ADVOCATING INEQUITY: A CRITIQUE OF THE CIVIL RIGHTS ATTORNEY IN CLASS ACTION DESEGREGATION SUITS

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I. *INTRODUCTION*

The occasion that prompts this discussion is the 20th anniversary of *Brown v. Board of Education* of Topeka, Kansas.[1] On the one hand, *Brown* is the legal profession's major contribution to 20th century America's pursuit of social equity. On the other hand, the nature of legalism[2] and civil rights lawyers who represent class action plaintiffs makes *Brown* an impediment to concepts of race and class that are prerequisite to achieving that social equity.

The NAACP must be forever acknowledged as architect and advocate of *Brown* and the opportunities for Black Americans that occurred because of that decision. The destruction of state sanctioned discrimination in schooling is the most observable consequence of *Brown*. In addition, *Brown* has resulted in the growth of a reform momentum in employment, housing, and other aspects of American life. In 1974, Black Americans have social, economic, educational, political, and legal choices that exist, only because of *Brown*. Thus, the critique that follows is offered in a context of appreciation and gratitude.

As a 1974 instrument of social equity, *Brown*, has a number of defects that must be attended to if we are to effect levels of social gain that will justify the national agony that must accompany further efforts to implement *Brown's* long range intent.[3]

Black pupil performance must become a primary and explicit criterion for judging the effectiveness of judicial efforts to correct the constitutional abuse of Black children. While this author has elsewhere discussed[4] the neglect of pupil performance as a measure of effectiveness in judicial efforts to effect equality of educational opportunity, a short summary of the argument may be helpful for purposes of the present discussion.

The present judicial conception of the proper means by which Black Americans should obtain redress of educational grievance is not in the best interest of all Black Americans. The federal courts have developed an educational ideology based on the assumptions that: (1) segregation in public instruction is unconstitutional; (2) justice for Black children requires that those children attend schools where the majority of students are white; and (3) Black pupil performance need

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1. 347 U.S. 483 (1954)
2. For purposes of this discussion, "legalism" refers to the process of adjudication that characterizes class action desegregation suits. That process, briefly, consists of a legal construction of remedy where segregation is found to exist, in which lawyers ignore the needs of their clients and construct a remedy in the interest of their constituents. See discussion in text *infra* for definitions of client and constituent.
3. The intent of *Brown* is to afford an "equal educational opportunity" to Blacks and others similarly situated. That this is so is evidenced by the sweeping conclusion of *Brown* that separate is inherently unequal. Unequal can only refer to the fact that the opportunity to receive an adequate formal education is not present in the separate, segregated Black school.
4. R. Edmonds, "A Discussion of Factors To Be Considered in Evaluating Desegregation Proposals", Feb. 1972 (A summary of the discussion appears in D. Bell, *Race, Racism and American Law*, (Little Brown & Co., 1973).

not be considered by the court as an independent variable since accomplishing (1) and (2) automatically improves performance.[5]

By defining integration as an educational setting in which Black children are in the minority and are likely to remain so, court-ordered desegregation has often been coercive for both Black and white parents. The coercion occurs because substantial portions of the Black community doubt the positive relationship between court-ordered integration and Black pupil performance and thus, given a choice, might not send their children to judicially integrated schools.[6]

Finally, Black Americans have not historically had choices of the means of their deliverance from societal disability. The Supreme Court and other forces in American life have inadvertently conspired to compel judicial activism and integration as the primary means and substance of racial redress.[7]

II. *IMPACT OF 1954 BROWN DECISION*

In 1954, Black parents were nearly unanimous in their acceptance of desegregation as the means of their children's educational improvement.[8] Black parents, while still opposed to segregation, are now sharply divided on their willingness to endure the dislocation of desegregation in the absence of greater assurance that their children will receive educational benefits.[9] The shift in Black parent attitude toward *Brown*-inspired desegregation may represent a more sophisticated parental understanding of the dynamics of class, color, and schooling. Unfortunately, no such shift has occurred within the judiciary which continues to use the *Brown* principle as the definitive standard for equity required under the Constitution.[10]

The federal courts' lack of interest in Black pupil performance has its origin in the nature of *Brown*. The most important assumptions in the *Brown* decision's description of the relationship between race and education, are summarized as follows:

A. The existence in the United States of state-supported dual school systems is accompanied by the discriminatory treatment of those schools. That discrimination consists of inequitable distribution of educational resources to predominately Black schools, in effect denying to Black children the minimal resources prerequisite to proper schooling.[11]

B. Even if the distribution of educational resources is made equitable, justice will still be denied Black children, because state-imposed segregation persuades Black children that they are inferior and their belief that they are inferior interferes with their ability to acquire school skills.[12]

C. Therefore, Black pupils must be integrated with white pupils before Black pupil performance levels can be brought to an acceptable level.[13]

The research literature since 1954, on the other hand, indicates that under court-ordered integration, some Black pupils do better, some Black pupils do about the same and some Black pupils do worse.[14] Therefore, it would seem that court-ordered desegregation, in and of itself, is an insufficient and in some cases inappropriate response to the present in-

5. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971).
6. *See* the results of opinion poll of Black parents in NEWSWEEK, Mar. 13, 1972.
7. R. Edmonds, *supra* note 4 at 5 - 9. The full text of this article provides a detailed discussion of this topic.
8. W. White, "What Negroes Want", U.S. NEWS & WORLD REPORT, 36: May 28, 1954.
9. *See* note 6 *supra*.
10. *See* note 4 *supra*.
11. 347 U.S. at 493 (1954).
12. *Id.*
13. *Brown v. Bd. of Education*, 349 U.S. 294, 300 (1955).
14. *See, e.g.*, J. McPartland, "The Relative Influence of School and of Classroom Desegregation on the Academic Achievement of Ninth Grade Negro Students", XXV *Journal of Social Issues* No. 3, 94; R. Crain, "School Integration and the Academic Achievement of Negroes", 41 *Sociology of Education*, 1 - 26 (Winter 1971); E. Ellis & G. Nowell, "Integration and Scholastic Performance: A Pilot Study of Chicago Public High School Graduates Attending the University of Illinois, Chicago", 26 *Psychological Reports* 889-891 (1970).

equity that characterizes public instruction for Black children.[15]

Because integration improves performance for some Black pupils, interest in integrated education must continue. However, if circumstances bring about improved Black pupil performance in majority Black settings, then we must attend to that also, partly by challenging demonstrably ineffective educational ideologies like integration as it is presently perceived by the courts.

Judicial intolerance of predominately Black schools reinforces the national belief that such schools are educating their pupils poorly. This belief insures that integration in education must continue to reflect preference for middle-class behavior and precludes the possibility of identifying or developing appropriate educational behavior in a majority Black setting.

Majority Black settings are, and will remain, a part of American life. Several cases[16] under review by the courts may produce desegregation orders that are as unacceptable to Black parents as they have historically been to white parents. Black children should be transferred from neighborhood schools to distant and potentially hostile white schools only if such transfer can be justified by greater certainty that all affected Black children will educationally profit from court-ordered desegregation.

III. *CLIENT-CONSTITUENT DYNAMIC*

It is a premise of this discussion that the acquisition of basic school skills by all Black pupils should be a minimal component of court-ordered desegregation plans designed to be equitable as well as legal. Basic school skills can be defined as those bodies of knowledge and sets of skills that must be mastered at each successive grade level to assure pupil success at the next. In elementary education, reading, writing, and computation mastery are prerequisite to successful secondary schooling. Civil rights attorneys often do not represent their clients' best interest in desegregation litigation. Rather, they answer to a miniscule constituency while serving a massive clientele.

For purposes of this discussion, clients are those on whose behalf the civil rights attorney brings suit. Constituents on the other hand, are those to whom the attorney must answer for his actions. The attorney consults those to whom he is answerable before fashioning a legal remedy. Thus, the test of constituency lies in identifying whom the civil rights attorney consults before fashioning relief in class action desegregation cases.

The attorney-client relationship in desegregation cases is analogous to the intereaction that occurs in most social service settings. For example, schools have pupils as clients; adoption agencies have children as clients; welfare agencies have the needy as clients. White controlled school boards are constituent to teachers in majority Black classrooms; biological parents on the governing boards of adoption agencies are constituent to social workers who decide when and whether, parentless children will be placed for adoption; and middle-class policy boards for welfare agencies are constituent to the case workers who provide welfare to the needy.

In each instance, an institution and certain categories of professionals proceed in ways that are intended to further the best interests of the clients. Yet, there is a discernible discrepancy between the disposition and the predilection of the constituent and the disposition and the predilection of the client in the social service. A majority white school board (constituent) may be disposed to ask teachers to teach lower-class Black students middle-class manners, habits of dress, diet, speech, etc. Lower-class Black parents (clients) may

15. P. Prichard, "Effects of Desegregation on Student Success in the Chapel Hill City School", 7 *Integrated Education*, No. 6, Nov. - Dec. 1969.
16. *See e.g., United States v. Board of School Commissioners of the City of Indianapolis*, 332 F. Supp. 655 (S. D. Ind., 1971), aff'd 474 F. 2d 81 (7th Cir. 1973), *cert. denied* 407 U.S. 920 (1973); for other cases see R. Pressman, "Pending Desegregation Cases" *Inequality in Education*, No. 11 Mar. 1972, p. 51.

on the other hand be disposed to ask teachers to teach their children demonstrable mastery of reading, writing, and computation. When a conflict in priorities arises, the social service professional will answer the demands of the constituent at the expense of the interest of the client.

The crises of confidence in our institutions of social service need not be elaborated here. It is sufficient to say that the civil rights attorney in desegregation litigation is imitating the inappropriate client-constituent dynamic to which this author refers. Lower-class Black children, because of their numbers, are clients in class action desegregation litigation. Since court-ordered desegregation does not use pupil performance as a primary variable in assessing remedy for constitutional abuse, it must be concluded that those middle-class Blacks who instructionally profit from desegregation can be defined as constituent. This point is emphasized by posing the question — to what class of Americans does the civil rights attorney feel he must answer for his professional conduct?

The answer to this question lies in the description of those few with whom the civil rights attorney confers as he defines the goals of his arduous labors. More than any other of the professionals to whom reference has been made, the civil rights attorney labors in a closed setting. No matter how numerous, his clients cannot become constituent unless they have access to him before or during the legal process that describes desegregation litigation and judicial remedy for constitutional abuse. Those who currently have access to the civil rights attorney have characteristics that illustrate this author's concern for the concept of viewing client as constituent.

First, the constituents of civil rights attorneys are "liberal" whites and middle-class Blacks. Second, the concept of integration advocated by the middle-class constituents to whom this paper refers, categorically opposes majority Black schools. This categorical rejection of predominately Black schools has brought us to the advent of metropolitan desegregation without sufficient regard having been given to the probable instructional consequences of such a move for those Black children most numerously affected.[17]

Practicing and potential civil rights attorneys must acknowledge the inadequacy of their training and methods for the unique demands of class action desegregation suits. Attorneys are not trained to respond to clients who do not pay their fees. A class action suit serving only those who pay the attorney fee has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought.

Thus, these attorneys do not consult representatives of the most numerous portion of citizens who comprise a "class" in a class action suit. Failure to consult with the numerical majority in a class action desegregation suit has the effect of making the attorney an instrument of autocracy and coercion. These circumstances establish the necessity for attorney reexamination of the substance and nature of desegregation relief as an instrument of justice and social equity.

IV. *PUPIL PERFORMANCE AS THE APPROPRIATE INDEX FOR JUDICIAL RELIF*

That white Americans must be denied the right to segregate and constitutionally abuse Black Americans is not at issue. The issue is whether or not Black parents are entitled to make educational choices for their children. A combination of the traditional prohibition on discriminatory pupil placement with a greater assurance of Black pupil acquisition of basic school skills is the substance of the judicial relief this author urges. *Bradley v. Milliken*[18], a successful suit in the lower federal courts, established that educational decision makers in Michigan constitutionally abused Black

17. *Bradley v. Milliken* 338 F. Supp 582 (E.D. Mich, 1971), aff'd 484 F 2d 215 (6th Cir. 1973), *Cert. granted sub nom* 42 U.S. L.W. 3306 (1973)
18. *Id.*

children. The suit was a class action, and thus brought on behalf of all Black children in Detroit. Such children were, for the most part, of low social and economic status.[19] Despite this, the remedy of metropolitan desegregation advocated by plaintiff's counsel reflected a concept of integration that was more instructionally responsive to middle-class Black children than their more numerous lower-class peers.

The data on pupil performance break along class lines without respect to color.[20] In tests which are controlled for grade level, middle-class pupils, whether Black or white, show greater performance gains on standardized measures than lower-class pupils. Thus, under court-ordered desegregation, middle-class Black pupils do better than lower-class Black pupils. Given this data, court-ordered desegregation based on the assumption that racial composition is the primary educational variable in affecting performance serves the educational interests of middle-class Black children while denying the educational needs for lower-class Black children. This is especially troublesome since lower-class Black children are more numerous in the Black population than their middle-class counterparts.[21].

Reference to Bradley is not intended to detract from the virtue of the NAACP's having brought suit, nor is there a lack of appreciation for the attorney skill and effort that persuaded Judge Roth[22] to find for the plaintiffs. However, the proposed resolution in the Detroit case is illustrative of the fashioning of remedy that is more responsive to the disposition, predilection, and interest of one class than of another. The remedy advocated by counsel for the plaintiff and ordered by the court was metropolitan desegregation of massive proportions.[23]

The Detroit pupil population is majority Black, thus necessitating metropolitan desegregation if Black pupils are to be enrolled as a minority in every school. Such minority status is obtained for Black children by court creation of a metropolitan school district that combines the Detroit School District with more than fifty of the contiguous suburban districts.[24]

If the court order is implemented, lower-class Black children in inner city Detroit will be bussed to middle-class suburban districts. Examination of the court order in *Bradley* does not suggest that probable pupil performance was a consideration in the construction of metropolitan desegregation as the appropriate remedy.[25]

At issue is the efficacy of the notion that metropolitan desegregation constitutes remedy for all, or even a majority of, the constitutionally abused Black children of the Detroit Public Schools. If, as this author has suggested, Black pupil performance in desegregated schools correlates with Black pupil income and social class, one must conclude that metropolitan desegregation serves the interests of middle-class Blacks rather than those of lower-class Blacks. Thus the clients, who are majority lower-class, are compelled to participate in an educational arrangement of greater benefit to middle-class minority.

The civil rights attorney in this, and similar instances, is not defining his clients as constituents. Failure to define clients as constituents is another way of saying that the most numerous of those to be served are not privy to arrangements to which they must eventually be party.

V. *PROPOSED SOLUTIONS*

It is tragic to be confronted with circumstances that compel criticism of the most socially sensitive and useful class of attorneys now appearing before the bar. Fortunately,

19. 1970 Census, U.S. Dep't of Commerce.
20. R. Thorndike *Reading Comprehension in Fifteen Countries*, (1973).
21. 1970 Census, U.S. Dep't of Commerce, General Population Characteristic.
22. Stephen Roth, Presiding Judge, U.S. District Court, Eastern District of Michigan, Southern Division.
23. *Bradley, supra* note 17.
24. *Id.*
25. *Id.*

there are alternatives to these lamentable circumstances. This author offers three proposals for change in the current approach to desegregation litigation.

First, the civil rights attorney in desegregation litigation must become far more scrupulous in his analysis of, and response to, the origins of the premises from which he proceeds. More than any other category of litigation, the fashioning of relief in desegregation litigation goes to the core of community. For Black Americans, the public schools are inordinately determinant of the nature and quality of community.

Effective community requires the power to make choices. Black ghettos illustrate the relationship between choice and community. Very few Black people feel their residence in the ghetto is voluntary. That is so for two reasons. First, the physical amenities and social services in the ghetto are so consistently poor as to persuade all who can do so to leave the ghetto. Second, the prevailing American concept of integration rejects voluntary Black association. Ghettos can become communities only when both these impediments to choice are overcome, and when housing, schooling and other social services are improved.

Under such improved circumstances, integration ceases to be coercive because Black people in the ghetto stay or leave based on their individual preferences of association. Court ordered desegregation interferes with the development of community by affecting the quality and location of schooling which is the most pervasive of the social services. Thus, any circumstance in which the interest of a majority of the class action clients are not decisive in fashioning judicial relief eliminates the possibility of the further development of community.

To avoid such a circumstance, the civil rights attorney must explicity define his clients as constituents. Defining clients as constituents is intended to make the civil rights attorney more professionally democratic in determining whose interests he should represent. Such a definition requires attorney access to the interests of the most numerous of his class action clients. The civil rights attorney must fashion the instruments of consultation with those hard working, impoverished, and constitutionally abused Black citizens in whose behalf he theoretically labors.

This discussion has acknowledged that neither training nor experience prepares attorneys for such democratic consultation. Despite that, this discussion makes no explicit attempt to counsel attorneys on how best to develop more democratic methods for determining whose interests are to be represented in class action suits. The point is that practicing and aspiring attorneys must themselves raise these issues and questions.

Failing the development of democratic processes of consultation, the civil rights attorney must confess that desegregation litigation today is too often an instrument of middle-class manipulation and coercion of poor, Black citizens. This author hopes that the conscientious civil rights attorney will not choose to be party to any circumstance in which he is compelled to thus define his labors. The instruments of consultation can be made more democratic and, thus, more accurately descriptive of the interest of the whole of the client population in class action desegregation litigation.

This author's experience in desegregation prompts the prediction that client interest will divide into two broad categories: those at or above the socioeconomic indicators that determine upwardly mobile working-class and middle-class status will broadly agree on desegration as an automatic instrument of instructional improvement in the schooling of their children; those of relatively low socioeconomic status will also be committed to instructional improvement in the schooling of their children, but will be far less com-

26. Community is an association prompted by the belief that together individual interests will advance more than if pursued singly. Community requires some minimum of shared interests and can be based on race, culture, social class, age, or any other condition that produces shared interests.

mitted to desegregation as the automatic instrument of such improvement.[27]

Such description of divided class interest is made to emphasize the suggestion that the civil rights attorney become more mindful of the origins of the premises from which he proceeds when acting as a party to the fashioning of remedy.

Secondly, the civil rights attorney must recognize the preeminence of pupil performance as the measures for Black people of the efficacy of desegregation. Black middle-class consensus on the historic and present efficacy of desegregation exists because desegration remains, for middle-class Black children, an instructionally potent educational arrangement. Middle-class Black consensus on the value of desegregation would soon dissipate if, in the coming decade, desegregation became as instructionally impotent for middle-class Black children as it is now for lower-class Black children. The question that should be put on middle-class constituents is, "how shall I proceed in fashioning remedy if I were to predict that your children will not instructionally profit from traditionally designed desegregation"? Middle-class Black parents, who answer honestly, will make it clear to a civil rights attorney that socializing with whites, improved school facilities and furthering the American ideology of assimilation, are not substitutes for pupil performance. Civil rights attorneys who become mindful of such attitudes will be well on the way to appreciating the agony of lower-class Black parents who, when told their children are to be desegregated, are opposed to continued segregation and are equally opposed to educational rearrangements of dubious instructional benefit to their children.

Finally, the civil rights attorney must become a better tactician in classroom instructional reform. If it is a persuasive argument that remedies in desegregation litigation must better represent the pupil performance interest of the entire Black community, it is equally persuasive that in the closed court setting in which remedy is fashioned, the civil rights attorney must be more of an instructional advocate. The specific task for the civil rights attorney is to adopt a process of institutional analysis likely to make instructional effectiveness in the classroom both an outcome and a measure of the efficacy of desegregation remedy.

This analysis of the dynamics of desegregation recommends a concept best characterized as "the language of minimums." Generally, the language of litigation is expansive. The design for desegregation is often accompanied by euphoric language that anticipates "improved group dynamics," "greater cultural contact", and equally abstract and grand outcomes. The lack of substance in such language may be of little moment to those middle-class Black parents who can anticipate improved performance for their children. Yet, such language is tactically disastrous for those lower-class Black parents who, after desegregation, must confront the failure of majority white schools to convey basic school skills to their children.

Institutions lend themselves to assessment and accountability as the means they provide for measuring their behavior approach precision. Therefore, this author recommends that the civil rights attorney ascertain his most numerous clients' description of the minimum characteristics of adequate schooling. In all probability, the Black community's description of minimally successful schooling will approximate universal primary pupil acquisition of basic school skills. Lower-class Black parents want their children to learn to read, write, and compute. Emphasis is attached here to "minimal description" of adequate schooling because language that describes minimums is more precise than language that is grand and describes maximums. Institutions are more amenable to assessment and

27. This experience has included service as Human Relations Director during the implementation of desegregation plans; consultant to school systems contemplating or engaged in desegregation; Assistant Superintendent of the Michigan Department of Public Instruction with administrative responsibility for Title IV, Elementary and Secondary Education Act, thus providing technical assistance to all desegregating school districts in Michigan.

accountability when the measures of their performance contain minimum description of performance outcomes.

Desegregated schools, committed to "improved group dynamics" and equally "grand" goals, are free to use their own judgment of whether, and to what extent, these lofty goals are being attained. Schools that are free to use their own judgment in evaluating their progress are not likely to become accountable to Black parents.

Lower-class Black parents who must monitor a school's response to their children, need measures of pupil progress that are both informative and accurate. It is easier for parents to discern whether or not children are learning basic school skills than whether or not "group dynamics" are what they should be.

This author is specifically suggesting that the attorney's opportunity to influence the court's language of remedy should therefore emphasize precise and minimal measures of schooling. As a result, parents will then be left with a precise description of desegregation intent, and will be better prepared to respond to the school when the court and the civil rights attorney have departed.

VI. *SUMMARY*

The uniqueness of these suggestions, given the manner in which courts and attorneys proceed, must be acknowledged. Yet, their consideration must be pressed because *Brown* demands greater gains in social equity than the past two decades demonstrate. That courts are inhospitable to the suggestions presented in this paper ought not to deter counsel for the plaintiff since we know that an altered court concept of equity for Black children must begin with attorney advocacy of that altered concept.

Clients as constituents, Black pupil performance, and the "language of minimums" are the substance and process of the altered concept of equity urged upon counsel. Thus, might *Brown*, in the third decade of implementation, exceed that "all deliberate speed" with which we have so laboriously begun the move toward equity for all Americans.