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SERVING TWO MASTERS: INTEGRATION IDEALS AND CLIENT INTERESTS IN SCHOOL
DESEGREGATION LITIGATION ^{al}

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

Coalition of black community groups in Boston ¹

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

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

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

Civil rights lawyers dismiss these new obstacles as legally irrelevant. Having achieved so much by courageous persistence, they have not wavered in their determination to implement *Brown* using racial balance measures developed in the hard-fought legal battles of the last two decades. This stance involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. Indeed, muffled but increasing criticism of “unconditional integration” policies by vocal minorities in black communities is not limited to Boston. Now that traditional racial balanceremedies *472 are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools.

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

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

A. The Strategy

Although *Brown* was not a test case with a result determined in advance, the legal decisions that undermined and finally swept away the “separate but equal” doctrine of *Plessy v. Ferguson*⁶ were far from fortuitous. Their genesis can be found in the volumes of reported cases stretching back to the mid-19th century, cases in which every conceivable aspect *473 of segregated schools was challenged.⁷ By the early 1930's, the NAACP, with the support of a foundation grant, had organized a concerted program of legal attacks on racial segregation.⁸ In October 1934, Vice-Dean Charles H. Houston of the Howard University Law School was retained by the NAACP to direct this campaign.⁹ According to the NAACP Annual Report for 1934, “the campaign [was] a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases.”¹⁰ These strategies were intended to eliminate racial segregation, not merely in the public schools, but throughout the society. The public schools were chosen because they presented a far more compelling symbol of the evils of segregation and a far more vulnerable target than segregated railroad cars, restaurants, or restrooms. Initially, the NAACP's school litigation was aimed at the most blatant inequalities in facilities and teacher salaries.¹¹ The next target was the obvious inequality in higher education evidenced by the almost total absence of public graduate and professional schools for blacks in the South.¹²

Thurgood Marshall succeeded Houston in 1938 and became Director-Counsel of the NAACP Legal Defense and Educational Fund (LDF) when it became a separate entity in 1939.¹³ Jack Greenberg, who succeeded Marshall in 1961, recalled that the legal program “built precedent,” treating each case in a context of jurisprudential development rather than as an isolated private law suit.¹⁴ Of course, it was not possible to plan the program with precision: “How and when plaintiffs sought relief and the often unpredictable course of litigation were frequently as influential as any blueprint in determining thesequence *474 of cases, the precise issues they posed, and their outcome.”¹⁵ But as lawyer-publisher

Loren Miller observed of *Brown* and the four other school cases decided with it, “There was more to this carefully stage-managed selection of cases for review than meets the naked eye.”¹⁶

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

*475 By the late 1950's, the realization by black parents and local branches of the NAACP that litigation would be required, together with the snail's pace at which most of the school cases progressed, brought about a steady growth in the size of school desegregation dockets. Because of their limited resources, the NAACP and LDF adopted the following general pattern for initiating school suits. A local attorney would respond to the request of a NAACP branch to address its members concerning their rights under the *Brown* decision. Those interested *476 in joining a suit as named plaintiffs would sign retainers authorizing the local attorney and members of the NAACP staff to represent them in a school desegregation class action. Subsequently, depending on the facts of the case and the availability of counsel to prepare the papers, a suit would be filed. In most instances, the actual complaint was drafted or at least approved by a member of the national legal staff. With few exceptions, local attorneys were not considered expert in school desegregation litigation and served mainly as a liaison between the national staff lawyers and the local community.¹⁹

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

The civil rights lawyers would not settle for anything less than a desegregated system. While the situation did not arise in the early years, it was generally made clear to potential plaintiffs that the NAACP was not interested in settling the litigation in return for school board promises to provide better segregated schools.²¹ Blackparents *477 generally felt that the victory in *Brown* entitled the civil rights lawyers to determine the basis of compliance. There was no doubt that perpetuating segregated schools was unacceptable, and the civil rights lawyers' strong opposition to such schools had the full support of both the named plaintiffs and the class they represented. Charges to the contrary initiated by several Southern states were malevolent in intent and premature in time.²²

B. The Theory

The rights vindicated in school litigation literally did not exist prior to 1954. Despite hundreds of judicial opinions, these rights have yet to be clearly defined. This is not surprising. Desegregation efforts aimed at lunchrooms, beaches, transportation, and other public facilities were designed merely to gain access to those facilities. Any actual racial “mixing” has been essentially fortuitous; it was hardly part of the rights protected (to eat, travel, or swim on a nonracial basis). The strategy of school desegregation is much different. The actual presence of white children is said to be essential to the right in both its philosophical and *478 pragmatic dimensions. In essence the arguments are that blacks must gain access to white schools because “equal educational opportunity” means integrated schools, and because only school integration will make certain that black children will receive the same education as white children. This theory of school desegregation, however, fails to encompass the complexity of achieving equal educational opportunity for children to whom it so long has been denied.

The NAACP and the LDF, responsible for virtually all school desegregation suits, usually seek to establish a racial population at each school that (within a range of 10 to 15 percent) reflects the percentage of whites and blacks in the district. But in a growing number of the largest urban districts, the school system is predominantly black.²³ The resistance of most white parents to sending their children to a predominantly black school and the accessibility of a suburban residence or a private school to all but the poorest renders implementation of such plans extremely difficult.²⁴ Although many whites undoubtedly perceive a majority black school as ipso facto *479 a poor school, the schools can be improved and white attitudes changed.²⁵ All too little attention has been given to making black schools educationally effective. Furthermore, the disinclination of white parents to send their children to black schools has not been lessened by charges made over a long period of time by civil rights groups that black schools are educationally bankrupt and unconstitutional per se.²⁶ NAACP policies nevertheless call for maximizing racial balance within the district as an immediate goal while supporting litigation that will eventually require the consolidation of predominantly white surrounding districts.²⁷

The basic civil rights position that *Brown* requires maximum feasible desegregation has been accepted by the courts and successfully implemented in smaller school districts throughout the country.²⁸ The major resistance to further progress has occurred in the large urban areas of both South and North where racially isolated neighborhoods make school integration impossible without major commitments to the *480 transportation of students, often over long distances. The use of the school bus is not a new phenomenon in American education,²⁹ but the transportation of students over long distances to schools where their parents do not believe they will receive a good education has predictably created strong opposition in white and even black communities.³⁰

The busing issue has served to make concrete what many parents long have sensed and what new research has suggested:³¹ court orders mandating racial balance may be (depending on the circumstances) educationally advantageous, irrelevant, or even *disadvantageous*. Nevertheless, civil rights lawyers continue to argue that black children are entitled to integrated schools without regard to the educational effect of such assignments.³² That position might well have shocked *481 many of the Justices who decided *Brown*, and hardly encourages those judges asked to undertake the destruction and resurrection of school systems in our large cities which this reading of *Brown* has come to require.

Troubled by the resistance and disruptions caused by busing over long distances, those judges have increasingly rejected such an interpretation of *Brown*. They have established new standards which limit relief across district lines³³ and which reject busing for intradistrict desegregation “when the time or distance of travel is so great as to either risk the health of children or significantly impinge on the educational process.”³⁴ Litigation in the large cities has dragged on for *482 years and often culminated in decisions that approve the continued assignment of large numbers of black children to predominantly black schools.³⁵

II. Lawyer-Client Conflicts: Sources and Rationale

A. Civil Rights Rigidity Surveyed

Having convinced themselves that *Brown* stands for desegregation and not education, the established civil rights organizations steadfastly refuse to recognize reverses in the school desegregation campaign—reverses which, to some

extent, have been precipitated by their rigidity. They seem to be reluctant to evaluate objectively the high risks inherent in a continuation of current policies.

1. *The Boston Case*

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

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

*484 2. *The Detroit Case*

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

*485 3. *The Atlanta Case*

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

but for only limited pupil desegregation. In exchange, the school board promised to hire a number of blacks in top administrative positions, including a black superintendent of schools.

The federal court approved the plan.⁴⁵ The court's approval was apparently influenced by petitions favoring the plan's adoption signed by several thousand members of the plaintiffs' class.⁴⁶ Nevertheless the national NAACP office and LDF lawyers were horrified by the compromise. The NAACP ousted the Atlanta branch president who had supported the compromise.⁴⁷ Then, acting on behalf of some local blacks who shared their views, LDF lawyers filed an appeal in the Atlanta case. The appeal also raised a number of procedural issues concerning the lack of notice and the refusal of the district court to grant hearings on the Compromise Plan. These issues gave the Fifth Circuit an opportunity to remand the case to the district court without reaching the merits of the settlement agreement.⁴⁸ Undaunted, LDF lawyers again attacked the plan for failing to require busing of whites into the predominantly black schools in which a majority of the students in the system were enrolled. But the district court's finding that the system had achieved unitary status was upheld by the same Fifth Circuit panel.⁴⁹

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

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

....

More importantly, Black people must not resign themselves to the pessimistic view that a non-integrated school cannot provide Black children with an excellent educational setting. Instead, Black people, while working to implement *Brown*, should recognize that integration alone does not provide a quality education, and that much of the substance of quality education can be provided to Black children in the interim.⁵⁰

B. Alternatives to the Rigidity of Racial Balance

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

The plans adopted in these cases were formulated without the support and often over the objection of the NAACP and other civil rights groups. They are intended to upgrade educational quality, and like racial balance, they may have that effect. But neither the NAACP nor the court-fashioned remedies are sufficiently directed at the real evil of pre *Brown* public schools: the state-supported subordination of blacks in every aspect of the educational process. Racial separation is only the most obvious manifestation of this subordination. Providing unequal and inadequate school resources and excluding black parents from *488 meaningful participation in school policymaking are at least as damaging to black children as enforced separation.

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

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

C. The Organization and Its Ideals

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

***489 I. Racial Balance as a Symbol**

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

2. Clients and Contributors

The hard-line position of established civil rights groups on school desegregation is explained in part by pragmatic considerations. These organizations are supported by middle class blacks and whites who believe fervently in integration. At their socioeconomic level, integration has worked well, and they are certain that once whites and blacks at lower economic levels are successfully mixed in the schools, integration also will work well at those levels. Many of these supporters either reject or fail to understand suggestions that alternatives to integrated schools should be considered, particularly in majority-black districts. They will be understandably reluctant to provide financial support *490 for policies which they think unsound, possibly illegal, and certainly disquieting. The rise and decline of the Congress of Racial Equality (CORE) provides a stark reminder of the fate of civil rights organizations relying on white support while espousing black selfreliance.⁵⁶

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

School expert Ron Edmonds contends that civil rights attorneys often do not represent their clients' best interests in desegregation litigation because “they answer to a miniscule constituency while serving a massive clientele.”⁶⁰ Edmonds distinguishes the clients of civil rightsattorneys *491 (the persons on whose behalf suit is filed) from their “constituents” (those to whom the attorney must answer for his actions).⁶¹ He suggests that in class action school desegregation cases the mass of lower class black parents and children are merely clients. To define constituents, Edmonds asks, “[To] what class of Americans does the civil rights attorney feel he must answer for his professional conduct?”⁶² The answer can be determined by identifying those with whom the civil rights attorney confers as he defines the goals of the litigation. He concludes that those who currently have access to the civil rights attorney are whites and middle class blacks who advocate integration and categorically oppose majority black schools.

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

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

3. *Client-Counsel Merger*

The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class. This position represents an extraordinary view of the lawyer's role. Not only does it assume a perpetual retainer authorizing a lifelong effort to obtain racially balanced schools. It also fails to reflect any significant change in representational policy from a decade ago, when virtually all blacks assumed that integration was the best means of achieving a quality education for black children, to the present time, when many black parents are disenchanted with the educational results of integration. Again, Mr. Jones would differ sharply with my evaluation of black parents' educational priorities, but his statement indicates that *493 it would make no difference if I were correct. The Supreme Court has spoken in response to issues raised in litigation begun and diligently pursued by his agency. The interpretation of the Court's response by him and other officials has then determined NAACP litigation policies.⁶⁵

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

III. Civil Rights Litigation and the Regulation of Professional Ethics

A. NAACP v. Button

The questions of legal ethics raised by the lawyer-client relationship in civil rights litigation are not new. The Supreme Court's 1963 treatment of these questions in *NAACP v. Button*,⁶⁸ however, needs to be examined in light of the emergence of lawyer-client conflicts which are *494 far more serious than the premature speculations of a segregationist legislature.

1. The Challenge

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

solicitation of legal business did not violate the Constitution in proscribing many of the legal activities of civil rights groups such as the NAACP.⁷⁶

*495 2. The Supreme Court of Response

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

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

The Court deemed NAACP's litigation activities “a form of political expression” protected by the First Amendment.⁷⁹ Justice Brennan conceded that Virginia had a valid interest in regulating the traditionally *496 illegal practices of barratry, maintenance, and champerty,⁸⁰ but noted that the malicious intent which constituted the essence of these common law offenses was absent here. He also reasoned that because the NAACP's efforts served the public rather than a private interest, and because no monetary stakes were involved, “there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants”⁸¹

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

Although the issue was raised by the state,⁸⁵ the majority did not decide whether Virginia could constitutionally prohibit the NAACP from controlling the course of the litigation sponsored, perhaps because the NAACP consistently denied that it exercised such control.⁸⁶ *497 Justice White, concurring in part and dissenting in part, cautioned:

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

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

3. *Justice Harlan's Dissent*

Joined by Justices Clark and Stewart, Justice Harlan expressed the view that the Virginia statute was valid. In support of his conclusion, Harlan carefully reviewed the record and found that NAACP policy required what he considered serious departures from ethical professional conduct. First, NAACP attorneys were required to follow policy directives promulgated by the National Board of Directors or lose their right to compensation.⁸⁸ Second, these directives to stafflawyers *498 covered many subjects relating to the form and substance of litigation. Third, the NAACP not only advocated litigation and waited for prospective litigants to come forward; in several instances and particularly in school cases, “specific directions were given as to the types of prospective plaintiffs to be sought, and staff lawyers brought blank forms to meetings for the purpose of obtaining signatures authorizing the prosecution of litigation in the name of the signer.”⁸⁹ Fourth, theretainer *499 forms signed by prospective litigants sometimes did not contain the names of the attorneys retained, and often when the forms specified certain attorneys as counsel, additional attorneys were brought into the action without the plaintiff’s consent. Justice Harlan observed that several named plaintiffs had testified that they had no personal dealings with the lawyers handling their cases and were not aware until long after the event that suits had been filed in their names.”⁹⁰ Taken together, Harlan felt these incidents justified the corrective measures taken by the State of Virginia.

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

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

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

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

*500 it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school

authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.⁹³

4. NAACP v. Button *In Retrospect*

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

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

The *Button* majority obviously felt that the potential for abuse of clients' rights in this procedure was overshadowed by the fact that Virginia enacted the statute to protect the citadel of segregation rather than the sanctity of the lawyer-client relationship. As the majority pointed out, litigation was the only means by which blacks throughout the South could effectuate the school desegregation mandate of *Brown*.⁹⁴ The theoretical possibility of abuse of client rights seemed a rather slender risk when compared with the real threat to integration *501 posed by this most dangerous weapon in Virginia's arsenal of “massive resistance.”

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

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

Nevertheless, a few contemporary commentators found cause for sober reflection in Harlan's dissent.⁹⁸ And even those writers who viewed the decision as necessary to protect the NAACP conceded that the majority had paid too little attention to Justice Harlan's conflict-of-interest concerns. As one writer noted, Justice Brennan's response—quoting from Justice Harlan's opinion in *NAACP v. Alabama ex rel. Patterson*⁹⁹ to the effect that NAACP interests were identical with those of its members—was inadequate.¹⁰⁰ In the Alabama case the NAACP was attempting to protect the secrecy

of its membership; the Court ruled that the organization had standing to defend the privacy and freedom of association of its members because they could not come forward without revealing their names and sacrificing the very rights at stake. But in school cases, as Justice Harlan observed in *Button*, an individual plaintiff might prefer a compromise which would frustrate attainment of the goals of the sponsoring groups. “[F]requently occasions might arise in which the choice between an immediate small gain and possible later achievement of a larger aim should at least be put to the plaintiff in whose name the suit was being *502 brought, not decided for him by third parties.”¹⁰¹ It is no answer that the plaintiff is always at liberty to withdraw his name from the case, because “if the plaintiff does not know—or if—his case is being conducted, he is not likely to be able to ascertain with any precision where his interests lie. Furthermore, the issue may be so complex that the litigant needs professional advice before the alternatives become clear to him.”¹⁰²

B. The ABA Response

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

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

The market system mentality of the drafters of the *Code* surfaces in another provision suggesting that problems of control are less likely to exist where the lawyer “is compensated directly by his client.”¹⁰⁸ But solving the problem of control by relying on the elimination of compensation from a source other than the client was rejected in *504 *Button*. All that remains is the warning that a person or group furnishing lawyers “may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client.”¹⁰⁹

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

Current ABA standards thus appear to conform with *Button* and its progeny in permitting the representation typically provided by civil rights groups. They are a serious attempt to come to grips with and provide specific guidance on the

issues of outside influence and client primacy that so concerned Justice Harlan. But they provide little help where, as in school desegregation litigation, the influence of attorney and organization are mutually supportive, and both are so committed to what they perceive as the long range good of their clients that they do not sense the growing conflict between those goals and the client's current interests. Given the cries of protest and the charges of racially motivated persecution that would probably greet any ABA effort to address this problem more specifically, it is not surprising that the conflict—which in any event will neither embarrass the profession ethically nor threaten it economically—has not received a high priority for further attention.

Idealism, though perhaps rarer than greed, is harder to control. Justice Harlan accurately prophesied the excesses of derailed benevolence, but *505 a retreat from the group representational concepts set out in *Button* would be a disaster, not an improvement. State legislatures are less likely than the ABA to draft standards that effectively guide practitioners and protect clients. Even well intentioned and carefully drawn standards might hinder rather than facilitate the always difficult task of achieving social change through legal action. And too stringent rules could encourage officials in some states to institute groundless disciplinary proceedings against lawyers in school cases, which in many areas are hardly more popular today than they were during the massive resistance era.

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

IV. The Class Action Barrier to Expression of Dissent

Even if civil rights lawyers were highly responsive to the wishes of the named plaintiffs in school desegregation suits, a major source of lawyer-client conflict would remain. In most such suits, the plaintiffs bring a class action on behalf of all similarly situated black students and parents; the final judgment will be binding on all members of the class.¹¹⁵ As black disenchantment with racial balance remedies grows, *506 the strongest opposition to civil rights litigation strategy may come from unnamed class members. But even when black groups opposed to racial balance remedies overcome their ambivalence and obtain counsel willing to advocate their positions in court, judicial interpretations of the federal class action rule make it difficult for dissident members of the class to gain a hearing in pending school litigation.

Ironically, the interpretations of Rule 23 which now hinder dissent derive from early school desegregation cases in which the courts sought to further plaintiffs' efforts to gain compliance with *Brown*. Typical of the early solicitude for plaintiffs in school desegregation cases was *Potts v. Flax*.¹¹⁶ Defendants maintained at trial that the suit was not a class action because neither of the two plaintiffs had affirmatively indicated that they sought class relief.¹¹⁷ The district court found first that the suit properly presented the question of constitutionality of defendant's dual school system. The court then determined that although the suit was instituted only by individuals, the right sued upon was a class right—the right to a termination of the system-wide policy of racial segregation in the schools—and thus affected every black child in the school district.¹¹⁸ The Fifth Circuit, approving the lower court's reasoning, doubted that relief formally confined to specific black children either could be granted or could be so limited in its effect. Viewing the suit as basically an attack on the unconstitutional practice of racial discrimination, the court held that the appropriate relief was an order that it be discontinued. Moreover, the court suggested, “to require a school system to admit the specific successful plaintiff Negro

child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination.”¹¹⁹

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

Basic principles of equity require courts to develop greater sensitivity to the growing disagreement in black communities over the nature of school relief. Existing class action rules provide ample authority for broadening representation in school cases to reflect the fact that views in the black community are no longer monolithic. One aspect of class action status requiring closer scrutiny is whether the representation provided by plaintiffs will “fairly and adequately protect the interests of the class.”¹²² Because every person is entitled to *508 be adequately represented when his rights and duties are being adjudicated, it is incumbent upon the courts to ensure the fairness of proceedings that will bind absent class members. The failure to exercise such care may violate due process rights guaranteed by the Fifth and Fourteenth Amendments.¹²³

These problems can be avoided if, instead of routinely assuming that school desegregation plaintiffs adequately represent the class, courts will apply carefully the standard tests for determining the validity of class action allegations and the standard procedures for protecting the interests of unnamed class members.¹²⁴ Where objecting members *509 of the class seek to intervene, their conflicting interests can be recognized under the provisions of Rule 23(d)(2).¹²⁵ In this regard, the class action intervention provisions are in harmony with those contained in Rule 24.¹²⁶

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

In *Norwalk Core v. Norwalk Board of Education*,¹²⁹ groups seeking integration *510 more extensive than that sought by the named plaintiffs became ensnared in the traditional reading of the class action rule. The district court denied a motion to intervene as of right under Rule 24(a)(2) by a group purportedly representing blacks and Puerto Ricans in the community. CORE, which represented a class similarly defined, had challenged the method of school desegregation (the closing of facilities in the black and Puerto Rican communities and the transporting of minority children to predominantly white outlying schools) rather than the objective of desegregation itself. It sought reopening of the school facilities in the minority communities. The proposed intervenors asserted that this would hamper the board’s efforts to integrate

the schools. In denying the motion to intervene, the court reasoned that since neither group opposed school integration and both sought integrated schools, the question was simply whether the original plaintiff had standing to bring the suit. However, the district court in effect satisfied the intervenors' request by refusing the two-way busing sought by the original plaintiffs.¹³⁰

Courts have been more sensitive to the differing interests of persons of varied racial, ethnic, and national backgrounds. While efforts of white parents to intervene as defendants in order to make arguments similar to those being made by school boards generally have not been successful,¹³¹ courts have allowed intervention in recognition of *511 the distinct interests of Mexican-¹³² and Chinese-Americans.¹³³ The disagreements among blacks as to whether racial balance remedies are the most appropriate relief for segregated schools, particularly in large urban districts, reflect interests as divergent as those which courts have recognized at the request of other ethnic minorities.

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

*512 V. The Resolution of Lawyer-Client Conflicts

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

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

This seemingly harsh suggestion is dictated by practical as well as professional considerations. Lacking more viable alternatives, the black community has turned to the courts. After several decades of frustration, the legal system, for a number of complex reasons, responded. Law and lawyers have received perhaps too much credit for that response.¹³⁶ The quest for symbolic manifestations of new rights and the search for new legal theories have too often failed to prompt *513 an assessment of the economic and political condition that so influence the progress and outcome of any social reform improvement.¹³⁷

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

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

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

In the last analysis, blacks must provide an enforcement mechanism that will give educational content to the constitutional right recognized in *Brown*. Simply placing black children in "white" schools will seldom suffice. Lawyers in school cases who fail to obtain judicial relief *515 that reasonably promises to improve the education of black children serve poorly both their clients and their cause.

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

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

the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.¹⁴³

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

Conclusion

The tactics that worked for civil rights lawyers in the first decade of school desegregation—the careful selection and filing of class action suits seeking standardized relief in accordance with set, uncompromising national goals—are no longer unfailingly effective. In recent years, the relief sought and obtained in these suits has helped to precipitate a rise in militant white opposition and has seriously eroded carefully cultivated judicial support. Opposition to any civil rights program can be expected, but the hoped-for improvement in schooling for black children that might have justified the sacrifice and risk has proven minimal at best. It has been virtually nonexistent for the great mass of urban black children locked in all-black schools, *516 many of which are today as separate and unequal as they were before 1954.

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

Footnotes

^{a1} This paper is a part of a larger study on the Roles of Courts in Desegregation of Education Litigation sponsored by the Institute of Judicial Administration through a grant from the Ford Foundation. The results of this research will be published in a forthcoming book on this subject.

^{d1} Professor of Law, Harvard University. Pamela Federman, Susan Mentser, and Margaret Stark Roberts assisted in researching and preparing this article.

¹ Freedom House Institute on Schools and Education, Critique of the Boston School Committee Plan, 1975, at 2 (emphasis added) (on file with *Yale Law Journal*). This 15 page document was prepared, signed, and submitted in February, 1975, directly to federal judge W. Arthur Garrity by almost two dozen of Boston's black community leaders. The statement was a critique of a desegregation plan filed by the Boston School Committee in the Boston school case: Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 953 (1975); Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass.), *aff'd*, 509 F.2d 599 (1st Cir. 1975); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976). It was written during two all-day sessions sponsored by the Freedom House Institute, a community house in Boston's black Roxbury area. Judge Garrity had solicited comments on the School Committee's plan from community groups. Those who prepared this statement did so on behalf of the Coordinated Social Services Council, a confederation of 46 public and private agencies serving minority groups in the Boston area. The cover letter was signed by Otto and Muriel Snowden, co-directors of Freedom House, Inc. and two of the most respected leaders in the Roxbury community. They advised Judge Garrity that the statement “represents the thinking of a sizable number of knowledgeable people in the Black community, and we respectfully urge your serious consideration of the points raised.” Letter from Otto and Muriel Snowden to Judge W. Arthur Garrity, Feb. 4, 1975 (on file with *Yale Law Journal*).

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

² 347 U.S. 483 (1954).

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

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

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

⁶ 163 U.S. 537 (1896).

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

⁸ J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 34-35 (1959). For an account of the development of the NAACP's legal program, see Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 214-18 (1970).

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

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

¹¹ See note 7 *supra*.

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

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

¹⁴ *Id.* at 39.

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

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

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control, a substantial ability to influence the development and sequence of cases, which does not exist with many other efforts to make law in the courts today

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

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

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

Id. at 345.

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

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

Former NAACP General Counsel (now Judge) Robert L. Carter, like most commentators, places responsibility for resistance to *Brown* on Southern officials. Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. U.L.Q. 479, 486. But of course those officials were fully represented by lawyers. A telling manifestation of the misconduct of school board lawyers is the line of decisions that depart from the American rule denying attorneys' fees to successful litigants. In Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963), the court justified its departure from the general rule:

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

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

Congress viewed these awards as sufficiently appropriate to include a provision for such awards in § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. IV 1974). The Supreme Court interpreted this provision in Northcross v. Board of Educ., 412 U.S. 427 (1973), as entitling prevailing parties in school desegregation litigation to a reasonable attorney's fee as part of the cost, absent special circumstances rendering such an award unjust. The provision was given a degree of retroactivity in Bradley v. School Bd., 416 U.S. 696 (1974). There the Court held that § 718 can be applied to attorneys' services that were rendered before that provision was enacted, if the propriety of the fee award was pending resolution on appeal when the statute became law. Lower courts have also interpreted the provision liberally. See Thompson v. Madison County Bd. of Educ., 496 F.2d 682, 689 (5th Cir. 1974) (rejecting defenses based on employment of plaintiffs' counsel by a civil rights

organization and on the fact that plaintiffs incurred no obligation for legal fees); Henry v. Clarksdale Municipal Separate School Dist., 480 F.2d 583 (5th Cir. 1973); Davis v. School Dist. of the City of Pontiac, Inc., 374 F. Supp. 141 (E.D. Mich. 1974). *But see* Thompson v. School Bd., 363 F. Supp. 458, 466 (E.D. Va. 1973), *aff'd*, 498 F.2d 195 (4th Cir. 1974).

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

19

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

20

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

21

I can recall a personal instance. While working on the James Meredith litigation in Jackson, Mississippi, in 1961, at a time when the very idea of school desegregation in Mississippi was dismissed as “foolishness” even by some civil rights lawyers, I was visited by a small group of parents and leaders of the black community in rural Leake County, Mississippi. They explained that they needed legal help because the school board had closed the black elementary school in their area even though the school had been built during the 1930's with private funds and was maintained, in part, by the efforts of the black community. Closing of the school necessitated busing black children across the county to another black school. In addition, the community had lost the benefit of the school for a meeting place and community center. The group wanted to sue the school board to have their school reopened. I recall informing the group that both LDF and NAACP had abandoned efforts to make separate schools equal, but if they wished to desegregate the whole school system, we could probably provide legal assistance. The group recognized as well as I did that there were only a few black attorneys in Mississippi who would represent the group, and that those attorneys would represent them only if a civil rights organization provided financial support. Sometime later, the group contacted me and indicated they were ready to go ahead with a school desegregation suit. It was filed in 1963, one of the first in the state.

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

This NAACP insistence on integration even preceded *Brown*. *Davis v. County School Board*, which reached the Supreme Court as a companion case to *Brown*, originated with a request by blacks to the NAACP for legal help following an unsuccessful

year-long effort to obtain a new high school. According to one commentator, “[t]wo attorneys did come; but they explained that, in view of the new policy of the N.A.A.C.P., they could not help with litigation unless a suit was filed to abolish school segregation.” Wilkerson, *The Negro School Movement in Virginia: From “Equalization” to “Integration,”* in II THE MAKING OF BLACK AMERICA 259, 269 (A. Meier & E. Rudwick eds. 1969).

22 See p. 494 *infra*.

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

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

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

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

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

26 L. FEIN, THE ECOLOGY OF THE PUBLIC SCHOOLS: AN INQUIRY INTO COMMUNITY CONTROL 6 (1971): In effect, the liberal community, both black and white, was caught up in a wrenching dilemma. The only way, it appeared, to move a sluggish nation towards massive amelioration of the Negro condition was to show how terrifyingly debilitating were the effects of discrimination and bigotry. The more lurid the detail, the more guilt it would evoke, and the more guilt, the more readiness to act. Yet the same lurid detail that did, in the event, prompt large-scale federal programs, also reinforced white convictions that Negroes were undesirable objects of interaction.

- ²⁷ Significantly, LDF does not share NAACP's thirst for bringing more metropolitan school cases. James Nabrit reported that "in our litigation program at the Legal Defense Fund, at least for the short run future, we have no plans to pursue requests for interdistrict relief in the courts. I take the *Milliken* case to send us a broad signal that such cases are unlikely to succeed." CONFERENCE BEFORE THE UNITED STATES COMMISSION CIVIL RIGHTS, *MILLIKEN V. BRADLEY: THE IMPLICATIONS FOR METROPOLITAN DESEGREGATION* 21 (Gov't Printing Off. Nov. 9, 1974).
- ²⁸ The standards are contained in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). In a companion case to *Swann*, lower courts were directed to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971). Except where problems of distance and majority black percentages intervene, most courts continue to order plans patterned after the directives in *Swann*, *Keyes* and *Davis*. See, e.g., *United States v. School Dist.*, 521 F.2d 530, 535 n.7 (8th Cir. 1975); *Spangler v. Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1975).
- ²⁹ Of the more than 256,000 buses that traveled over 2.2 billion miles in 1971-1972, only a small percentage were used to achieve school desegregation. NAACP Legal Defense and Educational Fund, *It's Not the Distance, "It's the Niggers,"* in *THE GREAT SCHOOL Bus CONTROVERSY* 322 (X. Mills ed. 1973).
- ³⁰ See pp. 482-86 *infra*; note 1 *supra*.
- ³¹ As one author summarized the situation, "During the past 20 years considerable racial mixing has taken place in schools, but research has produced little evidence of dramatic gains for children and some evidence of genuine stress for them." N. ST. JOHN, *SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN* 136 (1975). Some writers are more hopeful, e.g., Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 *LAW & CONTEMP. PROB.* 241 (1975); others are more cautious, e.g., Cohen, *The Effects of Desegregation on Race Relations*, 39 *LAW & CONTEMP. PROB.* 271 (1975); Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 *LAW & CONTEMP. PROB.* 300 (1975).
- ³² NAACP General Counsel Nathaniel R. Jones cites frequent statements by Chief Justice Earl Warren to support his organization's position that "the *Brown* decision was not an educational decision resting in educational considerations. Rather, it was a decision regarding human rights." Denying that the quality of segregated schools is a major priority in NAACP school suits, he writes, "When we bring desegregation suits on behalf of black and white children, we do so because state-imposed school segregation is a living insult, in that it perpetuates that condition which the 14th Amendment proscribes." Comments of Nathaniel R. Jones at Harvard Law School, May 2, 3, 1974, at 1-2, 5 (on file with *Yale Law Journal*). Civil Rights lawyer J. Harold Flannery, counsel in the Boston school desegregation case, asserts: The constitutional objective is, and has always been, to rid this public institution completely of official segregation and discrimination, and comprehensively desegregated schools, i.e., each a microcosm of the district as a whole, is the central indicium of compliance—wholly without regard to educational consequences. Letter from J. Harold Flannery to author, Aug. 25, 1975, at 4 (on file with *Yale Law Journal*). See note 38 *infra*. Rhetoric irretrievably linking the relief under *Brown* to integration does not alter the educational decision made when racial balance remedies are advocated and obtained. Professor Alexander Bickel recognized as much: Inevitably the Supreme Court [in *Swann* and its companion cases] imposes a choice of educational policy, for the time being at least, when it orders maximum integration, a choice committing moral, political and material resources to the exclusion of alternate attempts to improve the educational process, and I don't think we can be sure that the choice is the right one everywhere. Bickel, *Education in a Democracy: The Legal and Practical Problems of School Busing*, 3 *HUMAN RIGHTS* 53, 54 (1973). In the same article, Professor Bickel suggested that, given the paucity of alternative suggestions by either plaintiffs or school board counsel, racial balance remedies are adopted "because there is not much else that a court can do that will have an impact." *Id.* at 59-60. Of course, the NAACP position that integration is required regardless of its educational effect allows it to ignore the social science studies pointing to disappointing minority group academic achievement in desegregated schools. See note 31 *supra*.

- ³³ In Milliken v. Bradley, 418 U.S. 717, 745 (1974), the Supreme Court held (5-4) that desegregation remedies must stop at the boundary of the school district unless it can be shown that deliberately segregative actions were “a substantial cause of interdistrict segregation”:
- Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.
- Id.* at 744-45. The Court so held despite the fact that the only effective desegregation plan was a metropolitan area plan. The majority opinion, severely criticized by the dissenting Justices, has also been attacked by legal writers. *See, e.g.*, Symposium, *Milliken v. Bradley and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751 (1975); Amaker, *Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases*, 2 HASTINGS CON. L.Q. 349 (1975); Comment, *Milliken v. Bradley, Roadblock or Guide Post?: New Standards For Multi-District School Desegregation*, 48 TEMP. L.Q. 966 (1975).
- The *Milliken* standard was followed in United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). The district court deemed its interdistrict order necessary because requiring what it termed a massive “fruit basket” scrambling of schools within the city would simply lead to a white exodus from what would become substantially black schools. The court of appeals reversed all orders relating to a metropolitan remedy, but found “white flight” an unacceptable reason for failing to desegregate the city schools. *But see Newburg Area Council, Inc. v. Board of Educ.*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), approving in the light of *Milliken* standards a pre-*Milliken* order requiring consolidation of city and county school districts on findings that neither had fully complied with the *Brown* desegregation mandate. After remand of the case, the Jefferson County and Louisville school districts merged under the provisions of state law. The court of appeals subsequently granted plaintiffs a writ of mandamus directing the district court to approve a desegregation plan for the newly created district to take effect for the 1975-1976 school year. Newburg Area Council, Inc. v. Cordon, 521 F.2d 578 (6th Cir. 1975). For similar cases, see Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 96 S. Ct. 381 (1975); United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3280 (U.S. 1975).
- ³⁴ Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 30-31 (1971). *See also* Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971) (requiring “every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation”).
- ³⁵ For limitations on busing notwithstanding a substantial reduction in the potential for desegregation, see Mapp v. Board of Educ., 525 F.2d 169 (6th Cir. 1975); Northcross v. Board of Educ., 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974); Goss v. Board of Educ., 482 E.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); Mapp v. Board of Educ., 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973); Carr v. Montgomery County Bd. of Educ., 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 96 S. Ct. 394 (1975).
- ³⁶ Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); related decisions cited in note 1, *supra*.
- ³⁷ *See* note 1 *supra*.
- ³⁸ The court appointed a panel of four masters who held hearings on all plans submitted, adopted portions of each, and, with some additions, filed them with the court. Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass. 1975), *aff'd*, No. 75-1184 (1st Cir., Jan. 14, 1976). At one of the masters' hearings, plaintiffs' attorney J. Harold Flannery presented a closing argument that emphasized the need to proceed immediately with full desegregation:
- Educational innovation and school desegregation, I would hope, are complementary or not opposed or competing. But it seems to us an irreducible minimum that we must begin with assignments and then look to program, because that's the constitutional mandate. School desegregation, not educational innovation, that's not the *Brown* case. It is a race case, may it please the Court, not so much [an] education case.
- Transcript of Masters' Hearings at 1809. *See* note 32 *supra*.
- ³⁹ The plan filed by the masters, 401 F. Supp. at 227, included educational components at the expense of maximum racial balance. In their report, the masters found plaintiffs' plan “unsatisfactory” in several respects, despite its achievement of thorough

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numerical desegregation. In their view, "a plan should assure not just proper assignment of students, but also educational programs appropriate to the special needs of students who have been victimized by segregation." Report of the Masters in Tallulah Morgan, Et Al, Versus John Kerrigan, Et Al, Mar. 31, 1975, at 18 (on file with *Yale Law Journal*).

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

⁴¹ In the course of the San Francisco school litigation, *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974), District Judge Weigel asked counsel: Assuming minority groups desire separate schools, and assuming they can show that such schools would not be inferior, should that desire, if it is manifested to this Court, be considered by the Court." Seeking to clarify his question, Judge Weigel explained, "[T]here's something new that's coming along.... There [is] beginning to emerge a demand on the part of large segments of minority groups, particularly among the blacks, that they run their own schools and they have black schools." D. Kirp, "Multitudes in the Valley of Indecision" : The Desegregation of San Francisco's Public Schools, 1975, at 60 (unpublished paper prepared for the Institute of Judicial Administration project on judicial roles in desegregation of education litigation) (on file with *Yale Law Journal*). When a young black attorney recruited for the case by the NAACP sought to prepare a memorandum with an affirmative response to Judge Weigel's question, his colleagues on the case were shocked. Subsequently, the young attorney agreed to withdraw from the case, and his position was not asserted in any subsequent proceeding. *Id.* at 60-61.

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

⁴³ *Bradley v. Milliken*, 402 F. Supp. 1096 (E.D. Mich. 1975). The court pointed out that under the plaintiffs' definition, any school whose racial composition varies more than 15% in either direction from the Detroit system-wide ratio is racially identifiable. Accordingly, an elementary school with 57.3%-87.3% black enrollment, a junior high school with 58.0%-88.0% black enrollment and a senior high school with 51.9%-81.9% black enrollment are desegregated schools. Carrying ... [the] plan a step further, an elementary school that is 56% black is a racially identifiable white school and an elementary school that is 85% black is a desegregated non-racially identifiable school.

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

⁴⁴ *Judge in Detroit liars Busing Plans*, N.Y. Times, Aug. 17, 1975 at 1, col. 1; Detroit Free Press, Aug. 17, 1975, at 8A, col. 1. A local NAACP official was no less outspoken, referring to the decision as 'a traditional calamity [that] takes us back to the days of Dred Scott,' and asserting that "[t]he NAACP will not allow this kind of travesty of justice to exist without being challenged The NAACP ... is deeply angered" "*Busing Foes Laud De Mascio Ruling*, *id.* at 1A, col. 7. Apparently the comments of neither official were tempered by the realization that the mayor of Detroit, Coleman Young, and the president of its school board, C. L. Golightly, both of whom are black, had favored a plan that would emphasize improving school quality. Roth had opposed the NAACP's racial balance plan, and both praised the court's opinion for rejecting the idea that busing

is a magic formula and for addressing itself to the improvement of Detroit's school system. *Id.* Roy Wilkins sent the mayor a telegram calling the statement “of a piece with those uttered by the most vicious Southern racists.” Wentworth, *Detroit Blacks Divided*, Wash. Post, Sept. 2, 1975, at 1, col. 6. For a detailed review of decentralization and desegregation efforts in Detroit, see Pindur, *Professional Comment: Legislative and Judicial Holes in the Detroit School Decentralization Controversy*, 50 J. URB. L. 53 (1972).

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

⁴⁶ See *id.* at 1251 n.5.

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

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

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

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

⁴⁸ Calhoun v. Cook, 487 F.2d 080 (5th Cir. 1973). See note 130 *infra*. Significantly, the court permitted the Compromise Plan to take effect pending further hearings. *Id.* at 683-84. The Fifth Circuit noted that blacks occupied a majority of school board posts, two-thirds of the school administration and staff posts, and over 00 percent of the faculty positions. In addition, “the numerous nonappealing black plaintiffs who agreed to and support the present plan attest the district's lack of discrimination against black students as well as its freedom from the effects of past race-based practices.” *Id.* at 719.

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

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

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

It is true that the Supreme Court has evidenced considerable resistance to requests that “educational quality” be brought within the guarantees of the Constitution. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). And predictably, some lower courts interpret *Rodriguez* as a bar to ordering school districts to adopt specific educational

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plans as a remedy for unconstitutional segregation. See *Keyes v. School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3399 (U.S. 1976) (holding district court lacked authority to impose a detailed program of bilingual and multicultural education). But in *Keyes* the court agreed that the board was obligated to help “Hispano school children to reach the proficiency in English necessary to learn other basic subjects.” 521 F.2d at 482. Moreover, were the Denver court not already committed to a major desegregation effort on the racial balance model, it might have been more willing to impose education-oriented remedies.

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

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

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

⁵⁵ *Id.* The author also suggests that busing serves as a symbolic safeguard against white duplicity. Although some may argue that the “separate but equal” standard was impossible to realize only because of black political impotence, and that the current existence and continued growth of black political power means that segregation today need not, and would not, result in resource inequality, the suspicion remains that somehow the whites will connive to bring extra educational benefits and resources to white children. Busing, then, symbolizes the opportunity for blacks to discover what it is that whites have in their schools and to share fully in it—whatever “it” is.
Id. at 479.

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

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

⁵⁸ *Id.*

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

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

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

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

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⁶⁰ Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 1/8 (1974). Edmonds is Director of the Center for Urban Studies, Harvard Graduate School of Education.

⁶¹ *Id.*

⁶² *Id.* at 179.

⁶³ *Id.* Poverty law lawyers have recognized a similar problem. As one group of student commentators have put it: Many public interest lawyers, while representing specific clients in most of their legal work, see themselves as advocates for a much more loosely defined constituency or community. The lawyer's relationship to that constituency affects his independence in handling specific cases and, more importantly, in setting priorities as to the matters he will handle.

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

Comment, *supra* note 4, at 1124-25. Another commentator writes:

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

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

⁶⁴ Letter from Nathaniel R. Jones to author, July 31, 1975: It would be absurd to expect that each and every black person should be polled before a lawsuit is filed, or a plan of desegregation is proposed. Certainly, school boards, who resist these suits, do not poll their patrons on their views before shaping a position.

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

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

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

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

⁶⁵ A bizarre illustration of the lengths to which this reasoning can take the lawyer motivated by his own ideals is presented in a recent (and perhaps final) chapter of the East Baton Rouge school case, which was originally filed in 1956. See *Davis v. East Baton Rouge Parish School Bd.*, 398 F. Supp. 1013 (M.D. La. 1975). A motion for "supplemental relief" was filed by an attorney without authorization by any plaintiff. Referring to counsel as an "attorney-intervenor," Judge E. Gordon West interpreted the motion as seeking "'more integration' ... sought solely for sociological reasons rather than for the purpose of

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improved educational opportunity for children.” *Id.* at 1015. Nevertheless, the court appointed a state educational expert to investigate the East Baton Rouge school system to determine its compliance with the Constitution and prior court orders. A few of the expert’s education-oriented recommendations were adopted, and the court then declared the board was operating a unitary school system and dismissed the suit. *Id.* at 1019-20.

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

⁶⁷ *Id.*

⁶⁸ 371 U.S. 415 (1963).

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

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

⁷¹ *Id.* at 423.

⁷² 31 U.S.L.W. 3123 (Oct. 16, 1962).

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

⁷⁴ 371 U.S. at 434-35.

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

⁷⁶ *Id.* at 159-60; 116 S.E.2d at 69. The Virginia Supreme Court also found that the NAACP’s civil rights activities violated Canons 35 and 47 of the American Bar Association’s CANONS OF PROFESSIONAL ETHICS, which the court had adopted in 1938. *Id.* at 156; 116 S.E.2d at 67. Canon 35 provided:

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

Canon 47 provided:

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

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

⁷⁷ 371 U.S. at 428-29.

⁷⁸ *Id.* at 435 (footnotes omitted).

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79 *Id.* at 429.

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

81 371 U.S. at 443.

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

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

83 371 U.S. at 444-45.

84 *Id.* at 445.

85 “In reply to Mr. Justice White's question of what factors are necessary for violation of the statute, Mr. Wickham [counsel for the State of Virginia] stated that control is the key.” 31 U.S.L.W. 3125 (Oct. 16, 1962). The Virginia Supreme Court had found: “The absence of the usual contact between many of the litigants and the attorneys instituting proceedings is indicative of the control of the litigation by the NAACP and the Conference.” NAACP v. Harrison, 202 Va. 142, 155, 116 S.E.2d 55, 65-66 (1960). *See* note 76 *supra*.

86 In its brief, the NAACP argued:

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

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

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

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

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

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

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

A. That is correct.

Q. And the Conference does not interfere?

A. The Conference has nothing to do with the attorney and the litigant. Transcript of Record at 262-63.

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

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

A. I know of no such specific case. *Id.* at 302-03.

87 371 U.S. at 447.

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

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

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

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

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

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

A. There isn't any question about it.

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

A. Not and expect compensation from the Conference no.

Id. at 94.

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

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

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

Transcript of Record at 218.

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

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

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

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

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

Q. It never looks for plaintiffs?

A. The Conference never looks for plaintiffs.

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

A. That is correct.

Q. There are no exceptions in your experience? A. I can think of no exceptions. *Id.* at 260-61.

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

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371 U.S. at 460.

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Id. at 462.

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Id.

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Id. at 429-30.

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- ⁹⁵ E.g., Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 TEXAS L. REV. 1018 (1964); 12 AM. U. L. REV. 184 (1963); 32 U. CIN. L. REV. 550 (1963); 1963 U. ILL. L.F. 97.
- ⁹⁶ H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 90 (Phoenix 1966).
- ⁹⁷ *Id.* at 89-90.
- ⁹⁸ E.g., *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 122-24 (1963); 29 BROOKLYN L. REV. 318 (1963); 15 S.C. L. REV. 845 (1963).
- ⁹⁹ 357 U.S. 449 (1958).
- ¹⁰⁰ Birkby & Murphy, *supra* note 95, at 1036.
- ¹⁰¹ *Id.* at 1036-37.
- ¹⁰² *Id.* at 1037.
- ¹⁰³ E.g., Brotherhood of Ry. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) (state restrictions on the practice of law voided to the extent that they impinged upon the right of a labor union to maintain a legal staff to give advice respecting prospective litigation and to recommend attorneys for investigation of claims under the Federal Employees Liability Act); United Transp. Union v. State Bar, 401 U.S. 576 (1971) (protecting the union's right to handle members' claims under the Federal Employees Liability Act); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (labor union entitled to hire attorneys on a salary basis to assist members in processing workmen's compensation claims).
- ¹⁰⁴ Cf. Freund, *Civil Rights and the Limits of the Law*, 14 BUFFALO L. REV. 199, 207 (1964) (referring specifically to the genesis of the libel case, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in the reporting of civil rights protests in Alabama).
- ¹⁰⁵ The *Code of Professional Responsibility* took effect in 1970 and was amended in 1970, 1974 and 1975. It consists of nine canons which broadly state the standards of professional conduct. There are two explanatory sections under each canon: Ethical Considerations (EC), which are “aspirational in character” and for purposes of guidance describe more particularly the principles set out in the canons; and Disciplinary Rules (DR), which “state the minimum level of conduct below which no lawyer can fall without being subjected to disciplinary action.” ABA, *CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 1 (1975)* (Preliminary Statement) [hereinafter cited by provision only]. The DR's are the only part of the *Code* which are mandatory and applicable to all lawyers “regardless of the nature of their professional activities.” *Id.*
- The key section for public interest lawyers is Canon 2, the outgrowth of *Button* and its progeny. Canon 2 provides that “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.” This Canon has created great controversy; as one writer observed, the new Canon must prohibit individual champerty, maintenance, barratry, solicitation of legal business, and advertising, while encouraging similarly-directed group activities. Inasmuch as any group can act only through its members, a fine line is then drawn between conduct of a lawyer that furthers his own interest or that furthers the common good. Particularly is this true when individual benefits are produced by permissible “professional” activities.
- Smith, *Canon 2: “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,”* 48 TEXAS L. REV. 285, 287 (1970). See Elson, *Canon 2—The Bright and Dark Face of the Legal Profession*, 12 SAN DIEGO L. REV. 306 (1975); Nahstall, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2-103 (D) (5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334 (1970).
- The ABA's recognition of group services has been grudging. In what has been called “a lateral pass to the Supreme Court,” group legal services by nonprofit organizations were initially permitted “only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities.” DR 2-103(D)(5); Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEXAS L. REV. 255, 262 (1970). Subsequent amendments have liberalized the range of permissible professional activity in the areas of legal services and group practice. See, e.g., EC 2-33 (Feb. 1975), which reminds lawyers of their professional

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obligations to individual clients and cautions against situations where there may be interference by lay officials or where, because of economic considerations, competence and quality of service may suffer.

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

107 EC 5-21 provides:
The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

108 EC 5-22 provides:
Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

109 EC 5-23.

110 *Id.*

111 EC 5-24.

112 EC 7-7.

113 EC 7-8.

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

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

It is clear from the Notes of the Advisory Committee on Rules, FED. R. CIV. P. 23, 28 U.S.C. app., at 7766 (1970), that under the 1966 revision to FED. R. CIV. P. 23, subdivision (b)(2) was intended to cover civil rights cases including school desegregation litigation, "where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1776 (1972). FED. R. CIV. P. 23(b)(2) provides:

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

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

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

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

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

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

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

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

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

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

122 FED. R. CIV. P. 23(a)(4). The issue of adequacy of representation is of critical importance in school desegregation cases where all members of the class are bound by the decrees entered. C. WRIGHT & A. MILLER, *supra* note 11"), §§ 1765, 1771. See Note, *Class Actions: Defining The Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U. L. REV. 406 (1973) (arguing for a more vigorous application of the prerequisites for class action status).

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

124 Several steps might be taken to protect class interests:

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

(2). *Notice to class*. Individual notice to known members of the class is required by Rule 23(c)(2) in Rule 23(b)(3) actions. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Individual notice might prove unnecessarily burdensome to plaintiffs in Rule 23(b)(2) civil rights suits and is not required. C. WRIGHT & A. MILLER, *supra* note 115, § 1793. But some effective means of advising the class of the existence of the suit, the type of relief to be sought, and the binding nature of the judgment should be considered by the court. See FED. R. Civ. P. 23(d)(2). Local newspapers usually report the filing of school suits, but provide little information about the significance of the class action nature of the litigation. Notice prepared by plaintiffs

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might, at the court's direction, be distributed to each minority child in the school system. Precedent exists for providing each parent with a letter and questionnaire advising the parent of the pending action and inquiring whether the parent wished to be represented by the plaintiffs and their counsel. Knigh v. Board of Educ., 48 F.R.D. 108 (E.D.N.Y. 1969). An individual notice procedure would provide several advantages. It would:

- a. Enable a fairly accurate determination to be made as to class support for the suit and for the form of relief sought by plaintiffs;
- b. Provide the court with indications regarding the possible need for special steps that might be taken to protect the interests of the class;
- c. Provide class members with an opportunity to provide information through the questionnaire as to individual instances of discrimination they have experienced;
- d. Provide class members with an opportunity to challenge class certification; and
- e. Provide objecting class members an opportunity to intervene. (Specific provision for intervention in class is provided in subdivision (d)(2).)

(3) *Preliminary hearing on class action issue.* In those instances where members of the class raise objections to the adequacy of plaintiffs' representation or the character of relief sought, courts may hold a hearing before deciding under subdivision (c)(1) whether to allow a class action. Challenges will seldom be made at the outset of school desegregation litigation. Subdivision (c)(1) orders are, of course, not irreversible and may be altered or amended at a later date. C. WRIGHT & A. MILLER, *supra* note 115, § 1785.

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

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

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

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

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

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

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

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

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- 131 See, e.g., United States v. Board of School Comm'rs, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); Spangler v. Pasadena City Bd. of Educ., 427 F.2d 1352 (9th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); Hatton v. County Bd. of Educ., 422 F.2d 457 (6th Cir. 1970); Augustus v. School Bd., 299 F. Supp. 1067 (N.D. Fla. 1969). But see Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). The *Smuck* court held that white parents could intervene in order to appeal a school desegregation decision after a majority of the board had determined not to appeal. The court found the requisite interest in the parents' legitimate concern for their children's education and also found potential harm if the petition were denied. The court stated that the desegregation decision presented "substantial and unsettled questions of law" which could be the basis of an appeal. *Id.* at 180.
- 132 E.g., United States v. Texas Educ. Agency, 467 F.2d 848, 853 n.5 (5th Cir. 1972).
- 133 Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 352-54 (9th Cir. 1974).
- 134 Dam, *Class Actions: Efficiency, Compensation, Deterrents and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975): Two different *conflicts of interest* should be considered. The first involves the representative party, who is a volunteer not normally chosen by the class members to act on their behalf. The representative plaintiff may have interests that are not in all ways congruent with those of the members of the class. The second, and for the analysis here more significant, conflict is faced by counsel representing the class. In particular, his decision calculus as to settlement versus continued litigation may be sharply different from that of the class.
- A former legal services staff person has viewed the potential for lawyer-client conflict in class actions as even more serious when such actions are brought by law reform lawyers. Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INTEREST 38 (1973). He charged that in the San Francisco legal services program, lawyers had a "one-track" commitment to class action strategy even though the results of this commitment were "minimal or even harmful." *Id.* at 41, 44. Class action suits were pursued when the legislative route might have been more effective and even when their use "jeopardized the specific goals and the autonomy of the community organizations [the lawyers] presumed to serve." *Id.* at 45. Even successful suits were sometimes counter-productive; the defeat of the one year residency requirement for welfare recipients, for example, resulted in austerity measures and new restrictions resulting in a decrease in the total number of welfare recipients. *Id.* at 43-44. Subsequently, the director of the legal services office issued a strong denial of the charges, stating that the lawyers did serve their clients well and that class action suits were quite successful. Carlin, *The Poverty Lawyers*, 33 PUB. INTEREST 128 (1973). In an earlier article, however, Carlin presented a less rosy view of his office. He noted, *inter alia*, the division between militant white lawyers in the office and more conservative black professionals and neighborhood leaders. Carlin, *Storefront Lawyers in San Francisco*, TRANSACTION, Apr. 1970, at 64, 74.
- 135 See p. 493 *supra*.
- 136 Blacks lost in Plessy v. Ferguson, 163 U.S. 537 (1896), in part because the timing was not right. The Supreme Court and the nation had become reactionary on the issue of race. As LDF Director-Counsel Greenberg has acknowledged: [Plaintiff's attorney in *Plessy*, Albion W.] Tourge recognized [that the tide of history was against him] and spoke of an effort to overcome its effect by influencing public opinion. But this, too, was beyond his control. All the lawyer can realistically do is marshall the evidence of what the claims of history may be and present them to the court. But no matter how skillful the presentation, *Plessy* and *Brown* had dynamics of their own. Tourge would have won with *Plessy* in 1954. The lawyers who brought *Brown* would have lost in 1896. Greenberg, *supra* note 15, at 334.
- 137 Several commentators have noted the tendency of law reform advocates to delude themselves with what one writer calls a "myth of rights," defined as "a social perspective which perceives and explains human interaction largely in terms of rules and of the rights and obligations inherent in rules." S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANCE* 13 (1974) (footnote omitted). See Mayer, *The Idea of Justice and the Poor*, 8 PUB. INTEREST 96 (1967).
- 138 Marian Wright Edelman, a former LDF staff lawyer who lived and practiced in Mississippi before moving to Washington, has spoken of her concern about the distance between her and her clients. She stated:

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

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

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

140 *Id.*

141 See note 136 *supra*.

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

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

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REFLECTIONS OF COMMUNITY ORGANIZERS: LAWYERING
FOR EMPOWERMENT OF COMMUNITY ORGANIZATIONS

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Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.²

Empowerment lawyering with organizations of the poor and powerless differs from corporate lawyering or criminal defense lawyering in purpose, substance and style. It also differs from traditional public interest lawyering in significant respects.³

The purpose of empowerment lawyering with community organizations is to enable a group of people to gain control of the forces *456 which affect their lives.⁴ The substance of this lawyering is primarily the representation of groups rather than individuals.⁵ This style calls for lawyering which joins, rather than leads, the persons represented.

Community organizing is *the* essential element of empowering organizational advocacy. Unless the lawyer recognizes that advocacy with groups cannot proceed without community organizing, there can be no effective empowering advocacy. In fact, if an organization could only have one advocate and had to choose between the most accomplished traditional lawyer and a good community organizer, it had better, for its own survival, choose the organizer.⁶

Community organizers are in an important position to observe and evaluate lawyers in community organizations. Because lawyers ask doctors and engineers to help shape and evaluate their legal product, lawyers should also consider the insights of community organizers in developing approaches to lawyering with organizations where the goal is empowerment of the organization's members. This article considers the observations and reflections of three community organizers, none of whom are lawyers, who have worked with hundreds of community groups.⁷ They were interviewed concerning the role lawyers play in community organizations, how they help and how they hurt the empowerment of organizations. These reflections offer insight on the role of the law and lawyers in working with empowering community organizations.

This article concludes with themes highlighted by the organizers and some observations about how those themes apply to lawyering for empowerment of community organizations.

*457 I. REFLECTIONS BY COMMUNITY ORGANIZERS

A. Ron Chisom

Ron Chisom, an African-American community organizer, has worked over three decades with dozens of community organizations in the southern United States, including public housing tenants, people opposing police brutality, neighborhood preservationists, and civil rights groups.⁸ He consults with numerous groups and is a national trainer with The People's Institute for Survival and Beyond.⁹ Here are his reflections on the role of lawyers in community organizations:

Lawyers have killed off more groups by helping them than ever would have died if the lawyers had never showed up.

Most organizations when they come up with a problem - they turn it into an issue and then they get stumped and then they call a lawyer. A lawyer steps in, in what is essentially a technical role and shows some real authority and expertise by even simple things like taking notes which most people in the community do not do.

People in the organization look up to the lawyer because of their writing skills, their reading skills, their education, their speaking skills and it really makes the lawyer look like they are doing something. People then tend to transfer their interest in the issue and the problem to the lawyer to have the lawyer solve it and this creates dependency.

Total dependence on a lawyer by an organization is not good because most lawyers are "career oriented." They will usually help the community, but they also later hurt the community by making money off the contacts in the community, by political aspirations and by leaving the community stranded. In many cases, they actually leave the community in a worse condition had they never been involved.

Most lawyers do not understand about organizing. Lawyers do not understand that the legal piece is only one tactic of organizing. It is not the goal.

***458** In my 25 years of experience, I find that lawyers create dependency. The lawyers want to advocate for others and do not understand the goal of giving a people a sense of their own power. Traditional lawyer advocacy creates dependency and not interdependency. With most lawyers there is no leadership development of the group.

If lawyers get involved, they create a lot of problems. Most lawyers have never been through the consistent frustration of community building with its petty disputes, confusion, personality problems and the like. Most lawyers get frustrated with that, have a low degree of tolerance with people problems, and will walk away from the effort of community building.

The legal dimension of community organizing is only one piece of the overall strategy. Commonly, lawyers are not clear about strategy. They don't understand community, they don't understand organizing, they don't understand leadership development.

Lawyers, if they understand the process, can play a major role in the development of the community. If lawyers understand the dynamics of community leadership and development, this understanding can also work to reduce the frustration level of the lawyer because the people involved will not call the lawyer for every little problem that they have in the struggle.

As an example, when the organization goes to court or to confront the government, the people must play a major role in the choices of where to go and how to go. The people must also participate in the investigation and speaking out on the issue.

At a certain level, groups will need a lawyer. What the groups really need is a lawyer with understanding and an analysis of the community group - who they are, what are their problems

and what is their history. If the lawyer does not understand how the group fits into the larger part of society and community, the lawyer will only see this organization as just another case. This is particularly true when the group itself does not understand the big picture either.

Big problems develop when the lawyer becomes the leader. The lawyer ends up almost as a god to the group and that will kill off the momentum and emotionalism that brought the group that far. The people lose interest as the lawyer becomes the momentum. The lawyer can stimulate the group, pacify the group or walk out at any time. This effectively kills the leadership and power of the group.

The lawyer is “credentialized.” The lawyer is structured, disciplined, succinct, and trained. He or she is closer to and understands the system better than anybody in the group. Then, the lawyer becomes the focal point of the group and becomes leader of the group. More mature groups will not let this happen, but when it does happen the collective power of the group is transferred from the individuals to the lawyer. The group is then susceptible to any action or lack of action that the lawyer takes rather than the direction and leadership being given by the organization.

*459 In tactics, the legal piece is only one tactic of many. There is the legislative, legal, demonstration, picketing, fund-raising, community building, leadership development and many other pieces. Lawyers do not usually understand that.

Lawyers tend to focus only on the case and want the organization to bend itself to the case rather than the other way around. Lawyers think in terms only of what will help or hurt the case, but they do not understand that “the case” is not the point of building up the community.

Another problem is that most community lawyers, especially white lawyers, do not want to confront or agitate the power structure. This is primarily because of the role of racism in all of these conflicts. Lawyers, particularly white lawyers, are trained to understand and be comfortable with the system even when they criticize it. Almost all lawyers, including community lawyers, want to succeed in the system. They want money, power, political advantage, respect or whatever their individual dreams are. Therefore, confronting the system or raising hell makes the lawyer very uncomfortable because it is not how the lawyer was trained to deal with the system, and the lawyer, without realizing it, is challenged individually because the lawyer is part of the system.

The white legal system perpetuates the white power system. Reliance on that system is a contradiction to the development of collective power in a community organization. I also find that black lawyers also have serious problems confronting the system because they don't really want to challenge the system because black lawyers gain advantage and reap rewards from the system so, therefore, they cannot challenge it the way it needs to be challenged.

The lack of understanding is not confined to lawyers because it is frequently that the group itself and many times inexperienced organizers themselves do not understand the demands of leadership development.

Leadership development is the key to solving problems locally. If the lawyer does not understand leadership development and the group does not understand leadership development then certainly leadership development is not going to happen. There may well be some flurry of activity on a problem, perhaps even the problem will be solved, but the community will be left with as little, or sometimes even less power and understanding of power than they had before they started the fight.¹⁰

B. Wade Rathke

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Wade Rathke is Chief Organizer of Local 100, Service Employees International Union (SEIU) and one of the founders of the Arkansas *460 Community Organization for Reform Now (ACORN).¹¹ He has been an organizer for twenty years, first with the Welfare Rights Organization movement, and later as a founder and chief organizer for ACORN. ACORN has created a national organization of low and moderate income members, with active local organizations in twenty states. He speaks about the experiences of the organizations with which he has worked:

The fundamental challenge in finding good organizational lawyers is to find out whether or not a lawyer is willing to see their role as similar to an organizer or researcher who is employed by an organization as a helper toward the process of helping the organization gain power. Empowerment must be the lawyer's goal; not breaking the new legal ground which changes a particular statute or right.

I remember a top lawyer who worked with us in the early days of the ACORN organization who used to take new volunteer lawyers and the first thing he would make them do, for as long as a month, was make them run the mimeograph machine and put out mailings. He would take them door to door canvassing and train them like organizers. He believed that unless lawyers for organizations understood that there is different training to work with organizations than the training they had in law school then there would always be problems. Lawyers have to be able to understand that organizing an issue is a process where an individual problem changes and becomes a political issue.

ACORN has found that the lawyers who are most accessible to organizations tend to be ones who come out of the union lawyer tradition. In union lawyers there is still a strong culture that says the organization's membership must bear the control of final decisions. Because that tradition is not as common in either civil rights or in poverty law, we have tended to find that we do better in working with lawyers who come out of the union tradition of membership and organizational leadership and service than those coming out of classically trained legal services lawyers who, we have found, more want to create law than create power.

One thing that you just do not find much in lawyers is people who are sensitive enough to understand organizations and their *461 dynamics well enough to be able to look at the structures of law and figure out how you can attack some laws to open up vital organizational opportunity and authority. You know, it is not necessarily a colorful area of law, but there is a tremendous amount of work that needs to be done in areas like access to public records and opening up payroll and other deduction systems.

In the ACORN experience we have seen substantial legal precedents in law won through organizational activity joined with lawyers. At the same time, there is a level of what some call "gonzo law" that is essential to allow organizations to pursue campaigns. This law may pursue new ideas in the law but may not pursued to create precedent at all, and in some non-organizational view may be almost totally frivolous. As an example, it is certainly not news that it is a common organizational tactic in trying to pursue issue campaigns, that, when you are unable to win all the objectives of the campaign and it has been a fierce struggle, the organization may try to exit the campaign by filing a suit. The filing of a lawsuit may make it appear that the issue is not totally lost and gives the losing issue an afterlife where something may or may not come down the legal avenue, but it at least gives it a public viability that it is being pursued. If something comes of it, great, if not, it was a way to get out of a losing situation.

This is a tactical use of law. There are some lawyers who are comfortable with this sort of use of the law, but I think it is a rare talent.¹²

C. Barbara Major

Barbara Major, an African American organizer, works with numerous low income women's groups in the southern United States.¹³ She is also a trainer with the People's Institute for Survival and Beyond.¹⁴ She has suggested the following:

Empowerment is when a person or a group of people know who they are, accept who they are, and refuse to let people make them anything else.

Lawyers, like any other profession, can be a really good resource in the community that is seeking to empower itself. An excellent resource and always a necessary one. Especially when you look historically in terms of the need - not only to change attitudes, but *462 to change policy and legislation to really make access available to resources for everybody. I think lawyers have always played a key role, especially in the civil rights movement, the worker's rights movement, and the women's rights movements in this country.

I think one of the things that lawyers have to understand is the reality of the community that it deals with. I think oftentimes lawyers come in with their own reality, their own world view, and think or assume that this is everybody's reality and they just start moving along. That is not the case because a lot of times, especially when you are dealing in a struggling community, their reality is very different from the reality that people who have been educated have, or their world view is very different from the people at the bottom that they will be working with.

People use to work "in community" but I think now people should think a little more about working "with community." This means lawyers have to learn how, with all of their skills, to journey with the community. This journey has to involve the community really getting a sense of who they are, in the sense of beginning to understand their own power. In working with community the wisdom or the knowledge of the lawyer does not outweigh the wisdom and the knowledge of the community, about itself especially.

I think also when you talk about lawyers you must help them have a reality check, in my experience lawyers don't often do that. You know, they often believe in the system - that the system is going to work because it's the right thing to do. I do not think they understand that, when you are dealing with challenging power, that the system works on the side of power. The lawyers do not realize they need another tool to challenge the system, one that lawyers do not know about, and that is the power of the community. Because no matter how good you might be in court, the power of the people in the street weighs mighty heavily on the decision of the power brokers, sometimes more heavily than the law itself. One lawyer, I don't care how good she is, how well she argues or whatever, the power brokers will take that same lawyer and beat her to death one day, unless, the people in the street say this is not legal, this is not fair.

I think a lot of times lawyers have come into the community and only created another entity to be dependent on. Their communities begin to believe that all they have to do is bring their problems to court and they forget that they must continue to organize and educate the people. I think the lawyers too often create another entity to be dependent on so people will lay back and just think well "I'll just sue 'em." This will not lead to permanent change. Because even if the community wins the suit, what are they going to do the next time there is a problem? Sue again?

Problems can be headed off if the powerful know there is an organized community willing to fight them. That is better than the best suit.

Another problem is when the lawyer comes in and just takes over and becomes the leader and the spokesperson and it disempowers *463 the community. The lawyer becomes the one everyone

wants to interview and everybody wants to talk to. Then the media and the powerful don't ever talk directly to the people any more. The community's struggle becomes the lawyer's struggle and not the people's struggle.

Who becomes the spokesperson is real important because the community starts out so weakened. It's not destroyed, but it's weakened. The community needs to feel its own power and continue to be built back up in the sense that says you not only have the right to speak for yourself, but you can speak for yourself. The community needs to be allowed to demonstrate as many times as possible its capabilities and abilities to do and to be itself, its own power source, its own leadership. I find it real destructive when outside people speak for the community. It is the simple folk that sustain us as a people - not some lawyer or nun or hot shot organizer who comes in and does works in the community. It is very important for the community to feel its own power, and part of that power is the ability to speak for itself.

If lawyers want to work with the community, they must first do some thinking. If they come in with a sense of not only just coming in to say they want to work, they want to help the community, but coming in and saying that I, too, have something to gain from this, then I think the community will welcome them. Because, then the building up will not be one-sided. As the community builds its power and self confidence, the lawyer will also reach new heights. I know as an organizer when I see the community moving up and I am connected to them, it's like hey, I am moving too. You know they are not leaving me behind and I can't leave them behind. So we are moving together. It's a different kind of relationship.

It is not a matter to me of where you live, or whether you are poor yourself. The lawyer can live in a nice house, as long as they are struggling for folk in that community to have nice houses too. See, I don't think poverty is a damned virtue. It's your becoming a part of that human family is what you are really becoming a part of in that community. I have had problems out of all kinds of lawyers - Black male, Black female, White male, White female and everything in between. So, their race and gender does not matter to me. It is the ability of that person to see the human capacity in the community. Unfortunately, a lot of people don't see it - all they see is that depressed community that I am coming in and giving something to.

Only when they understand that they will not only be the only one giving, but they will also be receiving, then it can roll. And it will be a growing and learning process for everybody.¹⁵

*464 III. THEMES IN COMMUNITY EMPOWERMENT LAWYERING

1. *The primary goal is building up the community.*

As Chisom suggested,

If the lawyer does not understand leadership development and the group does not understand leadership development then certainly leadership development is not going to happen. There may well be some flurry of activity on a problem, perhaps even the problem will be solved, but the community will be left with as little, or sometimes even less power and understanding of power than they had before they started the fight.¹⁶

In his very first meeting with the residents of a neighborhood, Joe Lewis, a community organizer hired by the Atlanta Project as a coordinator for the area, was asked by residents what he was going to do for the community. He said, "I don't know. You haven't told me yet."¹⁷

As one author has suggested, “Organizing in its simplified form is people working together to get things accomplished. Organizing is about people taking a role in determining their own future and improving the quality of life not only for themselves but for everyone.”¹⁸ Educate, activate, and build the membership of the organization. These are the goals of organizational empowerment lawyering.¹⁹

2. Lawyers can disempower groups by creating dependency

Empowerment is a term that has been given several slightly differing conceptual meanings. In all meanings, it involves an attempt *465 to give the acted upon the right to decide for themselves or act in their own interests. What does traditional public interest lawyering say to the goal of empowerment? Not much.²⁰

There are two traditional methods of public interest lawyering: providing individual legal services to the indigent, usually in a government-funded setting, and providing reform or impact litigation which targets particular issues for focused high intensity litigation. Neither of these traditional forms of public interest lawyering is well suited to empowering. Both focus the power and the decision-making in the lawyer and the organization which employs the lawyer. The lawyer decides if she will take the case. The lawyer decides what is a reasonably achievable outcome. The lawyer and her employer decides how much time and resources can be committed to the effort. Both approaches individualize or compartmentalize the problems of the poor and powerless by not addressing their collective difficulties and lack of power.

While both approaches employ many hard-working and dedicated advocates, even when successful in achieving their defined mission they define for themselves, empowerment will not occur. Consider the following example:

In 1983 a group in a suburban area contacted the Citizens Clearing-house for Hazardous Waste (CCHW) for guidance on opposing the construction of a solid-waste landfill. The people of this suburb were primarily older residents plus a small but growing number of professionals. All told, the group had two or three hundred members of various backgrounds. CCHW gave the group some basic advice: Organize. Put out a fact sheet. Go door to door to educate the public. Petition. Get people involved.

In the months that followed, the group called CCHW frequently for advice. Each time they were given the same advice: action. The group seemed to agree, yet took no action. At the outset they had hired a prominent lawyer from the area. He was well respected in the county and had numerous official contacts. The group relied upon his suggestions and would not take any action that contradicted them. Effective methods like canvassing door to door, putting out flyers, and petitioning he considered “undignified.” The group, he said, should not engage in any activity that might upset any court action.

*466 Within a year, the ribbon-cutting ceremony was held for the unlined landfill the group had formed to oppose. Of the groups's hundreds of members, ten or fifteen carried signs that day - their first public demonstration. Their fight had been lost by their lawyer. Anticipating a loss of the court fight, he had been calling for a lined landfill.

In the process the group accumulated legal fees amounting to nearly \$300,000. The group's only courtroom victory came after they had lost their major fight. By dropping a subsequent suit against the county, they were able to recover \$75,000 of their legal fees from the county.

Today, the landfill is leaking and the group is now taking that message to the streets with some success. At last they are learning from their mistakes.²¹

If empowerment is the end, creating dependence on a lawyer is not the means.²²

3. *Litigation is only one of many means to the end.*

The clash in problem-solving approaches between the lawyer and the organizer highlights one of the inherent difficulties in using litigation in an empowering fashion. Consider the following:

Lawyers and organizers tend to approach problems differently, with often marked implications. For example, consider an intersection where the lack of a stop sign is causing traffic hazards and threatening children. A lawyer would solve this problem by going to court to get the stop sign put into place. From this process people either do not know how the stop sign got there or learn that lawyers produce change. Both results aggravate people's perceptions of their powerlessness, which is disastrous from an organizer's perspective. In contrast to the lawyer, the organizer would knock on all the doors in the neighborhood, organize a meeting of interested people, and help them collectively deal with the problem. They would probably hold a mass demonstration, meet with a city official, and successfully pressure her to provide the stop sign. From this experience, people in the neighborhood would learn that they can have ***467** power if they organize, and coordinate their efforts. Because so many individuals participated in producing the sign, nearly everyone in the neighborhood would learn this lesson. Suddenly an aspect of the neighborhood is the product of the residents' personal actions.²³

This example sharply contrasts two ways to approach the same problem. If the goal is getting a stop sign, then litigation may well be the superior method to use. If the goal is taking, developing, and sharing power, then litigation is not effective.²⁴

Other than the circumstances discussed below, it is a good rule to avoid litigation in empowerment advocacy. The goal of this advocacy is to help the group and its members take, develop, and share their rightful power. Litigation usually does not further that goal.²⁵ There are literally scores of other actions that groups can take that will highlight the problem, call for solutions, and involve the community members in leading their own fight.²⁶ At its worst, litigation on behalf of an emerging organization of people may well be harmful to the growth and development of the organization.²⁷

***468** When lawyers are confronted with a wrong, they are tempted to draw on their litigation skills. Also, people tend to seek out lawyers for their litigation skills as opposed to their organizational assistance.²⁸ In advocacy with an organization, litigation can be considered helpful in three situations: defending the organization and its members;²⁹ serving the organization's development;³⁰ and terminating causes from which the organization has no other way to exit.³¹

Law reform litigation should be undertaken only reluctantly in organizational advocacy and only after considerable thought by the organization. Litigation should be avoided in most other situations because lawyering and organizational development do not often go together. Indeed, in a 375 page guide on organizing for grassroots leaders, organizer Si Kahn devoted four sentences to legal action.³² Martin Luther King, Jr. also pointed out that litigation was not the desired path of organizational campaigns: "Whenever it is possible, we want to avoid court cases in this integration

struggle.”³³ Many lawyers have tried to achieve justice for poor and powerless people and organizations and victims of discrimination. As even most successful lawyers will ruefully admit, there was often more victory in the courtroom than in reality.³⁴

One of the weaknesses of litigation is the inherent limitation of the judicial system when called upon to produce social reform.³⁵ The *469 judiciary is far more disposed to and capable of stopping something from happening than it is to force something positive to occur. If the organization needs to stop something and can figure no other way to do it, or, better yet, is trying all other ways to stop it, then litigation may prove helpful if properly constrained and directed. However, the real work of organizational development is to take the members' rightful share of power and redistribute it. The judicial system has fundamental problems with such positive actions.³⁶ And even where the judicial system takes a modest step or two forward, it can only make change and was probably prodded to those modest achievements in the first place, with significant support from other parts of society.³⁷ *470 Thus, litigation, particularly litigation as the sole approach to a problem, will not likely be effective in solving the problem.

Another difficulty in utilizing litigation in empowerment is the clash of cultures between the legal system and the powerless or group members.³⁸ This clash is founded on the fact that what is important in the context of a lawsuit is often not at all important in the real world of people.³⁹ Everything from dress codes to language patterns, from the race and gender roles to the emphasis on the written word, not to mention the obvious role that wealth and power play in all phases of litigation, work against the poor and powerless role in litigation.⁴⁰

Further, even when reform-minded lawyers participate on behalf of the poor and the powerless, too frequently a gap in understanding and common priorities prevents even infrequent, well-intentioned litigation from succeeding in actually empowering those on whose behalf the litigation is brought.⁴¹ This failure is a result of the different priorities that litigation has, by its nature, opposed to the priorities of helping people gain power.⁴² As Professor White ironically notes in her analysis of the empowerment shortcomings of public interest litigation,

The gap between what poor people want to say and what the law wants to hear often seems enormous. Legal education does not *471 prepare lawyers for this daunting task, and the profession does not encourage or reward such efforts. Reform-oriented lawyers have been taught to read statutes, question bureaucrats, and analyze policy. They have not learned to listen and talk to poor people ...

Therefore, in practice, welfare litigators often subordinate their clients' perceptions of need to the lawyers' own agendas for reform. They rarely design litigation to respond to their clients' own priorities and ideas. Rather, litigation is designed to effect broad reforms that will benefit the whole class of welfare recipients Not only do clients feel incapable of speaking and acting freely in the strange language and culture of the courtroom; in addition, their own lawsuits are often framed to render their perceptions and passions irrelevant to the legal claims.⁴³

Thus, traditional public interest reform, or impact litigation, is of very limited value in actually helping the poor and powerless. While identifiable progress may well be made on a particular issue, the progress will be made by lawyers in an environment unsympathetic to poor people. If empowerment is the end, this type of legal public interest work is rarely the means.

4. *Learn community organizing and leadership development.*

The challenge of the community organization process is to help the people recognize common challenges and fashion common, workable strategies to address the common problems. While most people, including the powerless, are fairly cognizant of common challenges to themselves and their communities, it takes strategy and skill to develop realistic, achievable approaches to combat the problems.⁴⁴ Without such community organizing, there can be spontaneous protest, a flare of activity, and minimal progress. But this progress will be short-lived and likely reversed once the immediate crisis passes, unless there is good community organizing in between these moments of passion.⁴⁵

Friedmann recognizes community organizers by their French description as *animateurs*.⁴⁶ Their challenge is to “animate” or breathe *472 life into the soul of the community and move it to appropriate action. These animateurs or organizers can be members of the powerless community; indeed, the very best organizers often are community members. However, the essence of the organizer is an understanding of how to empower people.⁴⁷

In the context of an organization of poor or powerless people lawyering has as its goal the reallocation of power from those who have an unfair share to those who lack their rightful share.⁴⁸ The organization lifts the concerns of the individuals together beyond the concerns of any one individual. Individual desires and energies are fused to secure greater power, voice, and influence for those who are individually undervalued by the present system. Therefore, lawyering involves not advocacy for individual interests, but advocacy with a group of people organized to reclaim what is rightfully theirs, their own power. That is empowerment. Lawyers interested in learning more about organizing and leadership development have a variety of sources from which to choose.⁴⁹

*473 5. *The community must be involved in everything the lawyer does.*

Martin Luther King, Jr. once said,

[W]e've got to understand people, first, and then analyze their problems. If we really pay attention to those we want to help; if we listen to them; if we let them tell us about themselves - how they live, what they want out of life - we'll be on much more solid ground when we start 'planning' our 'action,' our 'programs,' than if we march ahead, to our own music, and treat 'them' as if they're only meant to pay attention to us, anyway.⁵⁰

There is a tendency to consider work with organizations as volunteer or pro bono work that is somehow governed by different dynamics than work for paying clients.⁵¹ It should not be so considered. If the lawyer takes the community organization's problem as her own task and begins to independently prepare and execute a legal strategy, the organization immediately loses control of its own actions. No lawyer would consider independently creating and implementing a legal strategy for a big corporation. Community organizations demand the same respect. Since empowerment by definition means controlling one's own destiny in as many ways as possible, even the *474 most well-intentioned lawyer who works independent from the organization is undercutting the life of the organization.

The organization should work with the attorney to decide what the attorney should be involved in, how the legal strategy should proceed, and when the lawyer's assistance is needed. If a legal strategy is developed, the organization should decide what are the first steps taken, what forum should those steps be taken in, what resources should be committed to the task, and what realistic goals and timetables should be communicated to the members of the organization. This control of the legal agenda by the organization is at the heart of advice provided to organizations by those with experience in dealing with lawyers. Here we will consider a few things to keep in mind and discuss with your lawyer from the outset:

You should control key decisions on your case. Use your lawyer for advice. Some lawyers automatically discuss the handling of their case with their clients; others do not. If your lawyer seems to be making important decisions without consulting you, it may be time to get another lawyer. Remember: You hired the lawyer - you are the boss.

Your lawyer's help or legal action can be a useful component to your local organizing. But don't let your lawyer decide your organizing strategy. Most lawyers are not experts on organizing. ...

Many people think once they have hired a lawyer they no longer need to participate in the local group because the lawyer has the problem under control. Nothing could be further from the truth.⁵²

6. *Never become the leader of the group.*

Consider the advice of another veteran organizer: "You don't need a lawyer to talk to politicians for you. Hiring a lawyer to deal with politicians would be a waste of your money. You can say it better than them - from the heart and from your own experience."⁵³ Empowerment means people seizing control of their own life choices. Following a lawyer is not empowerment. As was once said so succinctly, "the lawyer should be on tap, and not on top."⁵⁴

7. *Be willing to confront the lawyer's own comfort with an unjust legal system.*

Interests that have pushed themselves onto the stage have been organized, have been part of a movement, have, in short, been *475 groups; ... Groups did not gain ground because the legal profession "discovered" them, or because reformers in and out of government took up their case on theoretical grounds. They gained ground by exerting pressure. It was the squeaky wheel that got the oil."⁵⁵

Ultimately every group of people who seeks power must face those with the power. Seeking a rightful share of power means demanding the return of that power from the powerful. This is confrontation. It can happen in the legislatures, on the streets, in the courts, in the media, or in the banks, but it is confrontation. It is certainly one of the options that those without power must consider.⁵⁶ The lawyer for an organization can assist in the inevitable confrontation by either of two approaches: shut up and get out of the way and/or help the group discuss the best options to provoke or defend the resulting confrontation.

The lawyer's comfort level with the current legal, political, economic and social system comes to the forefront at certain points in organizing, even when there is confrontation. Lawyers participate and reap benefit from these systems even while apparently challenging the them. Lawyers profit by their education in and participation in the legal system, even while they self-identify themselves as "standing outside the system." This participation cannot be denied but need not paralyze the lawyer of an organization seeking its rightful share of power. This participation must first be consciously recognized as an investment in the current system and then, to the degree the lawyer can do so, it must be consciously set aside while assisting the organization in confronting those who unjustly have their power.

In analyzing options in confrontation strategies, the lawyer's comfort level with some types of confrontation and lack of comfort with others must be identified and, to the degree possible, set aside. Since some lawyers have substantial experience in controlled legal confrontation, there is the tendency of the lawyer to try to control and direct the confrontation to conform to the confrontation style to which the lawyer is accustomed.⁵⁷ This tendency usually seeks for *476 more polite, ordered confrontation that follows the rules of polite, ordered society. This tendency is usually a

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mistake for those who have been shut out of the polite, ordered society. The point of confrontation is not to persuade the quiet and ordered powerful to generously provide a donation of excess power, but to assist the powerless in finding their own voice to demand what is justly theirs.

Subjecting the powerless to the rules of the powerful in a confrontation over the just reallocation of power is contradictory and counterproductive. This is not to say that thoughtless stridency is the best approach to confront the powerful, rather the lawyer must be prepared for the group to consciously adopt and utilize methods of confrontation which the lawyer would never choose for herself.

Take the simple example of deciding whether to be quiet when ordered to do so in a public meeting of the city council. Continuing to speak beyond the allotted time or on topics not allowed on the agenda or directly to members of the government who do not wish to be so addressed will likely result in being requested or ordered to sit down and be quiet. The polite, ordered response of those who follow the rules would be to reluctantly sit down and ponder other ways to get the point across. For the purposes of development of the group, it may well be most effective to continue to speak and either be physically expelled or even arrested⁵⁸ to demonstrate the unwillingness of the powerful to even give an airing to the group's concerns. The lawyer's tendency to seek ordered results has to be subordinated to the development of progress on the organization's goals.

In working with organizations, the goal of all action, legal and nonlegal, is to empower the members of the group so they are able to be as self-directed as possible. This means assisting the members to work jointly to take and share their rightful power. There is a new role for the lawyer, a role not taught in law schools and a role not prized by the legal profession as a whole. Put politely as possible, *477 the legal profession views such practice of law with great anxiety.⁵⁹ A further challenge involves the entire concept of de-lawyering current systems so the members of the organization can better learn to advocate for themselves.

The lawyer has a delicate and paradoxical role to play in empowerment advocacy. The primary role is to help the organization and its members take, develop, and share their rightful power. In contemporary society, the lawyer holds a position of power partly because the law has drawn away from regular people and become a system unto itself, unaccessible to a nonlawyer, with its own language, and its own liturgies of practice. In this sense, the ignorance of the client enriches the lawyer's power position. Thus, the lawyer, even the well-intentioned public interest lawyer, has a share of power that is only the result of others not having access to it. The lawyer pursuing the goals of empowerment advocacy is called to a higher form of advocacy than "doing for" her client. Rather, the lawyer is called to assist her client to escape the need of being anyone's client and learning to advocate for herself. This demands that the lawyer undo the secret wrappings of the legal system and share the essence of legal advocacy. Doing so lessens the mystical power of the lawyer but, in practice, enriches the advocate in the sharing and developing of rightful power.

8. Be wary of speaking for the group.

There are only two instances when it is appropriate for a lawyer to speak to the media about the organization. First, if the organization asks the lawyer and specific instructions on how to proceed, and second, in an emergency. The lawyer should not speak for the organization unless that is the only way the organization's position will be reported, all the organization's members are unavailable, or the organization's message is already decided and communicated to the lawyer. Consider how the powerful deal with the media. Does a lawyer for Proctor & Gamble assume she has the authority to comment on anything for Proctor & Gamble without explicit permission and direction? No, and neither should the organizational lawyer.

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A working organization should have a media committee and the lawyer could be a great help to that committee by having work and home numbers for all members to give to the media when they call *478 the lawyer.⁶⁰ The lawyer for the organization must herself consider the media implications of whatever efforts she will engage in on behalf of the organization and help the organization think through these issues.⁶¹ The primary goal must continue to be whether the action will help or hinder the organization's development in taking and sharing power.

9. *Understand how much the lawyer is taking as well as giving.*

It has been suggested that “the challenge of responding to others, especially across great distances of life experience, inevitably leads us to confront more deeply the uncertainty-the possibility-that is ourselves.”⁶² Anyone who has worked with vital community organizations in a fight against those who oppress the members of the organization knows it can be one of life's peak experiences. Along the way it will also likely be one of the most frustrating experiences in which they will ever participate.

The essence of working with a community organization is harnessing the powers of the individuals involved into a team. When the lawyer is part of that team, and the team wins an uphill battle, there is no big fee, no precedent-setting case, no pro bono award, that can ever substitute for the enduring sense of fulfilling friendship that binds those who were there and met the challenge.

The lawyer gives, no doubt about it. But the lawyer receives, too, no doubt about it.

10. *Be willing to journey with the community.*

As Barbara Major said,

People used to work “in community” but I think now people should think a little more about working “with community” which means lawyers have to learn how, with all of their skills, to journey with the community. This journey has to involve the community really getting a sense of who they are, in the sense of beginning to understand their own power⁶³

....

*479 Only when they understand that they will not only be the only one giving, but they will also be receiving then it can roll. And it will be a growing and learning process for everybody.⁶⁴

There is no need to expound upon this quote, it is poignant and says all that needs to be said.

IV. CONCLUSION

Learning to join rather than lead, learning to listen rather than to speak, learning to assist people in empowering themselves rather than manipulating the levers of power for them, these are the elements of lawyering for empowerment. By mastering their elements, a lawyer can help people join together and control those forces influencing their daily lives. By helping people in a community organized process to recognize common challenges, they can work together to formulate common strategies to combat these challenges.

Footnotes

- ¹ Assistant Professor and Director of Gillis Long Poverty Law Center, Loyola University School of Law, New Orleans, Louisiana. The author wishes to thank Anthony Alfieri, Steve Bachmann, Ron Chisom, Pam Karlan, Martha Mahoney, Barbara Major, Jack Nelson, Wade Rathke, Florence Roisman, and Elizabeth Scott for their help. Many of these ideas were first presented at the Joint Conference on Lawyering presented by the University of Liverpool Law School and the University of California at Los Angeles School of Law at Lake Windermere, UK.
- ² Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970). Professor Anthony Alfieri says this quote is an “autocite” for writers about advocacy with poor and powerless people. There is a very good reason it is cited so much. It is because there are so few examples of quotable legal writing about poor people and organizing.
- ³ Traditional public interest lawyering is called “regnant lawyering” by Gerald Lopez, as opposed to “rebellious lawyering” which seeks to empower subordinated clients. Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1609-1610 (1989). This “regnant lawyering” is criticized as well-intentioned individual and even class-wide problem solving by liberal and progressive lawyers in offices isolated from organizational activity like community organization, community education, self-help campaigns, and other forms of grass roots mobilization. *Id.*
Lopez goes further in *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Education*, 91 W. VA. L. REV. 305, 358-386 (1989). He indicates one of the reasons why lawyering for empowerment or “rebellious lawyering” is not prevalent is that even “[t]hrough millions in this country live in social and political subordination and though lawyers have worked to help challenge these conditions, law schools only rarely have understood their job to include designing a training regimen responsive to this situation and this task.” *Id.* at 306. Lopez takes up this task and proposes a curriculum for legal education and training of students to work with, and for, the poor and powerless. *Id.* at 376-78.
Finally, in REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF A PROGRESSIVE LAW PRACTICE (1992), Lopez illustrates the potentials and pitfalls inherent in lawyering with sketches of struggles faced by those who take both law and justice seriously.
See also Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991) and Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992).
- ⁴ Some well-intentioned persons may ask: Why do people need to gain power over their own lives? Why can't we just help give them what they need? The answers to these questions are discussed in Joel Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541, 544 (1989). Handler points out that even if we were to provide more funds for social programs, enact better laws, and provide many more dedicated lawyers to help them, powerless people still need to work on the imbalance of power in our society or they will, by definition, remain powerless and trapped. *Id.* at 557. Granting codes of legal rights and protection to the powerless, without more, is fruitless. People need power to use the legal system. *Id.*
- ⁵ See discussion of group representation in Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 663-670 (1992).
- ⁶ That is not to say that good community organizing alone guarantees a continuously healthy, vibrant movement of actively engaged people. See, for example, the story of the growth, development, and ultimate decline of an excellent organization, the Congress of Racial Equality, in AUGUST MEIR & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 329 (1975).
- ⁷ The observations included in this article are taken from transcripts of oral interviews, not written statements by the organizers (transcripts on file with the author).
- ⁸ Examples of groups with which Mr. Chisom has been involved, in developing organizational campaigns include: New Orleans City-Wide Tenants Council (improvement of public housing in New Orleans, Louisiana); Tremé Community Improvement

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Association (low income neighborhood preservation); Parkchester Tenants Association (attempting to prevent demolition of low income housing); Fishermen and Concerned Citizens Association of Plaquemines Parish, Louisiana (wide range of civil rights and economic justice issues including survival of independent oyster fishermen, securing running water for an all African-American town, and reclaiming thousands of acres of expropriated land in rural Louisiana).

9 The People's Institute for Survival and Beyond was founded in 1980 and is a national multiracial, antiracist collective of veteran organizers and educators dedicated to building an effective movement for social change. The Institute conducts "undoing racism" and training workshops around the United States. The Institute is a nonprofit organization operating out of New Orleans, LA.

10 Interview with Ron Chisom national trainer with The People's Institute for Survival and Beyond (Jan. 26, 1993) (transcript on file with author).

11 ACORN was launched as Arkansas Community Organizations for Reform Now in 1970 by organizers from George Wiley's National Welfare Rights Organization. It has since changed its full name to the Association of Community Organizations for Reform Now, keeping the acronym ACORN. ACORN now has community organizations operating in twenty states. Local 100 of the Service Employees International Union is based in New Orleans and, though a separate organization, is an outgrowth of ACORN's organizing efforts with low wage workers in industries in Boston, Chicago and New Orleans. A good history of ACORN, Rathke, and the organizational challenges each has faced, can be found in GARY DELGADO, ORGANIZING THE MOVEMENT: THE ROOTS AND GROWTH OF ACORN, 63 (1986).

12 Interview with Wade Rathke, co-founder of Arkansas Community Organization for Reform Now (ACORN) (Jan. 28, 1993) (transcript on file with author).

13 Representative of the groups Major has worked with are the following: Clergy and Laity Concerned (peace and justice issues); New Orleans City-wide Tenant Council (public housing); Kuji Center (holistic health and economic justice for low-income area of New Orleans); and many other women's groups in the southeastern United States.

14 See *supra* note 9.

15 Interview with Barbara Major, Trainer with the People's Institute for Survival and Beyond (Mar. 8, 1993) (transcript on file with author).

16 See *supra* note 10 (citing quote in text).

17 *Atlanta Project: Empowering the Powerless*, FOCUS, Mar. 1993, at 3. The Atlanta Project is a community-based initiative launched by former U.S. President Jimmy Carter to improve the lives of residents of the city's most depressed neighborhoods. The project goal is to empower the traditionally powerless.

18 John O'Connor, *Organizing to Win*, in FIGHTING TOXICS: A MANUAL FOR PROTECTING YOUR FAMILY, COMMUNITY AND WORKPLACE 25 (Gary Cohen & John O'Connor eds., 1990) [hereinafter FIGHTING TOXICS].

19 Cole, *supra* note 5, at 688. Cole cites three similar questions for environmental advocacy:

1. Will it educate people?
 2. Will it build the movement?
 3. Will it address the root of the problem, rather than merely a symptom? *Id.* These questions were adapted from Michael Kazin, *The Peace Movement: Signs of Life ... And Intelligence?*, SOCIALIST REV., Sep-Oct. 1987, at 113, 115.
- Like many others, I believe that if lawyering educates, activates and builds the organization, there is no need to focus on the root versus the symptom of the problem, since the root problem is the powerlessness of the people. Educating, activating, and building, inherently address the root problem. Many organizers think the actual problem being addressed is irrelevant, be it a stop sign or a toxic waste dump. They see the problem as powerlessness and everything else is a campaign to learn how to empower.

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- 20 *But see* Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992). Tremblay rightly sees some conflict between those who advocate for greater use of individual client narrative or voice and those who seek more of a collectivist approach to lawyering. Tremblay would no doubt accurately describe the point of view adopted by this article as collectivist and then point out that this approach can be seen as substituting longer term justice quests for short term legal remedies. *Id.* at 950.
- 21 Sanford Lewis, *Your Legal Recourse*, in FIGHTING TOXICS: A MANUAL FOR PROTECTING YOUR FAMILY, COMMUNITY, AND WORKPLACE, 209, 231-32 (Gary Cohen & John O'Connor eds., 1990).
- 22 As one author states:
Two major touchstones of traditional legal practice—the solving of legal problems and the one-to-one relationship between attorney and client—are either not relevant to poor people or harmful to them. ... The lawyer for poor individuals is likely, whether he wins the case or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives.
Wexler, *supra* note 2, at 1053.
- 23 Steve Bachmann, *Lawyers and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (1985).
- 24 See SI KAHN, ORGANIZING: A GUIDE FOR GRASSROOTS LEADERS, 56 (1982). Kahn writes: “Advocacy may make real improvements in people’s lives. It may change the operating conditions of agencies or institutions. But it does little to alter the relationship of power between these institutions and the people who deal with them.” *Id.*
- 25 Indeed, Steve Bachmann, who has written frequently on this subject, recently summarized his perspective as follows:
Litigation validates the perception that ordinary people of low and moderate income have nothing to do with law reform and social change, and that such reform and change result only from efforts of well-heeled attorneys and judges. Litigation perpetuates the notion that significant change occurs “by magic,” because ordinary people of low and moderate income frequently do not know or care what happens in the court rooms. When ordinary people perceive that they can change nothing or that they have to rely on “experts” or “magic” to solve their problems, they come to believe they are powerless: ... which is to say, their original condition of limited capability for societal change is only exacerbated. The deplorable conditions of the status quo are intensified, not ameliorated.”
Steve Bachmann, *The Hollow Hope: Can Courts Bring About Social Change?*, 19 N.Y.U. REV. L. & SOC. CHANGE 391, 391-2 (1992) (book review).
- 26 *See* GENE SHARP, THE POLITICS OF NONVIOLENT ACTION: THE METHODS OF NONVIOLENT ACTION POLITICAL JIU-JITSU AT WORK, 117, 423 (1973). Sharp lists 198 methods of nonviolent protest and persuasion. The activities described range from petitioning to picketing to mock funerals to boycotts to civil disobedience. Not one of the 198 activities requires a lawyer’s involvement. It is a great cookbook of activities for organizers.
- 27 Wexler, *supra* note 2, offers a number of valuable observations on the role of a lawyer in developing or inhibiting organizational development. His observations on litigation for individuals are particularly appropriate and ring true for organizational development as well:
Two major touchstones of traditional legal practice—the solving of legal problems and the one-to-one relationship between attorney and client—are either not relevant to poor people or harmful to them The lawyer for poor individuals is likely, whether he wins cases or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives.
Id. at 1053.
- 28 As Richard Abel states: “Clients (especially individuals) consult lawyers in the first place because they have been trained to defer to and depend on professionals, and it is difficult in a few brief encounters, to overcome a lifetime of socialization in the culture of professionalism.” Richard Abel, *Lawyers and the Power to Change*, 7 LAW & POL’Y 5, 9-10 (1985).
- 29 Bachmann, *supra* note 25.

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- 30 Joel Handler sees several areas of indirect organizational assistance possible through litigation: publicity, fundraising, consciousness raising, legitimacy. JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 210 (1978).
- 31 Bachmann, *supra* note 25.
- 32 See KAHN, *supra* note 24, at 52, 56, 187, 188.
- 33 As quoted in GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 139 (1991).
- 34 See ROBERT H. MNOOKIN, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* (1985) which analyzes several major impact litigation campaigns and contrasts the occasionally substantial results achieved in the courtroom with the actual fairly unimpressive results achieved for the plaintiffs. This also seems to be what Marc Galanter is saying when he observes that “[r]ule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels.” Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y* 95, 149 (1974).
- 35 The most comprehensive discussion of the inherent limitations of the legal system is found in GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). This excellent treatise examines the role of litigation in a number of social movements, including civil rights, abortion, women rights, environment, reapportionment, criminal rights, and prison reform. In each case, Rosenberg makes a powerful argument that the role of the court in bringing about social change was not only exaggerated in popular understanding, but that reliance on litigation actually was counterproductive in bringing about the change. Rosenberg sees three inherent constraints which frustrate any attempt to seek social reform through the courts: the need for legal precedent, the dependence of the judiciary on popular political support, and the lack of implementation power by the courts. *Id.* at 336-37. Although these constraints can be overcome, there are almost never overcome by litigation alone. *Id.* at 342. They are only overcome when social reform is proceeding because of historical, political, or economic change already underway. *Id.* at 337. The book is best summed up in its final paragraph: 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 naive and romantic belief in the triumph of rights over politics. And while romance and even naivete have their charms, they are not best exhibited in courtrooms. *Id.* at 343.
- 36 There are several reasons for this. Consider the civil rights struggle and women's rights struggle which are frequently pointed to as areas where traditional public interest litigation has been successful. Rosenberg suggests that the litigation victories in these areas were not in fact successful. ROSENBERG, *supra* note 35, at 227. It was not until mass movements, lobbying, and legislation on the state and national levels that success actually occurred. *Id.* at 123. Rosenberg posits that it is because the courts have neither the “purse” nor the “sword” that they are extremely limited in their capacity to produce change. *Id.* at 15-21. Galanter makes a similar observation on the limits of the court's power to bring about change: The low potency of substantive rule-change is especially the case with rule-changes procured from courts. That courts can sometimes be induced to propound rule-changes that legislatures would not make points to the limitations as well as the possibilities of court-produced change. With their relative insulation from retaliation by antagonistic interests, courts may more easily propound new rules which depart from prevailing power relations. But such rules require even greater inputs of other resources to secure effective implementation. And courts have less capacity than other rule-makers to create institutional facilities and re-allocate resources to secure implementation of new rules. Litigation then is unlikely to shape decisively the distribution of power in society. Galanter, *supra* note 34, at 149-50.
- 37 William H. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984). Simon sees such a situation as the foundation for any successes the civil rights movement can claim through the courts:

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Surely it is not controversial to insist that the achievements of the civil rights movement, including the decisions of the Warren Court, are due to a conjunction of judicial decision-making (in which some of the most important initiatives were taken at the trial court level), electoral politics, and popular mobilization.
Id. at 498-99.

38 The idea of a “clash of cultures” between the legal system and the powerless on whose behalf it is used is best articulated in Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 542-45 (1987-88).

39 See Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons from Client Narrative*, 100 YALE L.J. 2107, 2118-30 (1991) and his criticisms of current poverty lawyering, including those methods based on the reform or impact litigation method.

40 White, *supra* note 38, at 542-46.

41 Tremblay, *supra* note 20, at 949.

42 Consider the following observations by Professor White on the role that law plays and can play in the lives of the poor and powerless:

Legal remedies that are designed by lawyers to impose improved conditions upon the poor aren't likely to do much to challenge subordination in the long run. In many cases, lawyer-engineered remedies will not work as intended. Even in the rare cases where such remedies do work according to plan, they still do not challenge the lived experience of subordination-the experience, that is, of other people controlling the terms of one's life. Yet when legal remedies respond to strategic needs that emerge as poor people mobilize themselves, those remedies can, indeed, make a difference.

Lucy White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 872 (1990).

43 White, *supra* note 38, at 544-45.

44 See SAUL ALINSKY, RULES FOR RADICALS 63-80 (1971).

45 John Friedman writes:

[T]he likelihood of a truly spontaneous organization of the poor is very small. The only unmediated action among disempowered households is mutual help and an occasional burst of protest But precisely because they lack formal organization, protest movements are easily contained. Local leadership may be coopted, state responses to social demands may be predicated on the promise of community compliance, and more overtly repressive measures may be used to discipline both the community and its leadership.

JOHN FRIEDMANN, EMPOWERMENT: THE POLITICS OF ALTERNATIVE DEVELOPMENT, 143 (1992).

46 *Id.* at 144.

47 As one example, consider India, where there is a group called SPARC (Society for the Promotion of Area Resource Centers) which advocates with groups in the areas of housing, women's issues, and drug abuse. Its method of operating is based on six general principles:

1. Locate the central features of the crisis as identified by the community facing the crisis;
2. Understand how the state perceives that crisis;
3. Share these insights with the community and debate the formulations of elements necessary for a solution;
4. Create an information base for participatory research;
5. Initiate professionals to take part in formulating alternatives with the communities;
6. Initiate a campaign for change: mass demonstrations, publication of information, and workshops; negotiate meetings with government.

Id. at 143-44, nn.4 & 5.

Also consider the following summary finding of a comprehensive study of many community organizations:

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The process of translating a provocative issue into collective action, in some cases supplemented by promotional or facilitative inputs, seems to involve: an appreciation by potential community group members that collective action is both possible and likely to be productive; individuals' motives being translated into a collective will to act; the identifying and mobilizing of group members; and the development of knowledge about the extent of the problem to enhance the members' commitment and capacity to act.

HUGH BUTCHER ET AL., *COMMUNITY GROUPS IN ACT: CASE STUDIES AND ANALYSIS* 251 (1980).

- 48 Who has the power? Consider the view of FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, WHY THEY FAIL* (1977). The authors state that “[c]ommon sense and historical experience combine to suggest a simple but compelling view of the roots of power in any society. Crudely but clearly stated, those who control the means of physical coercion, and those who control the means of producing wealth, have power over those who do not.” *Id.* at 1.
- 49 See *FIGHTING TOXICS*, *supra* note 18, which contains chapters on organizing, corporate research, working with the media, and use of lawyers; and a good little booklet by MARY EILEEN PAUL, *ORGANIZATIONAL DEVELOPMENT TOOLS* (1993), published and distributed by Resource Women, 733 15th Street NW, Suite 510, Washington, D.C. 2005. *TOOLS* includes activities and exercises for developing and revitalizing an organization. *FIGHTING TOXICS* gives an overview of the process of organizing in the environmental field but would also be very useful to anyone who wishes to learn more about the theory and practice of community organizing. *TOOLS* is more centered on the interior growth of an organization but is also useful for those who want to know more about the basic building blocks of effective organization of people. There is also an excellent short article describing how lawyers fit into community organizing. See Michael Fox, *Some Rules for Community Lawyers*, 14 *CLEARING-HOUSE REV.* 1 (1980).
- 50 Lucie White, *From a Distance: Responding to the Needs of Others Through Law*, 54 *MONT. L. REV.* 1, 16 (1993) (quoting Martin Luther King, Jr.), *reprinted in* JOELLE SANDER, *BEFORE THEIR TIME: FOUR GENERATIONS OF TEENAGE MOTHERS*, ix (1991).
- 51 Edgar and Jean Camper Cahn made a disturbing observation that lawyers in private commercial practice are somewhat more likely to respect the wishes of their clients than lawyers in traditional public interest practice. See Edgar S. Cahn & Jean Camper Cahn, *Power to People or the Profession?-The Public Interest in Public Interest Law*, 79 *YALE L.J.* 1005 (1970). They found in legal services law offices:
a greater tendency to manipulate, to usurp group decision-making functions, to use clients to fit the private agenda of the lawyer than is to be found in private practice. There are several contributing causes which induce lawyers for the poor to cease to be accountable to clients and to aggrandize their role as “social engineers” and self-styled reformers. It is not clear whether they feel free to do so because the clients are poor or members of minority groups or because legal services programs have a monopoly which makes it impossible for the client not to concur in any decision by the attorney. All contribute: the arrogance of youth, the monopoly power of attorneys, and condescension based on race and class. None are consistent with the traditional lawyer-client relationship.
Id. at 1035-36.
- 52 Lewis, *supra* note 21, at 214.
- 53 Lewis, *supra* note 21, at 210.
- 54 Quote made by an organizer at Environmental Racism Workshop at Xavier University in New Orleans, December 5, 1992.
- 55 Lawrence Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in *CLAIMS, CONFLICTS AND THE WELFARE STATE* 260 (1981).
- 56 See PIVEN AND CLOWARD, *supra* note 48, at xi, xii. “[P]opular insurgency does not proceed by someone else's rules or hopes; it has its own logic and direction. It flows from historically specific circumstances: it is a reaction against those circumstances, and it is also limited by those circumstances.” *Id.* Piven and Cloward suggest that history proves mass defiance

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and disruptive protest are often preferable to other forms of political activity in order for the poor to make gains against those who hold power.

57 This process of the lawyer selecting and reshaping the needs and desires of the poor and powerless client is called “interpretive violence” by Anthony Alfieri. *See* Alfieri, *supra* note 39, at 2126. He defines interpretive violence as being based on three common practices in traditional public interest lawyering: marginalization, which establishes the client’s inferiority; subordination, which changes the lawyer-client relationship into subject-object; and discipline, which actually ends up excluding the client’s own story or narrative from the legal process. *Id.* at 2125-30. Lawyers who unintentionally practice like this, strip clients of their individuality and unwittingly push organizations away from discovering and acting upon their own unique character and plans for action. *Id.*

58 There is a rich literature on the virtues of being arrested rather than going along with an unjust system. For example, Henry David Thoreau said: “Under a government which imprisons any unjustly, the true place for a just man is also in a prison.” *See* HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE, *reprinted in* WALDEN AND ON THE DUTY OF CIVIL DISOBEDIENCE, 245 (Collier Books 1854). “It costs me less in every sense to incur the penalty of disobedience to the State, than it would to obey.” *Id.* at 247.

59 Simon, *supra* note 37. Simon describes the posture of the legal profession towards those advocating for what he describes as “the politics of popular mobilization” as “sheer anxiety and even terror.” *Id.* at 494.

60 *See* KAHN, *supra* note 24, at 235-256, for ideas on how an organization develops media strategy and decides who should speak. *See also* Peter Obstler, *Working with the Media*, in FIGHTING TOXICS, *supra* note 18, at 147.

61 *See* CHARLOTTE RYAN, PRIME TIME ACTIVISM: MEDIA STRATEGIES FOR GRASSROOTS ORGANIZING 4-34 (1991), for another excellent discussion of media and organizational development.

62 Lucie E. White, *From A Distance: Responding to the Needs of Others Through Law*, 54 MONT. L. REV. 1, 18 (1993).

63 *See supra* note 15 (interview with Barbara Major).

64 *Id.*

STOP ACT Fact Sheet

What's the Harm with Stop and Frisk?

- Stops and frisks are the police tactics that affect the largest number of Chicagoans.
- Many of the people stopped have committed no crime. In the summer of 2014, CPD conducted more than 250,000 stops of individuals who were not arrested.¹
- In summer 2014, Chicagoans were stopped more than four times as often as New Yorkers at the height of NYPD's stop and frisk practice.
- "Black Chicagoans were subjected to 72% of all stops, yet constitute just 32% of the city's population."
 - In police districts where the population is mostly white, people of color were still stopped disproportionately frequently to the number of people of color living in those districts.
- Studies have found that people who have been stopped and frisked are often traumatized by the experience, particularly when they are unfairly accused of engaging in criminal activity.

Does the CPD Collect and Publish Stop and Frisk Data Already?

- The CPD records a limited amount of information about the stops it conducts.
- The CPD does not record whether a frisk or search took place following a stop, nor does it require officers to document the justification for any frisks or searches conducted.
- The CPD does not record information on a stop and/or frisk when the person is arrested or given a ticket or summons.
- The CPD does not make this limited information and data accessible to the public.

What Will the STOP Ordinance Do?

- Require the CPD to collect and share data on the location, reason, result, and demographic information for all individuals (including perceived race, age, and gender) stopped and/or frisked.
- Require the CPD to record whether a frisk or search was conducted and the justification.
- Require the CPD to record the outcome and disposition of all stops, including recovery of contraband, arrest, or issuance of tickets or summonses.
- Require the CPD to provide a receipt to the person stopped and/or frisked that includes the name and badge number of the officers involved in the interaction.
- Require the CPD to record whether a search was conducted pursuant to consent, and if so, to inform the individual of their right to refuse consent and document such consent in writing.
- Require the CPD to make all of this information publicly available in quarterly reports.

Why is the STOP ACT Necessary?

- To enable meaningful oversight of CPD's stop and frisk practices to determine if they are being effectively and fairly used to deter criminal conduct.
- To monitor and determine if Black people and other people of color are being unfairly targeted and harmed by stop and frisk practices in Chicago.

If SB1304 Becomes Law, Why Do We Still Need the STOP ACT?

Illinois Senate Bill 1304	STOP ACT
Requires police departments to keep records of stops that resulted in frisks, searches, arrests, or issuance of summonses or tickets, <i>not all stops</i> .	Requires CPD to record <i>all stops</i> .
Requires police departments to issue receipts for stops <i>that resulted in a frisk or search</i> .	Requires CPD to provide receipts to all people who were stopped and/or frisked.
Does not require police to inform people of their right to refuse to consent to a search.	Requires CPD to inform people that they have a right not to consent to a search and to obtain written proof of that consent.

Why Should the STOP ACT Be Passed Now?

- SB1304 will already require the CPD to overhaul its policies on keeping stop and frisk data and sharing it with the public by January 2016.

The STOP ACT will require the CPD to record all of the necessary information on *all stops* and *all frisks* conducted to ensure all of these practices are being used fairly and effectively.

¹ ACLU-IL website, <http://www.aclu-il.org/stop-and-frisk-in-chicago1/>. All facts regarding CPD Stop and Frisk demographics and rates are taken from *Stop and Frisk in Chicago*, ACLU of Illinois (March 2015).

ACLU & CITY OF CHICAGO AGREEMENT ON STOP AND FRISK

In March 2015, the ACLU issued a report that identified problems in the City of Chicago's oversight of the practice of stop and frisk. The City and the Chicago Police Department ("CPD") have agreed to several reforms that have been documented in an enforceable settlement agreement.

CITY OF CHICAGO AND CPD AGREE TO COMPLY WITH THE LAW

- The City and CPD have agreed that their stop and frisk practice will comply with the United States and Illinois Constitutions, including the Fourth Amendment protections from unreasonable searches and seizures.
- The City and CPD have also agreed that their stop and frisk practice will comply with the Illinois Civil Rights Act (ICRA), which requires that policies do not have a disparate impact on the basis of race.

DATA COLLECTION

- The CPD will document all investigatory stops and protective pat downs, including those that lead to arrest, citation, or other enforcement action. Previously, data was only collected on stops that did not result in enforcement action, making it difficult to assess the practice and its impact on people of color.
- The CPD will collect information about the officer who conducted the stop; the race and gender of the person stopped; all reasons for the stop; the location, date and time of the stop; whether a pat down or other search was conducted; whether contraband was found; and the outcome of the stop.
- These reforms are important because stops and frisks occur on the street, away from supervisors. Police supervisors need records of stops and frisks so they can assess whether their officers are abiding by the Constitution. The data will also help show whether minorities are improperly singled out for stops.

TRAINING AND SUPERVISION

- CPD will provide officers with training directed at ensuring that stops are lawful.
- District level supervisors will review all stop reports to determine if there are legal grounds for them.
- CPD headquarters staff will regularly audit samples of the narratives, records of corrections and rejections of stop reports, and civilian complaints related to stops.
- Officers who engage in unlawful stops will receive retraining, enhanced supervision, and/or discipline.

INDEPENDENT REVIEW BY FORMER FEDERAL JUDGE

- Former federal Magistrate Judge Arlander Keys will independently review the CPD's use of stop and frisk.
- Judge Keys will recommend changes to CPD's policies, practices and orders to ensure compliance with the U.S. and Illinois Constitutions and ICRA.
- Judge Keys will review any documents he determines are necessary to assess the CPD's program of stop and frisk, including civilian complaints and disciplinary files.
- Semiannually, Judge Keys will review a sample of the narratives of stops to assess whether they establish reasonable suspicion. He will also review data to determine whether there is a disparate impact.
- Twice a year, Judge Keys will publish public reports assessing whether the CPD is in compliance with the agreement. He may hire experts to assist him in the analysis.
- Judge Keys will continue to review the police department until he determines that the CPD is in substantial compliance with the Fourth Amendment and with the Illinois Civil Rights Act, which prohibits policies that have a disparate impact on the basis of race.

RELEASE OF DATA AND DOCUMENTS TO ACLU AND THE JUDGE

- CPD will provide the ACLU and the judge with all information in its stops database on a monthly basis.
- CPD will also provide the ACLU and the judge with all audits, training materials, and any other documents necessary to conduct an independent analysis and review of the CPD's stop and frisk policy.

(<http://wechargegenocide.org>)

STOP ACT

Stops, Transparency,
Oversight and
Protection.

The ordinance would require the Chicago Police Department to collect & share data for all stops of any kind, including the demographic information of the people being stopped, the number of officers involved and their badge numbers, and information about the location, reason and result of the stop.

wechargegenocide.org/stop-act

📅 August 12, 2015 | 👤 By WCG admin

💬 4 Comments (<http://wechargegenocide.org/an-open-letter-to-the-aclu-of-illinois-regarding-stop-frisk/#comments>)

📌 Posted in: Chi Stops (<http://wechargegenocide.org/category/chi-stops/>)

In light of the announcement of the ACLU of Illinois's agreement with the City of Chicago, and in the interest of transparency with the people of Chicago affected by this agreement and the Chicago Police Department's stop and frisk practices, we are sharing the following open letter to the ACLU. The letter outlines the process through which the ACLU negotiated its agreement—a process that excluded and undermined Black youth leadership around stop and frisk; it describes the fundamental differences between the substance of the ACLU/CPD agreement and the STOP Act developed by WCG; and reaffirms our commitment to the struggle against all forms of police violence.

WCG does not naively believe that our communities are harassed, brutalized, and abused by the police simply because there is insufficient data, or because there are not enough laws on the books. We understand police violence to be rooted in historical and systemic anti-blackness that seeks to control, contain, and repress Black bodies through acts of repeated violence. Stop and frisk should be understood as a tool police use to punish Black people just for being. Police violence is always state-sanctioned violence, and further strengthening narrow supervision of police action by elites will never address that. This is why any legislative or law-based campaign to address police violence requires not just policy change, but an actual transformation of power relations between

communities of color and the police. The ACLU's settlement—focused on your own access—does not and cannot accomplish this.

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An Open Letter to the ACLU of Illinois Regarding Stop and Frisk

American Civil Liberties Union of Illinois
 180 N. Michigan Avenue, Ste. 2300
 Chicago, Illinois 60601

Dear ACLU of Illinois:

We are writing in complete dismay and utter disgust upon learning—on the very day we were filing the Stops Transparency Oversight and Protection Act (“STOP Act”) in Chicago’s City Council—that you were in the midst of finalizing a “settlement” with the Chicago Police Department (CPD) and Mayor Emanuel’s office on the collection of stop and frisk data by the CPD. As a result of these secret negotiations, Mayor Emanuel requested that our aldermanic sponsors Proco Joe Moreno, Roderick Sawyer and Roberto Maldonado delay filing our ordinance until the September City Council meeting. In light of the Mayor’s request, after consulting with our aldermanic sponsors, we did not file the STOP Act despite We Charge Genocide (WCG) and Chicago Votes’ announcement that we would at a packed press conference that very morning. The press conference itself was built upon several months of organizing and outreach by and to scores of youth of color in the City of Chicago in anticipation of the STOP Act’s introduction at City Council.

The ACLU’s unprincipled failure to inform WCG about these negotiations as soon as they were initiated and invite WCG to participate in them has directly undermined and undercut the organizing and advocacy efforts of Black youth who are targeted by stop and frisk and discriminatory policing in Chicago. You failed to be transparent that these negotiations were taking place and excluded the input of community partners—especially the youth directly impacted by the issue that is the subject of the legislation and who are fighting for their lives. This letter uplifts their critical work and serves as a warning to others who consider the ACLU a collaborator or partner. It is

WECHARGEGENOCIDE.ORG @CHISTOPSWCG #CHSTOP	STOP ACT	ACLU OF IL	SB 1304
REQUIRES CPD TO DOCUMENT DISPOSITIONS (RESULTS) OF ALL STOPS	YES	YES	YES
REQUIRES CPD TO DOCUMENT WHETHER STOPS RESULT IN FRISKS AND/OR SEARCHES AND WHETHER ANY CONTRABAND WAS FOUND	YES	YES	YES
REQUIRES OFFICERS TO ISSUE RECEIPTS FOR ALL STOPS	YES	NO	NO <small>ONLY THOSE RESULTING IN A FRISK OR SEARCH</small>
REQUIRES OFFICERS TO OBTAIN WRITTEN PROOF OF CONSENT TO SEARCH	YES	NO	NO
REQUIRES OFFICERS TO DOCUMENT WHEN FORCE IS USED IN A STOP	YES	NO	NO
REQUIRES DOCUMENTATION OF NAME AND BADGE NUMBER FOR THE OFFICERS OF ANY OTHER LAW ENFORCEMENT AGENCIES PRESENT DURING A STOP, SUCH AS STATE POLICE, ICE, FBI, UCPD	YES	NO	NO
REQUIRES DELETION OF PERSONALLY IDENTIFYING INFORMATION FROM CPD DATABASES AFTER 180 DAYS	YES	NO	NO
REQUIRES STOP AND FRISK DATA BE MADE PUBLICLY AVAILABLE AND ACCESSIBLE	YES <small>QUARTERLY REPORTS ON A PUBLIC SITE</small>	NO <small>CPD GIVES INFORMATION ONLY TO ACLU AND CONSULTANT</small>	NO <small>A REPORT FROM ILL. DEPT. OF TRANSPORTATION IS MADE ANNUALLY TO GOVERNOR AND LEGISLATURE</small>

THE ACLU PROVIDES FOR OVERSIGHT ONLY FROM THE POLICE, THEIR HANDPICKED CONSULTANT (A RETIRED JUDGE), AND THEMSELVES; THE STOP ACT ALLOWS FOR THE PUBLIC TO EVALUATE FOR ITSELF THE EFFICACY OF STOP AND FRISK PRACTICES

(<http://wechargegenocide.org/wp-content/uploads/2015/08/STOPActComparisonLowerRes1.jpg>)

Comparison of STOP Act to ACLU-IL deal with CPD and SB1304 (Click on image for larger version)

precisely this unprincipled and frankly shameful betrayal of impacted communities and grassroots organizing efforts that the ACLU claims to fight for that gives the organization its reputation for undercutting rather than supporting movements for change across the country.

Now, we learn that as a result of your secret and exclusive negotiations with the City you have reached an agreement with the CPD and Mayor Emanuel's office on the collection of stop and frisk data, and your agreement does not provide the public with access to that data. Rather, under your agreement, only the ACLU and the designated "Consultant" will receive CPD stop and frisk data and other relevant information. Under your agreement, you are required to keep the information you receive confidential under an "attorney's eyes only" standard. This result flies in the face of the public transparency and accountability that the STOP Act sought to secure—principles the ACLU allegedly propounds. We want to be clear: We are not in support of your work with the city or its result, which harms our existing work and undermines the broader campaign to end stop and frisk in Chicago.

WCG's Campaign on Stop and Frisk

WCG raised the issue of racially discriminatory stop and frisk practices in September 2014 in its shadow report to the UN Committee Against Torture (CAT). After the CAT issued its profoundly favorable findings in response to the WCG's all youth-of-color delegation and the shadow report they drafted, WCG began developing our next steps, including advocating for the collection and publication of all stop and frisk data by the CPD. Over the course of the last ten months, WCG began a broad campaign to educate and mobilize youth of color across Chicago to end CPD's racially discriminatory stop and frisk practices, which has included launching the #ChiStops campaign, recruiting Chicago Votes to work alongside WCG in seeking the passage of the STOP Act, and going to classrooms and schools across the City to do the hard and essential work of building knowledge and support for the legislation among Black youth as young as eight who face discriminatory stops and abuse at the hands of the CPD every single day.

WCG's Communications with ACLU-Illinois

The ACLU Illinois has known for several months that WCG intended to seek mandated collection and publication of CPD's stop and frisk data through Chicago's City Council. It was first raised to the ACLU-Illinois in November, 2014, and later when WCG members met with the ACLU-Illinois at your office on April 7, 2015. At that meeting, WCG shared a draft of the proposed ordinance, and you indicated the ACLU's plan was to amend Illinois state law. You also informed us that you supported the STOP Act. You never suggested that WCG should not pursue the campaign to pass the STOP Act in Chicago's City Council or that the ACLU was interested in working with the City to address this issue. You only asked us to refer any potential plaintiffs to you for a hypothetical lawsuit regarding stop and frisk. We subsequently emailed the ordinance to you and you provided us with feedback and edits which we wholeheartedly accepted.

The Illinois legislature then passed a bill, SB1304, on the collection of stop and frisk data that provided only half of what the STOP Act sought to achieve. WCG reached out to an ACLU-Illinois member on June 5, 2015 to discuss the SB 1304 and discussed the continuing need for the STOP Act. WCG then followed up with you ACLU to get your official endorsement of the STOP Act, which you provided and we informed you on July 1, 2015 that WCG would send out a press release and file the STOP Act on Wednesday, July 29 at the City Council meeting.

In light of this history, it was mind-boggling to learn that you have been in negotiations with the City without informing us prior to July 29th. Common decency—let alone respect for the communities’ interests you claim to represent—would compel you to inform us of these developments. True solidarity, however, would have required you to not only inform us of your negotiations, but reach out to WCG’s youth members before even initiating or participating in them to discuss whether such negotiations should even be entered into, and on what terms.

Instead, you have chosen to shut us out of these negotiations entirely and even initially refused to disclose the possible terms of the “settlement” after the July 29th press conference. You only disclosed the terms of your deal to us on August 6th, the day you signed off on the deal with the CPD and Corporation Counsel, which was the same day you chose to meet with us. It was only then did we learn the true extent in which you undermined and undercut the efforts of WCG, Chicago Votes and Black youth who have been organizing against stop and frisk. Your actions evince a clear lack of respect and disregard for WCG and the communities impacted by the issue, and have completely disrespected and disregarded the many hours of work by the youth of color who are, in fact, those most impacted by stop and frisk.

The ACLU-Illinois’ Unacceptable Deal with the CPD

We Charge Genocide’s STOP Act is rooted in the experiences and ideas of those most directly impacted—young Black and Brown people. It is the strong desire of the youth we work with that data on stops and frisks be not only collected, but be made publicly available on a City website every three months as a guarantee of actual transparency. The settlement you agreed to with the City fails to do this. Now, only you and the Consultant are provided with the relevant data and information—and on a confidential attorney’s eyes only basis. All other members of the public must seek the information through the FOIA process, which makes the information both inaccessible and hard to decipher if obtained. Your agreement with the City thus maintains the status quo, in which an elite knowledge of the FOIA process is required to access and review stop and frisk data. This is unacceptable.

Additionally, we prioritized mechanisms in the STOP Act that would immediately reduce some of the harm caused by stop and frisk practices, e.g. issuing receipts after a stop that include the name and badge number of the police officers and requiring police officers to obtain written documentation of someone’s consent to search. These components of the STOP Act are critical parts of addressing the injustices experienced by young Black Chicagoans every day. They provide people with necessary information to complain about their encounters and attempt to hold the officers responsible while also being provided information as to their rights. Your settlement, however, does not include these pieces; it instead places more power, trust, and responsibility in the hands of those who brutalize us: the cops and the courts. If you had informed us of your negotiations with the City and respected the leadership of young Black people, the ACLU-Illinois would have known that we consider these elements to be non-negotiable aspects of any legislative measures regarding stop and frisk.

We do not naively believe that our communities are harassed, brutalized, and abused by the police simply because there is insufficient data, or because there are not enough laws on the books.

We understand police violence to be rooted in historical and systemic anti-blackness that seeks to control, contain, and repress Black bodies through acts of repeated violence. Stop and frisk should be understood as a tool police use to punish Black people just for *being*. Police violence is always state-sanctioned violence, and further strengthening narrow supervision of police action by elites will never address that. This is why any legislative or law-based campaign to address police violence requires not just policy change, but an actual transformation of power relations between communities of color and the police. Your settlement—focused on your own access—does not and cannot accomplish this.

What you have “won” is fundamentally different from the STOP Act, both in its means and in its ends. Our goals are rooted in the experiences of those most directly impacted; yours are not. Our movement is rooted in a political analysis that recognizes the need to shift power away from police and into our communities; your policy “victory” is not. Our motivation is rooted in a theory of change that prioritizes movement building and centering the leadership of those most affected; yours is not. Now, because of your self-serving interest in pushing simplistic policy changes, we and our allies face a much harder task pushing the critical package of reforms included in the STOP Act but ignored in your settlement. There is no such thing as an easy victory, and yours has come at a high cost.

Furthermore, as we expressed in our August 6th meeting, it is highly disingenuous to claim this victory as a result of the usual non-profit legal advocacy work of the ACLU. The City's desire to negotiate with you has much to do with WCG and the larger Black Lives Matter movement's demands for radical change. Your settlement represents just one of many efforts by City officials across the country attempting to co-opt our movement by engaging with less threatening groups. Passage of the STOP Act would be public recognition of the real, grassroots power of young Black and Brown Chicagoans; instead the City wisely sought to settle into an ongoing relationship with a legal organization that poses no real threat to the status quo. In other words, you were used.

Data collection through the STOP Act was the first of many steps in our plan to end to stop and frisk in Chicago. You have disrespected us. You have undermined our movement. You have wasted our time and that of our allies. But, your refusal to acknowledge or take seriously our leadership has neither silenced nor weakened us. We understand freedom will take a while and will not come without a fight. We are proud of what we have accomplished. We are proud of the base-building and power-building we have achieved. We are proud of our young Black leaders and their ongoing work. We are proud of our success. We will continue and build on that strong foundation in the coming weeks, months, and years. That is how we will win. That is how we will make Black lives matter.

“It is our duty to fight for our freedom.
It is our duty to win.
We must love each other and support each other.
We have nothing to lose but our chains.”

Signed,

We Charge Genocide
Black Lives Matter – Chicago



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August 13, 2015 6:11 pm

ACLU Statement on Agreement with the Chicago Police Department on Stop and Frisk Reform

When the ACLU issued our [report on stop and frisk](#) in Chicago in March 2015, we made a number of explicit recommendations, all of which are recognized as “best practices” by persons who oppose unlawful stop and frisk, including: data collection about every stop by police, the public release of this data, the issuance of a receipt to every person stopped, and enhanced training of CPD officers in stop and frisk. We have advocated for these steps from the City for more than a decade. That report was widely distributed and shared with many groups who understood and shared our goals.

In pursuing these shared goals, some groups determined that the most effective strategy was the pursuit of an ordinance, now known as the STOP Act. Because that ordinance comported so closely to the goals articulated in the report, the ACLU supported the STOP Act when it was shared with us, and we continue to support it today. **We hope the ordinance will move forward.**

The [agreement announced last week](#) between the ACLU and the Chicago Police Department and the City of Chicago is a good step in addressing the problems with stop and frisk on Chicago streets.

The agreement is a product of negotiations that took place after the ACLU informed the City that we would file a lawsuit on behalf of a number of persons who had been stopped and searched in Chicago. By their very nature, those negotiations are almost always confidential and were conducted as such. We were not able, as part of that negotiation, to win every point. But the ACLU made the decision that it was critical to immediately get the Chicago police to collect all necessary data surrounding street stops, and to have an independent former judge review the lawfulness of stops by Chicago police, as well as the training and discipline of CPD officers. **We are confident that the agreement will result in fewer stops on Chicago streets.**

But we must be clear about some things being said about this agreement. **It does nothing to limit the public’s access to data about stops.** Under the agreement, this data remains accessible under Illinois Freedom of Information Act. We have made clear that we stand ready to assist anyone or any group who wants this FOIA-accessible data as part of their advocacy.

Most important, the ACLU never viewed the agreement as an end to advocacy or further reform in this area.