance on social science with the opinion of business and military leaders on the benefits of racial diversity, while Justice

tween "integration" and "desegregation" was clear. School boards act unconstitutionally if they seek to perpetuate the "hard won gains" of the desegregation era by race-conscious programs to combat "resegregation" that is not directly attributable to state action.[223] The divisions within the Court were predictable. For Justice Breyer, the school board plans "represented local efforts to bring about the kind of racially integrated education" that was the promise of *Brown*.[224] Justice Kennedy was prepared to recognize the compelling nature of state action to further the nation's "historic commitment" to equal educational opportunity for all;[225] but, for Justice Thomas, once again the "tenuous"[226] or "far from apparent"[227] link between racial balance and improved educational outcomes for black children did not justify unconstitutional race-based experiments to achieve socially desirable ends: "this Court does not sit to 'create a society that includes all Americans' or to solve the problems of 'troubled inner city schooling.' We are not social engineers."[228]

Thomas in dissent dismissed the "faddish slogan of the cognoscenti" with counter- research citations with contrary outcomes. *See Grutter*, 539 U.S. at 350, 364 (Thomas, J., dissenting).

223. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

224. *Id.* at 2800 (Breyer, J., dissenting).

225. *Id.* at 2797 (Kennedy, J., concurring)("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating equal opportunity for all its children.").

226. *Id.* at 2778 (Thomas, J., concurring)("Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.").

227. *Id.* at 2776 ("The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.").

228. *Id.* at 2779 n.14. The court stated:

> regardless of what Justice Breyer's goals might be, this Court does not sit to "create a society that includes all Americans' or to solve the problems of 'troubled inner city schooling." We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

Id.

In his concurrence, Justice Thomas directly articulates the view that the "actual" gain in these cases lies not in the elimination of racial imbalance but in the elimination of state-enforced separation. "The dissent's assertion that these plans are necessary for the school districts to maintain their 'hard-won gains' reveals its conflation of segregation and racial imbalance." *Id.* at 2770 n.3. His opinion continues: "In the context of public schooling, segregation is the deliberate operation of a school system to 'carry out a governmental policy to separate pupils in schools solely on the basis of race.' In *Brown*, this court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth

III. EDUCATION VERSUS INTEGRATION IN BOSTON

One of the main arguments employed by the Boston school committee to justify its opposition to court-ordered desegregation was that of usurpation of power.[229] Judge Garrity's court plan and orders[230] usurped power the constitution had given to elected state officials; yet, as Judge Frank Johnson has explained, so-called "judicial activism" in cases like this was a function of abdication of civic responsibility.[231] Federal judges faced with official opposition were left largely to their own devices. The Supreme Court had declared war on "gradualism" and "freedom of choice" and other overtly race-neutral policies which masked attempts to subvert the effect of *Brown*, and indicated the broad parameters of the remedial powers of district courts to fashion appropriate decrees where school authorities default. It left the details to be worked out by district judges on a case-by-case basis.

As Judge Frank Coffin[232] has pointed out, the process was unfamiliar and far from standardized.[233]

Amendment . . . [but] [r]acial imbalance is not segregation." *Id.* at 2769 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971)). "Outside of the context of remediation for past *de jure* segregation, 'integration' is simply racial balancing." *Id.* at n.2.

229. Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976).

230. I have been unable to ascertain the exact number. The court records are not complete. Formisano gives a figure of 415 orders in eleven years. *See* RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S 2 (1991).

231. Frank M. Johnson, Jr., *The Role of Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 279 (1981). Johnson asserts:

> The remedy for judicial activism is a recognition that this trust is not one solely for the judiciary. As long as government officials entrusted with responsibility for constitutional governance disregard that responsibility, the judiciary must and will stand ready to intervene to the extent necessary on behalf of the deprived. To avoid this intervention, all that government officials need do is confront their responsibilities with the diligence and honesty that their constituencies deserve. Conscientious, responsible leadership will in most instances make judicial intervention unnecessary.

Id.

232. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983, 985 (1979).

233. It could also be extremely complex, presenting reviewing courts with considerable difficulties, *vide* the Fourth Circuit's abdication in *Swann*:

> We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to

> The judge must find the best way to accomplish a goal, seeking help not only from the parties but from court-appointed experts and masters and from citizens' committees. In this case, the district judge was concerned with such things as bus routes and distances, appropriate white-black-other minority ratios from specific schools, magnet schools, enrichment programs, methods of transfer between schools, teacher recruitment, and pairings of colleges and universities with specific secondary schools. All of these issues ordinarily would be appropriate grist for the relevant educational policymaking body, here the Boston School Committee. Indeed, the function is very close to legislative decision-making. Because the legislative authorities would not act, however, the district judge was forced to move beyond the traditional role ... and fashioned his own remedy.[234]

The immediate precedent for the Garrity orders came from the Southern state of South Carolina, where District Judge James B. McMillan faced a residentially segregated urban school system and a school committee unable or unwilling to produce an acceptable plan. Judge McMillan's appointment of education expert Dr James Finger as court advisor was a tactic which was subsequently followed by Judge Jack Weinstein in New York as well as by Judge Garrity in Boston.[235] The court-ordered "Finger

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> deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

Swann, 431 F.2d at 150.

234. Coffin, *supra* note 232, at 985.

235. Swann v. Charlotte Mecklenburg Bd. Of Educ., 311 F. Supp. 265 (W.D.N.C. 1970) *vacated in part*, Swann v. Charlotte- Mecklenburg Bd. Of Ed., 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971). *See* BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986)(for a discussion of McMillan's order); *see also* DAVISON M. DOUGLAS, READING WRITING AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOL (1995)(for a general account).

As Schwartz points out, the choice of Dr. Finger reflected the practical difficulties faced by judges and counsel in securing assistance from local educators who were unwilling to testify for fear of antagonizing the school board. SCHWARTZ, *supra* at 14. It seems that the first appointment of an educational expert in a schools case was by Judge Bohanon, supervising the desegregation of the public schools of Oklahoma City. He appointed education experts Dr William R. Carmack, Dr. Willard B. Spalding and Dr. Earl A. McGovern to carry out a study and file a desegregation report which the court then adopted. *See* Dowell v. Sch. Bd. of Okla. City Pub. Sch., 244 F. Supp. 971, 973 (W.D. Okla. 1965).

For Judge Weinstein's orders, see Hart v. Cmty. Sch. Bd., 383 F. Supp. 699 (E.D. N.Y. 1974), and for the discussion by Special Master, See Curtis J. Berger, *Away from the Courthouse and into the Field: the Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). For Judge Garrity's appointment of experts, see Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975).

Plan" which adopted "racial balance" as a criterion of desegregation and compulsory busing as a strategy received Supreme Court approval in 1971 and provided a blueprint for Northern school desegregation.[236]

Judge Garrity's court plan implemented, in September 1975, was essentially a student assignment and redistricting plan on the *Swann* model, with additional educational enrichment features of the kind later approved in *Milliken II*.[237] The "political dynamite"[238] of both plans that provoked controversy on the national stage and rioting on an unprecedented scale on the streets of Boston was the requirement for compulsory transportation of students.[239] Busing in Boston became the focal point for school committee-led opposition to court-ordered desegregation.[240] Both the State plan, ordered into effect in September of 1974, and the Court plan that took effect the year after required the busing of students out of their neighborhoods to schools in another part of the city.[241] The arrival of buses carrying black children into white, mainly Irish working class South Boston triggered the riots that made Boston the worst symbol of white racism outside the South and saw state troopers join city police on the streets and in the schools in an effort to restore order.[242]

A. *The Campaign for Racial Balance in Boston*

The lawsuit filed on behalf of black plaintiffs against the Boston school committee on March 2 1972 did not come out of the blue.[243] Dis-

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236. Hart v. Cmty. Sch. Bd., 383 F. Supp. 699 (D.C.N.Y. 1974).

237. Milliken v. Bradley, 433 U.S. 267, 275–76, 279 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); *Kerrigan*, 401 F. Supp. 216.

238. Schwartz, *supra* note 235, at 19.

239. *See* J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985); *see also* RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE CLASS AND ETHNICITY IN THE 19602 AND 1970S (1991); J. MICHAEL ROSS & WILLIAM M. BERG, 'I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER': THE BOSTON SCHOOL DESEGREGATION CONTROVERSY, (1981).

240. *See* Lukas, *supra* note 248; *see also* Formisano, *supra* note 248; Ross & Berg, *supra* note 248.

241. *Kerrigan*, 401 F. Supp. at 239. The Court plan required the busing of approximately 21,000 students. This number was an estimate based upon analysis by the court-appointed experts. School committee figures had grossly over-estimated the numbers of students in the system. *See* ROBERT A.DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE,27–28 (1981).

242. In October of 1974, Governor Sargent's request for federal assistance resulted in the 82nd Airborne Regiment, stationed in Fort Bragg (N.C.) being placed on stand-by alert. *See* ROSS &. BERG, *supra* note 239, at 263. Announcing his Phase II plan for implementation at school opening in autumn 1975, Judge Garrity noted that 166 state and local police officers continued to be stationed inside South Boston High, with 134 stationed in the vicinity during school hours. Morgan v. Kerrigan, 401 F. Supp. 216, 225 (D. Mass. 1975).

243. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

satisfaction on the part of black parents with the poor level of instruction available to their children predated the *Morgan* litigation by more than one hundred years. Although *de jure* segregation had never existed in Massachusetts, the city of Boston had maintained separate schools for black children since 1820.[244] In 1849, the case of five-year old Sarah Roberts became a *cause célèbre* when her father took action in the state courts to secure her admission to a white school.[245] The black school that she attended was badly run down. An evaluation committee had reported to the city that "the school rooms are too small, the paint is much defaced," and the equipment was "so shattered and neglected that it cannot be used until it has been thoroughly repaired."[246] Sarah had to walk past five white elementary schools to reach it.[247] The action was argued on her behalf by anti-slavery campaigner Charles Sumner who advanced the argument of racial stigmatization which, one hundred years later, found approval in *Brown*.[248] The case was ahead of its time and failed in the state Supreme Judicial Court, with Chief Justice Lemuel Shaw articulating the principles of "separate but equal" that the *Plessy* court subsequently adopted.[249] The case symbolized the underlying assumption on the part of black parents that, in a dual system which separated white children from black, the education offered to their children would be inevitably inferior.

In June 1961, the Massachusetts Commission Against Discrimination examined the issue of student allocation. Its finding that there was no intentional discriminatory practice on the part of the school committee was rejected by NAACP leaders who called upon the black community for support by boycott action.[250] On February 26 1964, following a nationwide week of boycotts, a "Freedom Stay Out" day in Boston was supported by 22,000 students, a figure which represented over 20 per cent of the city's 92,000 student population.[251] The following month saw the establishment of the Kiernan Committee consisting of 21 members drawn from the ranks of university presidents, religious leaders and representatives of labor and business, tasked with assisting the State Board of Education to carry out a study of racial imbalance in Commonwealth schools.[252] The Committee's report, published on April 15, 1965, identified fifty-five schools in the state and forty-five in Boston itself that were racially imbalanced, defined as having over fifty percent minority

244. *See* Roberts v. City of Boston, 59 Mass. 198 (Mass. Dist. Ct. 1849).

245. *Id.*

246. Quoted in KLUGER, *supra* note 99, at 75.

247. *Roberts*, 59 Mass. at 201.

248. Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954).

249. *See* Roberts v. City of Boston, 59 Mass. at 209 *as approved in* Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

250. *See* ROSS AND BERG, *supra* note 239, at 47, 48.

251. *Id.* at 49.

252. *Id.*

enrollment.[253] In terms of educational effect, the report concluded that racially imbalanced schools caused serious educational damage to black children by "impairing their confidence, distorting their self-image and lowering their motivation."[254] Moreover, the inferior educational facilities in predominantly black schools further reduced the opportunities of black children to prepare for the "professional and vocational requirements of our technological society."[255]

In 1965, when Governor John Volpe signed into law the Racial Imbalance Act (RIA) Massachusetts became the first state to mandate racial balance in its public schools.[256] In the course of the next seven years, neither the State Board of Education nor the federal government was able to make the Boston School Committee produce an acceptable plan.[257] The State Board finally produced its own plan, ordered into implementation by the state Supreme Judicial Court for September 1974 and which Judge Garrity adopted as an interim measure until the Court could devise a desegregation plan in accordance with Supreme Court mandate. Busing was integral to both State and Court plans and, given the city's residential patterns, an unavoidable desegregation technique as defendant school committee Chairman Kerrigan himself testified.[258] However, as Dentler and Scott point out, the concept of "forced busing," like the neighborhood school, was essentially a fabrication.[259] There was nothing remarkable about school buses: they had been a fact of Boston school life

253. MASS. STATE BD. OF EDUC., BECAUSE IT IS RIGHT—EDUCATIONALLY: REPORT OF THE ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION 2 (1965).

254. *Id.*, *as quoted in* ROSS AND BERG, *supra* note 242, at 50.

255. *Id.*

256. MASS. GEN. LAWS ANN. ch. 71, §§ 37C, 37D (2008).

257. The State Board withheld state aid, giving rise to action in the state courts by the school committee to release the funds and annual bills in the legislature for the repeal of the RIA. *See* Morgan v. Hennigan, 379 F. Supp. 410, 439 (D. Mass. 1974). A complaint by a black parent to the Massachusetts Commission Against Discrimination produced a "cease and desist" order against the Committee and enforcement proceedings in the Superior Court, which remanded for a consideration of mootness, as the complaining student had already graduated. *See id.* at 450. On May 28, 1974, an MCAD Commissioner reported that the discriminatory practices continued and had not been eliminated. *See id.* at 451. Abortive attempts by Federal officials to secure compliance resulted in the withholding of Federal funds and enforcement action by the Department of Health Welfare and Education (HEW). *Id.* at 421. Following a complaint by HEW, Administrative Law Judge Ring found the city "in violation of federal statute." *Id.* "Judge Ring's decision was affirmed, with minor exceptions, by the final reviewing authority in HEW, In the Matter of Boston Public Schools, April 19, 1974, which found that the city had been guilty of *de jure* segregation." *Id.* For a general account see ROSS AND BERG, *supra* note 239, at 63–66.

258. Morgan v. Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975)(quoting Committee Chairman Kerrigan, "There is no way it [desegregation] can be done without the forced busing of children.").

259. ROBERT A. DENTLER & MARVIN B. SCOTT, SCHOOLS ON TRIAL: AN INSIDE ACCOUNT OF THE BOSTON DESEGREGATION CASE 27 (1981).

for many years prior to 1974,[260] while school committee zoning practices ensured that "the 'neighborhood school' [had] been a reality only in areas of the city where residential segregation [was] firmly entrenched."[261] The rallying calls of "forced busing" and the "neighborhood school" were ostensibly neutral objectives behind which lurked the racism which the black plaintiffs and their lawyers sought to expose: "just as the myth of neighborhood schools gave its believers something 'neutral' to support, so busing gave them something 'neutral' to oppose."[262]

Judge Garrity retained active oversight of the desegregation process in Boston for ten years. The Court plan which he ordered into implementation was an ambitious attempt to overhaul and modernize the outdated Boston public school system, and much was achieved. By the early 1980s, however, the project was in trouble; a coalition of plaintiffs, school defendants, teachers and parents combined to frustrate court orders for school closings.[263] Support for racial mixing ebbed, undermined by growing disillusionment with the ability of the desegregation process to bring about lasting improvements to the quality of education experienced by black children.[264] Influenced by the radical ideas of Derrick Bell and Ronald Edmonds,[265] plaintiffs' counsel Larry Johnson began actively to question the nature of the desegregation process and to advocate a "freedom of choice" plan focusing on educational equity as opposed to "desegregation."[266] In so doing, he fragmented the plaintiffs' case and frustrated the consent decree negotiations that had been begun by State Commissioner Anrig as a way of terminating court jurisdiction, but largely to no avail.[267] By this time, the "law of the case" was firmly established. The

260. *Id.* On their figures "over 30,000 out of an alleged 90,000 students had been taking buses subways and taxis from home to public schools in Boston for many years prior to 1974." *Id.* School Department figures for the school year 1972–73 showed that 10% of elementary, 50% of intermediate and 85% of high school students rode to school. *See* Memorandum from Robert Dentler to the Masters: Commentary on Busing and Student Transport (Feb. 24, 1975)(On file with the University of Massachusetts, Healey Library Archives and Special Collections, Garrity Papers, Series XXXVIIf—Masters and Experts: Dentler & Scott Memos 1974– 1975 Folder 17).

261. *Morgan v. Hennigan*, 379 F.Supp. 410, 473 (D. Mass. 1974).

262. DENTLER & SCOTT, *supra* note 259, at 27.

263. For an account see DENTLER & SCOTT, *supra* note 259, at 93.

264. *Id.*

265. *See, e.g.*, Ronald Edmonds et al., *Desegregation Planning and Educational Equity*, 17 Theory into Practice 12 (1978) and Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

266. On February 23, 1982, Attorney Johnson wrote to Defense Attorney Simonds withdrawing from the consent decree negotiations and stating his intention to develop an alternative plan that would be more responsive to his clients' interests. *See* discussion in Murninghan, *supra* note 31, at 108–09.

267. For an account of the difficulties of the Consent Decree negotiations, see Morgan v. McDonough, Memorandum and Draft Orders Toward Closing Case No. 72–911–G (D. Mass. 1982)(on file with the University of Massachusetts, Healey Library Archives and

case was a "race" case and not an "education" case.[268] The consequence was that, however sincere the judge's concern with educational improvement might initially have been, the requirements of desegregation as mandated by the Supreme Court set limits to the extent that this concern could be realized, raising questions concerning the gains that *Brown* had been able to achieve.

B. *Lawyers Versus Clients: Should* Brown *Have Been Decided Differently?*

In 1976, Derrick Bell, himself a former NAACP/LDF staff attorney, published an important article asserting a conflict of interests between NAACP/ LDF attorneys and the black plaintiffs whom they claimed to represent.[269] Black plaintiffs, he argued, wanted the best education for their children, but litigators were committed to a strategy of integration as racial balance and paid insufficient attention to making black schools educationally effective.[270] A court desegregation plan requiring the transportation of students over long distances in the interests of racial integration which failed to materialize could not command the confidence of black parents, if the schools and the education they provided were of poor quality.[271] Though not the first to make these arguments, Bell's article—in effect advocating a return to the neighborhood school policies in force in most school systems prior to desegregation—reignited a debate about tactics within the NAACP/LDF which dated back at least to 1935, when W.E. B. Du Bois warned that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education."[272]

As Yudof points out, whilst in the pantheon of constitutionally protected values the status of equal educational opportunity is secure, consensus breaks down in the task of translating the general into the par-

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Special Collections, Garrity Papers, Series XLd Miscellaneous: Postscript Orders 1978–88 Folder 72).

268. Transcript of hearing on April 10 1975, Morgan v. Kerrigan, 401 F. Supp. 216, 226 (D. Mass. 1975)(No. 72–911–G)(on file with the University of Massachusetts, Healy Library Archives & Special Collections, Center for Law & Education Papers, Morgan & Hennigan Case Records 1964 -1994). In Morgan v. McDonough, 689 F. 2d 265 (1st Cir. 1982), school committee appellants contended that the district court had exceeded its legitimate role as the enforcer of a desegregation remedy and strayed into the realm of general educational policy. The First Circuit observed that absent racial bias, dislike of a desegregation proposal on educational grounds was not a valid reason for rejecting it. *Id.* at 276.

269. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470(1976).

270. *Id.* at 488.

271. *Id.* at 480.

272. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

ticular.[273] Equal opportunity in the context of education can mean one of three things: equal access (which requires absence of discrimination); equal resources (requiring equal inputs in terms of financial expenditure and availability of resources) or equal outcomes (measured in terms of academic achievement).[274] As a litigation strategy, the third will always be the least attractive, being dependent upon social science evidence that by then was heavily politicized. The argument received short shrift in *Jenkins III* on the basis that the District Court had not identified "the incremental effect [of] segregation ... on minority student achievement," i.e. it had not paid enough attention to the fact-finding exercise necessary to establish the required direct causal link between segregative acts and continuing educational harm.[275] In the absence of such a link, continuing achievement disparities must be attributable to external factors which were not the court's concern:

> Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of [the school committee] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus. Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when [the school committee] will be able to operate on its own.[276]

The initial NAACP strategy was one of equalization. The campaign to challenge the disparities in expenditure between white schools and black schools in state courts on matters such as, for example, teachers' salaries had received piecemeal success but left individual teachers exposed to victimization while the ability of the state to rely on endless permutations of possible factual situations made litigation an expensive long-term strategy.[277] The decision to press for access in federal courts represented a change in tactic;[278] the immediate success of *Brown* deflected attention from the underlying assumption that integration in the form of access to

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273. Mark Yudof, *Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 412 (1973).

274. *Id.*

275. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 101 (1995).

276. *Id.* at 102.

277. *See* Cottrol et al., *supra* note 32, at 54. The tactic was to confront the State with a "Hobson's choice": abolish the dual system or face bankruptcy. *See also* Tushnet, *supra* note 99, at 102–4; Kluger, *supra* note 99, at 132; Greenberg, *supra* note 31, at 58. The NAACP's first major victory in a federal court was Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938).

278. For a discussion see Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).

white schools would of itself bring about the objective of educational enrichment.[279] Had the NAACP continued to press for educational equity, the argument goes, the difficult questions of the legitimacy of race-conscious action unlinked to fault would not have arisen. As it was, the statement that "separate" was inherently unequal invited the conclusion that all that needed to be done was to integrate. Once that had been accomplished, official responsibility for the education of African Americans was *prima facie* discharged.[280]

In the early 1970s, disenchantment with the failure of desegregation to bring about measurable improvements in the quality of education experienced by many black children prompted a new strategy focusing on funding. School expenditure is funded in most states by means of local property taxes. The variation in property values within a particular state, coupled with residential patterns which concentrate black families in poor urban areas and white students in wealthier suburban areas, can lead to serious disparities in the funding available to black students relative to white students.[281] Bell wrote that "many, including myself, decided that given the difficulty of integrating black and latino students with their swiftly fleeing white counterparts, we should concentrate on desegregating the money."[282]

School funding suits had some initial success in state courts in California, where the state Supreme Court ruled that the public school funding system's heavy reliance on local property taxes caused substantial disparities among individual school districts in the amount of revenue available per pupil and thus invidiously discriminated against the poor and violated the equal protection clause of the Fourteenth Amendment.[283] The hope that equalized expenditure suits might substitute for racial integration suits was dashed when the U.S. Supreme Court, in a case from Texas, ruled that education was not a fundamental right and wealth was not a suspect classification.[284] The Texas system attracted mere rational scrutiny as opposed to strict scrutiny and prevailed despite substantial disparities in local school resources and differences in tax effort throughout the State.[285] *Per* Justice Powell, the system –which was similar to those employed in virtually every other state—was not the product of purposeful discrimina-

279. Tushnet, *supra* note 106, at 105–37.

280. *See generally* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM, 20–28, 186 (2004).

281. *See generally* DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001).

282. BELL, *supra* note 29, at 161.

283. Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

284. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

285. *Id.* "The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard." *Id.* at 55.

tion against any class but, instead, was a responsible attempt to arrive at practical and workable solutions to educational problems.[286]

CONCLUSION

A. *Towards a Theory of the Court Expert in Schools Desegregation Suits*

In Brown v. Board of Education (*Brown I*), the Supreme Court established a constitutional basis for the moral responsibilities of the nation in racial matters. The decision represented a defining point in the development of race relations in the United States but the principles it rested upon were ambiguous and the process of schools desegregation it inaugurated depended on political processes which the Court could command but not control. The constitutionalization of the desegregation mandate ensured that the political struggles it spawned were played out in the courts, but the inherent underlying ambiguity produced an open textured jurisprudence wherein the requirements of desegregation changed and the link between racial isolation and educational opportunity that underpinned NAACP demands for integration could no longer be assumed. Fifty years after *Brown*, a Court in retreat from an activist model of adjudication was unwilling to lend constitutional legitimacy to integrative social policies underpinned by contestable social science.[287]

For Judge Garrity and the lawyers involved in the Boston case, the immediate answers to the questions with which this Article opened were determined by reference to contemporary desegregation jurisprudence; these actions were necessary because the Constitution so required.[288] Where official action and policy had resulted in a dual system and freedom of choice would perpetuate the *status quo*, affirmative action was a mandate, not an option.[289] Racial balance in terms of student assignment and faculty composition were indicia of desegregation and achievement might require school closings.[290] Magnet schools and educational enrichment programs were legitimate techniques of enhancing "desegregative attractiveness."[291] The latter might be required to combat lingering vestiges

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286. *Id.* at 55. School finance litigation has had some success at the state level but as Professor Ryan contends, it continues to be "hamstrung by the obstacles created by poor race relations and the Court's desegregation jurisprudence." James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249, 255 (1999). *See also* Godwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW AND INEQ. 81 (2006).

287. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2776–2781 (2007)(Thomas, J., concurring).

288. Morgan v. Kerrigan, 388 F. Supp. 581, 582 (D. Mass. 1975).

289. Green v. County School Bd., 391 U.S. 430, 438–40 (1968).

290. Swann v. Charlotte- Mecklenburg Bd. Of Educ., 402 U.S. 1 (1971).

291. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 100–103 (1995). (stating that the district court plan was designed to improve the desegregative attractiveness of the Kansas

of segregation in matters of student achievement, in which case, however, detailed fact-finding must be scrupulously undertaken and the duration must be limited.[292] The curriculum was a legitimate area for scrutiny but, in the absence of proof of discriminatory intent, teaching and learning were pedagogical issues which were properly left to the State. Academic tracking or ability grouping, however, which might mask discriminatory intent, would not normally be permissible.[293]

As Forbes Bottomley, himself a former superintendent of schools in Seattle, Washington, has pointed out, an effective desegregation plan for a complex public school system such as that of Boston is more than a matter of jurisprudence.[294] Lawyers may be comfortable with standards couched in terms of "reasonableness" and "adequacy," but educational planners need more detailed guidance.[295] Translation from constitutional guidelines to specific proposals of design and implementation requires both professional expertise and a working relationship with the educational planners and school officers whose job it is on the ground to give effect to the orders of the court.[296] Where, as in Boston, school officials are recalcitrant and administrative default forces the judge to take over, the relationship can become "complex and frustrating."[297] The appointment of court experts in Boston extended the reach of the judge beyond the courtroom and the confines of the adversarial process, and so their role was part of the machinery of implementation. But in taking on the task of supervising and supplying the educational planning expertise necessary to devise and implement a workable plan, they shaped and gave content to the desegregation process in Boston and, to that extent, their role was more fundamental.

In identifying the importance of educational enhancement in a desegregation remedy, Judge Garrity's plan went further than any of his predecessors in federal desegregation suits and became the prototype for a new type of desegregation planning in which educational concerns were ostensibly as important as issues of student assignment.[298] Ultimately, the educational component fell victim to a desegregation jurisprudence con-

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City, Missouri (KCMSD), School District but was "so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that {. . .] it is beyond the admittedly broad discretion of the District Court.").

292. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70 (1995); Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977).

293. Hobson v. Hansen, 269 F. Supp. 401, 511–514 (D.D.C. 1967).

294. Forbes Bottomly, *The Professional Educator in the Desegregation Suit, in* LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION, 621,633 (Howard I. Kalodner & James J. Fishman eds., 1978).

295. *See id.* at 633.

296. *Id.*

297. *Id.*

298. Robert A. Dentler, *Improving Public Education: The Boston School Desegregation Case* 7 SUFFOLK U.L. REV. 3, 8 (1975).

ceptualized in terms of "race" and not "education." "Desegregation", said the First Circuit, "is not a mandate to equalize schools."[299]

Taking the failure of outcomes as a focus, this Article now takes the indeterminacy of the term "desegregation" as a starting point towards a theory of the role of the court expert in schools desegregation litigation. If the term "desegregation" is seen as inherently indeterminate, or, to borrow a term from discourse theory, an empty or floating signifier whose meaning crystallizes only as the general is translated into the particular, then a framework for analysis emerges.[300] The desegregation process becomes a forum for a negotiation between representatives of two professional discourses with differing and sometimes conflicting understandings and conceptualizations of what the process might require.

From this perspective, the court expert operates at the interface between two discursive imperatives: the so-called "harm-benefit thesis" of social science which seeks integration as a solution to "the Negro problem" and the legal imperative which prioritizes "legitimacy" and permits "integration" only as an aspect of remedial process. The two imperatives came together in the context of education, and both sets of professionals sought enhanced educational outcomes for African Americans; but, for lawyers, the harm which shaped strategy was racial discrimination whilst for social scientists the harm was racial separation.

In the forum of the federal courtroom, the discourses of law and the social sciences do not meet on an equal footing. The authority of the modern liberal state is defined in legal terms, and answers to questions of legitimacy are sought by reference to the concepts and rhetoric of legal discourse. Thus, in terms of an interaction between the rival discourses of the law and of the social sciences, it is the former which is dominant and hegemonic. The discourse of the social sciences acquires political legitimacy only to the extent that it has been subsumed within the discourse of law.[301] The role of the court expert can be theorized in terms of mediation or translation, the task being to give to the federal judge the content that he needs to give meaning to the otherwise indeterminate signifier "desegregation." The voice of legitimacy is the voice of the federal judge and his attempts to articulate the boundaries of the term represent so-called nodal points for the crystallization of meaning.

In this context, the relationship between the judge and the expert is dialectical: the judge has to guide the expert on "the law." This requires identification of the general legal principles which regulate the exercise of

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299. Morgan v. McDonough, 689 F. 2d 265, 267 (1st Cir. 1982).

300. For a series of essays on the value of discourse theory as an analytical perspective in social and political analysis see DISCOURSE THEORY IN EUROPEAN POLITICS: IDENTITY POLITICS AND GOVERNANCE (David Howarth and Jacob Torfing eds., 2005).

301. *See* CAROL SMART, FEMINISM AND THE POWER OF LAW 4–25 (1989)(for an analysis of the "power of law" to not only define what constitutes legal discourse but also to assimilate "truths" from other discourses).

the judicial function, and the specific principles of constitutional liability and relief which have been provided by the Supreme Court and Circuit Courts in previously-decided cases. These give the judge his "road map"; from these he identifies his imperatives and sets an agenda. Translation of these imperatives into proposals for practical changes in educational policy and practice is the task of the expert, who may be a testifying witness or may be a specially appointed court adviser. Either way, these proposals are acceptable only to the extent that they can be justifiable in terms of legal discourse. In other words, the practical proposals of the social scientist must be capable of translation into the language of the law and justifiable by reference to the legal signifiers to which they give content. The measure of accomplishment is the scrutiny of the wider legal community as represented in the first instance by the appellate judges to whose authority appeal might lie. Ultimately, however, the effect is to bring about a transfer of power from elected school officials to the wider group of academic and practicing lawyers and the politicians and representatives of business interests with whom they interact who collectively make-up the hermeneutic community that Dworkin has identified as the community of legal discourse.[302]

302. See RONALD DWORKIN, LAW'S EMPIRE 52, n.2 (1986) (identifying the philosophical foundations of creative interpretation and paying tribute to the influence of H.G. Gadamer).