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LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION. By Howard I. Kalodner and James J. Fishman. Cambridge, Massachusetts: Ballinger 1978.

*Reviewed by Mark G. Yudof**

LIMITS OF JUSTICE is an ambitious book that seeks to ground the study of desegregation decisions in an empirical methodology. The eight case studies in the volume, sandwiched between an introductory essay by Dean Kalodner and some concluding comments by distinguished civil rights commentators,[1] draw on the legal realist tradition of attentiveness to facts, social implications, social context, and rules in action rather than in the abstract;[2] and on more modern notions of implementation research in the social sciences.[3] Dean Kalodner's essay appears premised on the notion that traditional modes of enforcing and monitoring court desegregation decrees may not be efficacious—that the results of these paper decrees are far from preordained. The assumption is that the implementation of court decrees into school systems and the formation of rules and policies are worth studying precisely because the outcomes are virtually uncertain and unpredictable. It is one that also characterizes the modern implementation literature:

> The article of faith that unites implementation analysts is a belief that the carrying out of a policy, the installation of a plan, or the enforcement of a law is neither automatic nor assured. On the contrary, both casual observations and systematic investigation suggest that the outcomes of social policies and innovative plans generally have been unpredictable and unfortunate, at least in

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1. Derrick A. Bell, Jr. and Forbes Bottomly.

2. *See generally* T. BENDITT, LAW AS RULE AND PRINCIPLE (1978); G. GILMORE, THE AGES OF AMERICAN LAW (1977); E. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY (1973); Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY 405 (D. Fleming & B. Bailyn eds. 1971).

3. *See, e.g.*, G. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (1971); E. BARDACH, THE IMPLEMENTATION GAME (1977); A. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1965); H. KAUFMAN, THE FOREST RANGER (1960); J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION (1973).

> the eyes of the designers. Academic research seeks to understand and explain this uncertainty in outcomes; policy research aims to do something about it.[4]

The difficulty of this approach, of course, lies in the execution of the case study technique in the field of school desegregation. The desire to move beyond theorizing based on the stargazing variety to theorizing grounded in the harsh realities of race relations in public school systems is not easily fulfilled.

The contributors to LIMITS OF JUSTICE exhibit markedly different abilities to utilize successfully the case study technique. As Paul Berman remarked generally about implementation studies:

> [T]he literature consists mainly of atheoretical case studies of varying quality—some extraordinarily perceptive, others disappointingly dull—whose claims to generality are questionable because the cases cannot easily be compared. . . . Reviewing a wide sample of these retrospective studies leaves one feeling somehow wiser but still uncertain as to how to apply this wisdom in other than the special circumstances already past. . . . In brief, implementation analysis lacks a conceptual framework that places individual studies within their larger sectoral context and facilitates cross-sectoral comparisons.[5]

It is often easy to lose one's way as one encounters, with tedious regularity, the references to demographic trends, the decline of white school populations in urban school systems, the resistance of school boards and school professionals to desegregation orders, the blow by blow (motion by motion, appeal by appeal) elaboration of court decisions, and the political scrutiny of each of the selected school systems. If idle theorizing, devoid of social and political reality, is a sin, it does not make the unstructured, non-conceptual regurgitation of facts a virtue. Professors Robertson and Teitelbaum surely must be right when they argue that empirical studies are "merely the compost for the construction of a theoretical framework,"[6] a theoretical framework that explains relationships and outcomes and yields insights into improving the implementation process. Without some relationship to theory, all that is left is the compost.

Perhaps one should not be too demanding of case studies, par-

4. Berman, *The Study of Macro- and Micro-Implementation*, 26 PUB. POL'Y 157, 160 (1978).

5. *Id.* at 158-59.

6. Robertson & Teitelbaum, *Optimizing Legal Impact: A Case Study in Search of a Theory*, 1973 WIS. L. REV. 665, 667.

ticularly those involving complex legal and social problems like school desegregation. It is easy to criticize, but much more difficult to criticize constructively. There is a tendency (or perhaps it is simply a reflection of my own thinking) to look to the physical sciences for paradigms about ordering the world, determining the relevancy of facts, deciding what to investigate, and explaining relationships.[7] In addressing the philosophy of scientific revolutions, Kuhn, in the context of the physical sciences, speaks of investigating facts for three reasons: 1) To illuminate those facts which are particularly revealing of the underlying paradigm; 2) to use the facts as a basis for checking the predictions of the paradigm; and 3) to undertake empirical work which assists in the refinement of the paradigm and in the resolution of its residual ambiguities.[8] The case study in the social, political, and legal realm appears far from achieving such coherence. Case studies often multiply theories and, consequently, bring disagreement rather than consensus on underlying propositions. The further accumulation of facts under such circumstances may simply increase the number of mysteries and throw further doubt on the already pluralistic character of social science wisdom.[9] Prediction and refinement are often casualties of social science progress, not by-products.[10]

There is no reason to believe that a group of extremely able, empirically oriented lawyers can undo these heady difficulties. At best they should be held to modest standards of illuminating frequently ignored aspects of the desegregation process which may tell us something, however little, about the different ways in which school segregation problems may be resolved by legal institutions operating in a rich political, economic, and social framework of institutions and groups.[11]

Dean Kalodner has taken pains to narrow the scope of the enterprise which he co-edits. In his introductory essay, he asks how

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7. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

8. H. KALODNER & J. FISHMAN, LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 25-28 (1978) [hereinafter cited by page number only].

9. *See generally* Cohen & Weiss, *Social Science and Social Policy: Schools and Race*, in EDUCATION, SOCIAL SCIENCE, AND THE JUDICIAL PROCESS (R. Anson & R. Rist eds. 1977).

10. *Id.*

11. *See, e.g.*, E. CATALDO, M. GILES, & D. GATLIN, SCHOOL DESEGREGATION POLICY (1978); R. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION (1969); Kirp, Block, Myers, Gamble & Koshar, *Why Desegregation Didn't Happen: Race & Schooling in Oakland*, 87 SCH. REV. 355 (1979).

the courts may eliminate the vestiges of segregated school systems. He notes with regret the "flight" of the federal government from such matters,[12] and the tendency of "many school boards [to] pursue from the outset a course designed to shift the entire political burden of desegregation on the courts."[13] His framework is remarkably instrumental. The question is not so much whether a school district or state has committed *de jure* segregation or whether racially balanced schools within a particular geographic area are a constitutionally required remedy. The question is how to achieve a racial balance remedy once a violation of the fourteenth amendment has been found. How can courts make school boards and school bureaucracies cooperate in the objective? How can white flight be alleviated? How can the social costs of integration be reduced? How can compliance with a desegregation decree be monitored? How may the conditions for a quality, integrated education for black and white students be achieved?

In this light, Dean Kalodner makes detailed proposals for the use of experts early-on in the litigation to facilitate the fashioning of remedies.[14] He is concerned with the role and function of masters[15] and state and federal executive branch agencies[16] acting as court appointed monitors; and he focuses on the role of attorneys representing both school boards and plaintiffs.[17] In short, he searches for ways in which "the adjudication process could be improved in its functioning."[18] His analysis is careful and balanced. He recognizes limits in the nature of adjudication, but does not seek to turn courts into administrative agencies.[19] On the other hand, the fact that solutions to "broad social problems must come from the legislative and executive branches of government"[20] does not counsel judicial inaction: "[F]or all of the faults that have characterized adjudication, it is not possible to conceive of a constitutional system in which no institution of government is prepared to

12. Pp. 2-3.
13. P. 3.
14. P. 19.
15. Pp. 8-11, 19-20.
16. P. 21. Dean Kalodner is more dubious about the propriety of "court-created committees of citizens or parents": "Where the court chooses a citizen monitoring panel, there is generated a transfer of power from the school board to parents or other interested citizens. While such a shift may be politically justifiable, the role of the court in producing it is of doubtful validity." *Id.*
17. Pp. 21-22.
18. P. 23.
19. *See* pp. 22-23.
20. P. 23.

declare and enforce constitutional rights."[21] His proposals involve the improvement of the adjudication process without altering "the essential character of the role of courts in school desegregation litigation."[22] Walking a tightrope, he perceives an inverse relationship between the failure of political leadership in desegregation cases and the expanding equity jurisdiction of the courts in such cases:

> It is when the court is able to define the constitutional right to an education free of discriminatory school board action—and then confidently to expect the school board, the state commissioner of education, or other state or federal officials or agencies to formulate and implement the requisite changes to implement that right—that the role of courts can be reduced to more traditional dimensions. The failure of political leadership to play that proper role has led to the expansion of equity jurisdiction; only a reversal of that failure will lead to the contraction of equity jurisdiction.[23]

There are ambiguities in the Kalodner analysis, ambiguities of which he is painfully aware. The instrumental approach makes sense only if the objective is clearly stated or understood (and if there are not multiple and conflicting objectives) and if the costs of alternative means can be calculated in relation to the benefits. This is not the case in school desegregation litigation. The courts have vacillated on the need and justification for racial balance remedies and on the degree of state involvement in school segregation necessary to trigger a finding of a constitutional violation—ranging from adoption of neighborhood pupil assignment plans which predictably result in segregation to explicit separation of the races.[24] The target is a moving one, and the ends of the process are often subsumed by the process itself. The need for ongoing judicial supervision, the extraordinary breadth of the remedies, the complex nature and future orientation of the factfinding, and the multiparty structure of desegregation litigation make it far from

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21. *Id.* Kirp, *School Desegregation and the Limits of Legalism*, 47 PUB. INTEREST 101 (1977); *cf.* Mishkin, *Federal Courts as State Returners*, 35 WASH. & LEE L. REV. 949 (1978) (discussion of the proliferation and regularization of institutional decrees where courts have become judicial overseers of state and local governmental units).

22. Pp. 23-24.

23. P. 24.

24. *See generally* M. Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court (publication pending in *Law & Contemporary Problems*). *Compare* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *with* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977).

clear whether traditional litigation models can be shaped to the new exigencies.[25]

Unfortunately, many of the case studies in LIMITS OF JUSTICE lack the self-conscious incrementalism of Dean Kalodner's approach and ignore the ambiguities of the school desegregation process. With rare exception, the case study authors embrace the racial balance remedy without qualms and proceed to divide the world into good guys and bad guys—those who favor integration and those who do not. Perhaps the worst offender is Professor Smith. In analyzing the Boston desegregation case,[26] his presentation closely resembles an advocate's brief. Pre-1960's racism in Boston is dealt with in a cavalier fashion in less than six pages. Along the way, the Massachusetts Racial Imbalance Act, the distinction between *de jure* and *de facto* segregation, and the abolitionist movement are all but forgotten. The reader is told of lawless cops who will not maintain order, of "obstinate" boards of education, and of recalcitrant white interest groups. "Community" appears to mean the minority community (or at least parts of it) and not the political community from which public officials are elected. If this served the purpose of illuminating the problems of desegregation, perhaps the presentational bias may be overlooked. But it is not the case. With all seriousness, the reader learns that there are difficulties in relying on the wrongdoers (school officials) for desegregation plans,[27] members of the Citywide Coordinating Council (a monitoring agency appointed by the court) brought "the hardened perspectives and positions of their constituencies" with them,[28] the treatment of children is a volatile issue, desegregation remedies affect persons other than the wrongdoers, desegregation decrees bring resistance and polarization, and a 24-month old judicial decree cannot change two centuries of interracial hostility.[29] In short, a restatement of the problems substitutes itself for analysis.

The pattern of the Smith case study is repeated in a number of the other case studies. For example, Jessica and Jeffrey Pearson opine that the Denver school board's response to black migration to traditionally white neighborhoods "was to maintain racial segre-

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25. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Mishkin, *supra* note 21; *cf.* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (discussing the judicial branch of the government).

26. Pp. 25-113.

27. Pp. 105-08.

28. P. 109.

29. Pp. 110-13.

gation in the schools in the wake of neighborhood change."[30] Whether the neighborhood was white, integrated (even for a brief transitional period), or black, the school system maintained neighborhood schools. The authors do not explain why this should provide the basis for a finding of constitutional wrongdoing. What is the significance of going from overwhelmingly white to overwhelmingly black schools? Why is racial balance the objective? What might the school authorities have done? How does a school system prevent an integrated neighborhood from becoming predominantly minority? Or should it abandon neighborhood assignment policies? How would that policy alter demographic trends?

Pearson and Pearson also argue that "the personal socioeconomic and ideological composition of school board members and the politicization of civil rights issues both explain why resistance to school desegregation hardened so dramatically."[31] In fact they explain remarkably little. The question is not whether high socioeconomic or low socioeconomic status individuals are "liberal" on race matters, but why those committed to integration are frequently evicted from office only to be replaced by "anti-busing" public officials. The socioeconomic status of board members is not the independent variable in the analysis. Issues are not fortuitously politicized such that resistance to desegregation is increased. Politicization is itself a manifestation of resistance. If there is a lesson to be drawn from the Denver experience (and that of many other school systems), it is that board members are frequently placed under enormous pressure to resist racial balancing of the schools; and they either succumb to those pressures or pay a high political price.

The book is filled with tales of the decisions of progressive boards of education being overturned by less progressive successor boards. Desegregation resolutions were rescinded in Denver, Detroit, Dayton, and other cities, according to Professor Hain.[32] Ironically, this often compels plaintiffs to rely on the actions of a pro-desegregation board to build a case of *de jure* segregation against its successor. This sometimes leads to the bizarre result that cities with relatively progressive leadership on school and race matters are taken to court before those that have unambiguously engaged in racial discrimination. The precipitating event is the re-

30. P. 218.
31. P. 219.
32. P. 244 & n.101.

scission, but despite the assertions of Pearson and Pearson to the contrary,[33] it is far from clear that such rescissions, by themselves, constitute discriminatory state action for purposes of the fourteenth amendment.[34] With the exception of Professor Hain's work on the Detroit desegregation case, the case studies in LIMITS OF JUSTICE all but ignore this frequently repeated political and legal pattern.

The failure to treat the causes of politicization and anti-busing attitudes in the Denver case study is particularly disturbing in the light of the authors' emphasis on the alleged success of the Community Education Council in monitoring the Denver desegregation order. Once again, as in the Boston case, there is a court-appointed group of community monitors. This time, however, the reader is told that they get the job done. Why is that? How is Denver different from Boston? Because "the network [of monitors] draws from a cross-section of the community. It reaches into every school. . . . [T]he network is the community."[35] If the Community Education Council is truly representative of the community (could it *be* the community?), one would expect it to act like the Denver school board that rescinded the voluntary desegregation plans. If it successfully monitors the desegregation remedy, presumably this is because it is not representative of the larger community or it represents sympathetic constituent interests. Indeed, judicial intervention in desegregation issues is premised largely on the notion that minority groups cannot successfully press their constitutional and educational interests in the political arena of the legislative and executive branches of government. Pearson and Pearson would have it both ways. Community resistance to desegregation expressed through the political processes counts for little,[36] while court selected monitors are perceived as representing the real political community.

Another questionable aspect of a number of the case studies relates to generalizations about the educational disadvantages associated with segregated schools (particularly for minority children) and the benefits associated with integration.[37] Organization theo-

33. P. 220.

34. The Supreme Court ducked the issue in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). Reitman v. Mulkey, 387 U.S. 369 (1967); *cf.* Milliken v. Bradley, 418 U.S. 717 (1974) (discussing the degree of state involvement needed to find violations of the fourteenth amendment).

35. Pp. 221-22.

36. *See* p. 214.

37. Consider this remarkable statement in the Denver case study:

rists have frequently warned that there are distinctive organizational characteristics to public sector social service delivery systems such as education; the task is usually labor intensive and the output criteria are ambiguous as compared to private sector markets.[38] Virtually all of the authors, except for Professor Kirp, appear unaware of this organizational literature, and some fall into the trap of failing to take into account the difficulty of specifying educational outcomes and their causes. Professor Smith, without documentation, describes the quality of education in Boston after the desegregation order as "vastly improved."[39] He fails to explain how or why it is improved and ignores the sorry circumstances of the implementation process.

James Fishman, in an otherwise insightful case study of the efforts to desegregate the Mark Twain elementary school in Brooklyn,[40] asserts that segregation may be proven by reference to demographic patterns, board action and inaction, and educational failures:

> Proof of segregation in fact and that the segregation was caused by school board action and inaction was relatively easy. The demographics spoke for themselves. The dreary record of community board inaction was not contradicted. . . .
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> . . . The court visited the school. Combined with the sta-

> Although it is difficult to gauge the quality of a school district, various impressionistic evaluations as well as statistical indicators suggest an erosion of educational quality. During the past several years, for example, the teacher turnover rate in the Denver school district has consistently declined. This is largely attributed to the improved salary schedule negotiated in 1969 which rewarded career teachers and reduced teacher mobility. At the same time the pupil-teacher ratio has steadily dropped from 24 pupils per teacher in 1969 to 19.3 pupils in 1975. These indicators suggest improved quality.
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> On the negative side, however, the student drop-out rate has risen from 5.5 percent in 1971/72 to 6.6 percent in 1972/73 to 7.8 percent in 1973/74 to 8.5 percent in 1974/75. Pupil achievement test scores have dropped in these years, and students in more and more of the district's schools fail to meet or exceed national achievement norms. Furthermore, public satisfaction with the school district has also eroded. More recent achievement test comparisons covering the 1972-1975 period, however, fail to suggest continued patterns of decline.

Pp. 180-81 (footnotes omitted).

38. *See* Berman, *supra* note 4, at 174-75 (citing J. THOMPSON, ORGANIZATIONS IN AMERICA (1967)) (additional citations omitted).

39. P. 110.

40. Pp. 115-65. For example, Fishman notes that the school board "frequently misunderstood the legal process and the use of counsel." P. 130. Board members reacted to litigation by use of press conferences and by seeking to talk-out the problem with the judge as a fellow politician. *Id.*

> tistics relating to reading scores, feeder patterns, utilization [of school capacity], indicators of intraschool segregation, the fact of segregation was irrefutable.[41]

Perhaps the reference to declining reading scores was simply an oversight. If the suggestion is that low reading scores are a consequence of segregation, it is certainly a debatable point[42] and one which is not supported by the Fishman case study. Minority group reading scores are generally below those of whites,[43] and the role of segregation and integration in the causal chain is not clear. This does not mean, as Professor Bell seems to suggest in his commentary, that integration is not worth the candle because *Brown v. Board of Education*[44] and its progeny are addressed primarily to educational quality,[45] but that such outcome data are irrelevant to the determination of a constitutional wrong.[46] At the remedy stage, educational quality concerns seem more appropriate, and Fishman is quite correctly concerned with such matters under the "magnet" school concept developed to integrate the Mark Twain School:

> Nor is there great concern in the final order over the education that blacks will receive in the other schools. . . . Extra resources will go into Mark Twain to ensure the success of the magnet. But in a financially deprived school system, are there funds to go around for all kinds of students?
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> . . .
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> There will be neither the resources nor the individuals to create another magnet school [if another school in the district begins to tip in its racial balance].[47]

Perhaps the lesson to be learned is that the adjudication process fragments public policymaking. Courts resolve the dispute before them without thinking through the systemic consequences of their

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41. Pp. 131-32.

42. *See generally* N. ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN (1975); M. WEINBERG, MINORITY STUDENTS: A RESEARCH APPRAISAL (1977).

43. *See, e.g.*, note 42 *supra*.

44. 347 U.S. 483 (1954). J. COLEMAN, E. CAMPBELL, J. MCPORTLAND, A. MOOD, F. WEINFELD & R. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, INEQUALITY (1972); ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972).

45. Pp. 570-71.

46. *See* Yudof, *supra* note 24; Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973).

47. P. 165.

orders.[48] A diversion of resources and gifted students to one integrated school inevitably tears them away from other schools in the system. The overall quality of education for the vast majority of students, at least as measured by resources, may suffer.

Allowing courts to consider the educational context of desegregation remedies carries with it many dangers in terms of the expanded role of the courts in education policymaking. Professor Hain's enlightening study of desegregation[49] in Detroit makes this abundantly clear. After the Supreme Court ruled that a metropolitan remedy for overwhelmingly black Detroit was not constitutionally required in view of the nature of the *de jure* segregation, the NAACP sought a Detroit only racial balance remedy in which each school in the district would have a 65 to 35 ratio of black to white students.[50] This plan would have involved the reassignment of some 100,000 students[51] out of a school population of approximately a quarter of a million students. The board of education proposed a less extensive desegregation remedy. Federal District Judge DeMascio rejected both plans:

> [Judge DeMascio] . . . believed desegregation [in majority black urban districts] only required that blacks be represented in significant numbers in every school in the district, as evidence they were no longer excluded. It was not necessary, he believed, for whites to be as widely distributed. . . . "Equal facilities, integrated faculties and meaningful guarantees that every student is welcome in any school" were, in Judge DeMascio's view, sufficient indicia of a desegregated system.[52]

The principle ground for the rejection of the NAACP and board plans is not entirely clear. If racial balance is required as the remedy for past and/or present discrimination, why should the particular ratio of blacks to whites alter the remedy? If the remedy was simply one of nondiscrimination and not racial balance, then neither a token nor a substantial representation of blacks or whites in each school would be in order. Quite obviously, the court was influenced by the perceived educational disutility in racially balan-

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48. *See generally* Mishkin, *supra* note 21. N. GLASER; COURTS AND SOCIAL POLICY (publication forthcoming); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

49. Pp. 223-308.

50. P. 255.

51. *Id.*

52. P. 280.

cing schools which were already two-thirds blacks.[53] How the court was able to judge the relative costs and benefits of integration under such circumstances and why the consideration of such costs and benefits are legitimate only in majority black districts is far from clear. Further, the "welcome mat" theory of equal protection is strikingly reminiscent of freedom of choice and token representation remedies rejected by the courts in the late 1960's and early 1970's.[54]

If educational theorizing was implicit in the rejection of racial balance remedies, it was made explicit in the remedies actually approved by the court. Without the participation of plaintiffs' counsel (according to Professor Hain),[55] Judge DeMascio proceeded to refashion the public educational system in Detroit through a bargaining process with the school board. The judge perceived the need for a stricter discipline code in Detroit, and he proceeded to write one when the board's code did not live up to his expectations.[56] He was openly critical of the legislatively mandated decentralization of the Detroit school system into eight regions.[57] For reasons perhaps rooted in his own experience, the judge proposed (no party had) and ordered a major revision of the grade structure. He preferred that Detroit's students attend kindergarten through 5th grade, 6th through 8th grade, and 9th through 12th grade schools, rather than the previously prevalent kindergarten through 6th grade, 7th through 9th grade, and 10th through 12th grade system.[58] The result was that the court's plan moved more students than the board's plan and "achieved about half as much desegregation."[59] How much of this had to do with remedying racial discrimination remains a mystery. More justifiably, DeMascio attempted to put teeth into the revamped separate-but-equal doctrine by requiring various compensatory programs, with particular emphasis on reading and vocational education.[60] The United States

53. *Cf.* Calhoun v. Cook, 430 F.2d 1174 (5th Cir. 1975) (majority status of black students in each school indicates freedom from racial discrimination). *Calhoun* is discussed by Dean Kalodner at pp. 15-16.

54. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Bd. of Educ., 391 U.S. 443 (1968); Moses v. Wash. Parish School Bd., 456 F.2d 1285 (5th Cir. 1972).

55. P. 278.

56. P. 294.

57. P. 283 n.333.

58. Pp. 286-87. There were numerous exceptions to the Board's K-6, 7-9, 10-12 policy. P. 287.

59. P. 284.

60. Pp. 292-94. *See generally* Yudof, *supra* note 24.

Supreme Court, with the grumbling acquiescence of Justice Powell, affirmed the educational components of the plan and the lower court's order that the state of Michigan be compelled to contribute to the cost of their implementation.[61] The question of student desegregation remained in the courts, after the United States Court of Appeals for the Sixth Circuit rejected Judge DeMascio's "welcome mat" theory of desegregation.[62]

After he brilliantly and painstakingly assembled his facts, Professor Hain is content with a two paragraph summary of the Detroit litigation.[63] The reader questionably learns that the abandonment of Detroit by whites is "almost completed," the district court minimized the inconvenience for whites in his desegregation plan, and "only inclusion of the suburbs in a desegregation plan" has the potential for achieving racial balance for Detroit's black students. Even less pointedly, one learns that "rough, maligned Detroit has shown a grace more genteel cities might envy."[64] The first set of conclusions required no case study, and the second conclusion pretends to substitute civility for theory. There is no discussion of how negotiated remedies in public interest cases differ from traditional legal remedies.[65] No guidelines are offered to show when a judge has overstepped his equity powers and when he is responding responsibly to a difficult situation. There is no analysis of whether school boards and bureaucracies are more likely to implement plans requiring specific educational components than those requiring the dismantling of neighborhood schools. There is virtually no mention that the majority of Detroit's population is black and Detroit has a black mayor and school superintendent. The implications that this black representation might have on the implementation of desegregation orders are not pursued.[66] Somehow one feels wiser after reading the Detroit case study, but that wisdom points only to the past and not to the future.

William Marsh makes a convincing case for the existence of northern style racial discrimination in his Indianapolis study,[67] but misses a superb opportunity to examine the role of social science

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61. Milliken v. Bradley, 433 U.S. 267 (1977).
62. Bradley v. Milliken, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).
63. P. 306.
64. *Id.*
65. *See* Chayes, *supra* note 25; Mishkin, *supra* note 21.
66. *But see* p. 281.
67. Pp. 309-58.

evidence in the adjudication process. He is content to inform the reader that the termination of the litigation is not in sight, that no meaningful plan for desegregation has been adopted, and that there may be reason for hope in the recent election of a more progressive school board.[68] The Mount Vernon study[69] is interesting in that it focuses on state courts and education agencies as the forums for desegregation issues. Its conclusion that civil rights advocates erred in relying on the state commissioner of education and the state courts for a desegregation remedy is plausible, but I am suspicious about whether it is generalizable.[70]

Perhaps the best case study in the book is Professor Kirp's research on desegregation in San Francisco. Kirp at least articulates the traditional liberal position on race and schools:

> [Superintendent] Spear's perception of the changing racial composition of San Francisco's public schools did not entail any distinct administrative reaction. His attitude [in 1960] reflected the classic liberal position: race or other group attributes should be irrelevant, individual characteristics controlling, with respect to any institutional decision. Thus, while the district's hiring policy "emphasizes the selection of the best qualified teachers available . . . ," and its educational policy stressed quality education geared to the capabilities of the individual student, the racial implications of such policies constituted an inappropriate line of inquiry. . . . There existed no official statistics to document the impact of . . . [black migration to previously white areas on the racial composition of particular schools].[71]

The traditional liberal wisdom may appear naive to some, racist to others, and of continuing vitality to still others,[72] but it is clear that its rejection makes the task of achieving racial justice enormously more complex. Complexity only arises through the accompanying disagreement over the goals of school and race policies and laws, and the need to determine how, when, and why race may be taken into account. Professor Kirp's awareness of this complexity greatly augments his analysis of desegregation in San Francisco. His world does not neatly divide into evil-doers who oppose racial balance remedies and do-gooders who favor it. Fault is not easily assigned,

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68. P. 356.

69. Pp. 359-409.

70. *See* Crawford v. Board of Educ. of Los Angeles, 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

71. Pp. 416-417.

72. *See, e.g.*, L. GRAGLIA, DISASTER BY DECREE (1976).

particularly when institutional and political factors are taken into account.

The Kirp study elucidates several themes which render his collection of facts more intelligible. Professor Kirp does not assume a monolithic black or white community committed to a single race ideology,[73] and hence he is not surprised to find tensions over policy within constituent groups and institutions. Indeed, he recognizes that means and ends are frequently in a state of flux, and that permanent solutions will prove evasive:

> Issues as volatile as segregation are never resolved in any permanent fashion. Organizations whose primary concern is the furtherance of minority civil rights do not admit to final successes; they recognize only the stage-by-stage resolution of continuing controversies, disputes . . . are constantly changing, the demands constantly expanding, the inequality about which objection is voiced constantly becoming less readily detectable.[74]

The game changes over time. Equal facilities for blacks and whites may constitute an enormous civil rights victory at one point in time and a tremendous defeat at another. Successful resistance to the closing of a black neighborhood school may be a feather in the cap of a black politician on one day and a decisive defeat for integration on another. Racist white politicians may vow to resist freedom of choice plans to the point of disobeying court orders, only to embrace such plans in the name of parental choice and neighborhood schools at a later date. Much of the posturing and gamemanship, despite the grave consequences for black and white students, has a symbolic quality, and once a symbolic victory has been achieved, the pressures for change may abate: "[The realities of desegregation may matter less than the willingness of powerful white officials] . . . to defer to the wishes of the civil rights groups. . . . Once the symbolic victory had been secured, through the *Johnson* decision, most civil rights activists lost their interest in what happened."[75]

Professor Kirp notes other factors which desegregation commentators frequently overlook. The endless studies conducted by interest groups, experts, and school professionals may be a form of buying time because they are "studies in lieu of decisions."[76] Plain-

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73. P. 421.
74. P. 423. *See also* Kirp, *supra* note 21.
75. P. 489. *See also* p. 485.
76. P. 427.

tiffs in desegregation cases may not only lack the resources to formulate and monitor desegregation plans, a point well made by Dean Kalodner, but they may lack the will to do so.[77] If the plan is promulgated by the board of education, it is the board that is put on the defensive, and plaintiffs may continue to pick away at the official position. Professor Kirp, however, fails to note a time-honored rule of organizational politics: he who drafts the proposals frequently is able to confine the scope of discussion and limit changes to relatively inconsequential matters. On the other hand, he is mindful of the cardinal rule of organizational and bureaucratic behavior; incompetence may carry the day.[78] Too frequently, lack of normative commitment to the court's decision and racial prejudice are words used to describe organizational responses that can best be understood in the light of the organization's utter inability to do what courts have required. Devising new school attendance boundaries, selecting new building construction sites, meeting the transportation needs of an integrated school district, and a myriad of other tasks may strain the abilities (and resources) of professional education administrators.

Finally, Professor Kirp identifies the paradox that goes far in explaining all eight case studies in LIMITS OF JUSTICE: "Litigation represents an end-run around the political process of dispute resolution. That is both its strength, from the advocates' viewpoint, and its limitation."[79] Constitutional litigation in the desegregation cases is an attempt to appeal the decisions of majoritarian institutions to judicial ones better insulated from the voices of the majority. In the realm of broad social reform, courts must listen to and take account of those voices if judicial orders are to be obeyed. A change in forums that results in a decisional outcome perceived as favorable to a racial minority is undone at the implementation stage precisely because of the institutional characteristics of that forum. A strength at the point of decision becomes a weakness at the point of implementation.

If the courts are to succeed in desegregation cases, there are three choices. First, they may consistently and coherently articulate and defend their decisions and hope to succeed by moral persuasion over an extended period of time. The Supreme Court has gone far in dashing this hope by its inability to be consistent and

77. P. 465. *See generally* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1155 (1977).
78. P. 475.
79. P. 491.

coherent since its metropolitan desegregation ruling in 1974.[80] Second, the courts may temper their decisions in the light of popular concerns. Perhaps one may accurately describe Judge DeMascio's idiosyncratic response to segregation in Detroit as falling loosely within this category. The problem is that such moderation may undermine the goal of racial justice in the schools. Surely, civil rights groups might prefer to fight for implementation of a far-reaching decree than to acquiesce in the formulation of remedies, perceived as meaningless, which may be easily implemented. Third, the courts may consciously attempt to probe the causes of popular, elite, and institutional opposition or noncooperation in desegregation orders and to tailor their decrees and processes accordingly.

LIMITS OF JUSTICE is a first cut at the third type of judicial approach. The difficulties of devising an efficacious strategy, however, loom large. My own suspicion is that class conflicts have been subsumed under the category of racial discrimination in the school cases. Whites do not so much fear integration with blacks as integration with poor blacks. They perceive socioeconomic integration as a threat to the quality of education and as an invitation to school violence. Unless whites can be disabused of these notions, real or imagined, or unless the correlation between race and poverty is sharply reduced, racial balance (if that is the appropriate constitutional goal) is likely to be strenuously resisted. If the courts are not to be charged with the broadest responsibility for curing perceived unfairness in the distribution of wealth, they must work at changing attitudes. But these problems of the mind are complicated by the ineptness of school bureaucracies in assuaging these concerns. This explains the new "American dilemma," so ably described by Professor Orfield: Americans increasingly favor integration in the abstract but forcefully resist the only realistic means of achieving it, the transportation of students from their segregated neighborhoods to integrated schools.[81] Neighborhood segregation is associated with wealth differentials, discrimination, taste, and other factors.[82] If, by some wave of the magician's wand, neighborhoods in urban areas were to be integrated, the resultant school integration would strike many as "natural." The underlying reason is that

80. *See generally* Yudof, *supra* note 24.

81. G. ORFIELD, MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY (1978).

82. *See generally* Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63.

student bodies would be relatively racially heterogeneous but more economically homogeneous.

Without the ability to effect wealth redistribution or neighborhood integration, the task for the courts is one of persuasion in which the persuasive qualities of judicial opinions alone are quite limited. How may courts devise new strategies for communication and persuasion which will lead to implementation of their decrees? One thinks of publicity campaigns, in-service training for teachers, meetings with parents, workshops for administrators, and so on.[83] Even if these and other strategies can be identified and made to work, a matter easily disputed, their use would raise profound questions about the specific role of courts and the general role of governments in leading public opinion.[84] Propaganda, truth, and education are in the eyes of the beholder.[85] One person's moral leadership is another's brainwashing. Democratic government is rooted in the ability and opportunity of each citizen to make and express judgments on matters of public concern and to use those judgments to influence government institutions.[86] If government crosses the line from education and leadership to an "engineered" consent, it ceases to be legitimate in democratic theory and fact. This is no less true of the judicial branch than of the executive or legislative branches. Furthermore, accommodating the politics of persuasion to the traditional model of adjudication may defy even the creative impulses of the Kirps and Kalodners of the legal community. If future studies of desegregation cases are to be taken seriously, these are precisely the types of questions of theory that must be addressed.

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83. An extensive public relations campaign involving widespread press, radio, and television coverage, personal appearances by members of the board, the superintendent, and new principal, was set up to inform parents of the magnet school concept and to encourage them to send their children. Mailings to families with eligible sixth-grade children began. . . .

P. 161.

84. *See generally* Yudof, *Government Expression and the First Amendment*, in CONSTITUTIONAL GOVERNMENT IN AMERICA (R. Collins ed. 1979) (publication pending); M. Yudof, When Governments Speak: Politics, Law and Government Expression in America (unpublished manuscript, 1979).

85. *See* E. ARONSON, THE SOCIAL ANIMAL 55 (1972).

86. *See* Yudof, *supra* note 84. C. FRANKEL, THE DEMOCRATIC PROSPECT 34 (1962).