THE RELEVANCE OF "IRRELEVANT" TESTIMONY: WHY LAWYERS USE SOCIAL SCIENCE EXPERTS IN SCHOOL DESEGREGATION CASES

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Why do attorneys utilize social science experts in school desegregation cases? Although experts often testify for both parties in these cases, plaintiff lawyers are more likely than defense lawyers to call upon them. Plaintiff lawyers appear to have easier access to a network of scholars willing to testify. Moreover, plaintiff lawyers have a set of social theories and legal strategies that often requires the use of social science expertise. Although the testimony offered by social scientists is often not directly relevant to the legal issues in a trial, it is part of the attorney's attempt to educate or persuade the judge to a particular view of race relations and education.

Among many interesting aspects of the school desegregation cases is their use of social science evidence. From *Brown* v. *Board of Education* (1954), where the Supreme Court cited evidence from "modern" social science to support the proposition that segregated schools are inherently unequal,[1] to the present, many school cases have had one or more expert witnesses. Social science testimony has been controversial from the beginning. Various social scientists, lawyers, and judges have questioned the constitutional and litigative relevance of this evidence as well as its accuracy (Cahn, 1955; Clark, 1959-60; Rossell, 1980; Schwartz, 1978; van den Haag, 1960; Wechsler, 1959; Wolf, 1977). However, such testimony continues to be presented in these cases and, if anything, has come to play an even larger role in the last fifteen years. In this article we examine social science evidence from the perspective of trial attorneys who have used it. Why and how has it been used?

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[1] See Kluger (1976) for a general discussion of social science testimony in Brown and its companion cases.

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In order to understand these issues, we first examine the purpose of the scientific testimony, indicating its role as a resource in litigation. We then examine the different uses of this testimony by plaintiff and defense lawyers. Four factors appear to interact to produce much more frequent use of social science evidence by plaintiff than by defense lawyers: a) legal admissibility of evidence; b) availability of social science witnesses and scientific evidence; c) choice of legal tactics; and d) the view of race relations which lawyers bring to the cases. Finally, after examining how these factors influence the minds and actions of counsel, we conclude with a discussion of the impact of social science testimony in the school cases. Does it appear to achieve its purpose?

I. THE DATA BASE

The data base for this paper is part of a larger project which includes interviews with social scientists, lawyers, and judges involved in school desegregation cases.[2] We selected the lawyers, judges, and scientists by first choosing 17 cases from a list of (1) federal district court school desegregation cases[3] (2) which involved pupil desegregation, (3) which were active as of 1970, and (4) in which there was some social science testimony.[4]

In the summer of 1978 we identified 69 such cases (Wise, 1977). The selection of 17 cases from this universe was partly purposive and partly made by a representative sampling process. Besides Los Angeles, we chose Richmond and Detroit as northern and southern metropolitan areas. The remaining 14 cases were selected by constructing a four-fold matrix of larger and smaller school districts and northern and southern (pre-*Brown*, state-imposed segregation) cases. From each of these four categories we chose some cases which were legally and/or politically significant, ones which had a variety of types of expert testimony, and ones which had judges of varying political reputation. Together they seemed to provide a reasonable sample of school desegregation cases which

[2] We appreciate the financial support of N.I.E. grant #78-0073. The findings and interpretations reported here do not represent the views or policies of that agency, and no endorsement should be inferred.

[3] One exception to the federal district court requirement was made for the Los Angeles case, which was tried in the state courts. We included it because it employed a nontraditional use of experts—a court-appointed panel.

[4] In cases where the existence of social science testimony was not already known or obvious from the opinion, we called the attorneys in the case and asked them about it.

included social scientific evidence.[5] The final sample included the following cities: Atlanta, Austin, Baton Rouge, Charlotte, Columbus, Corpus Christi, Dayton, Denver, Detroit, Indianapolis, Kalamazoo, Los Angeles, Minneapolis, Montgomery, Omaha, Richmond, and St. Louis.

Within each case, we interviewed at least one attorney from each of the major parties to the litigation. This always included the school board and at least one plaintiff group. Where there was more than one major plaintiff, we interviewed at least one attorney from each party. As time and circumstances allowed, we also interviewed additional attorneys from the major parties and from other parties to the suit (e.g., white parent groups, state boards of education, etc.). The response rate among those attorneys we contacted was over 90 percent. We conducted a total of 52 (30 plaintiff and 22 defense) full and complete interviews during 1979 and early 1980.[6] Despite the purposive nature of some of the sampling of cases and attorneys, we believe the final pool of informants provides a reasonable estimate of the universe of opinions and perspectives of lawyers in school desegregation cases. We asked lawyers and social scientists who tried and testified in several cases (including many not in our sample) if we were missing important issues or types of testimony. Their answer was no. Also, by the end of our interviewing process we were hearing little that we had not heard before.

Only ten of the judges presiding over these 17 cases were willing to grant us interviews. Thus the data on judges are much less complete. By reputation and self-report, however, the judges we did interview ranged across the "liberal-conservative," "traditional-activist" spectra and provide at least an indication of judicial reactions to the nature of these cases and the use of social scientific evidence in court.[7]

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[5] With such a small pool of cases, and multiple criteria for selection, a random sampling procedure was inappropriate. Decisions about just what cases were "legally and/or politically significant" and what were "judges of varying political reputation" may differ with different observers. Therefore, we provide a complete listing of the cases selected, so that each reader may judge the reasonableness of the sample.

[6] To be "full and complete" the interview had to cover all our questions, and the tapes of the interviews had to be audible and transcribable. Due to insufficient time, mechanical failures, refusal to permit taping, or partial resistance, 17 additional interviews were considered incomplete and not included in the quantitative portions of our analysis. Since a few attorneys for plaintiff groups tried several of these 17 cases, we discussed several cases at once with them.

[7] While this paper focuses upon attorneys and judges, the larger study also attempted to interview all academically based social scientists who had testified in these cases, and, through snowball sampling techniques, all social scientists who had testified in any school desegregation case during this post-

Finally, we must make a distinction and thereby note the limits of the following discussion. School desegregation cases, like many types of litigation, are usually divided into two parts: a violation hearing designed to determine whether the defendant school board has violated the 14th Amendment and, if such determination is made, a remedy hearing designed to create a desegregation plan. In this paper we restrict ourselves to a discussion of academic experts at the violation or merit stage. It is at this stage that school law is made, and it is here that the parties must persuade the judge as to the nature of the case, as well as of the character of racial segregation in our schools and society. Moreover, most discussions of the positive utility and relevance of scientific evidence in the desegregation cases focus on the remedy stage (Doyle, 1977; Rist, 1978; Wolf, 1976). Since it often is assumed such relevance is absent or very limited at violation, this is a more intriguing stage at which to explore the question.

II. THE LITIGATION OF PUBLIC POLICY QUESTIONS

School desegregation cases often involve the judicial determination of questions of public policy. As Abram Chayes (1976) notes in his article on public law litigation, such suits may differ in several ways from traditional civil adjudication of disputes between two private parties. The defining characteristics of traditional "private" litigation are: the lawsuit is bipolar and retrospective; right and remedy are interdependent; the lawsuit is a self-contained episode; and the suit is initiated and controlled by the parties (Chayes, 1976: 1282-1283).

Since public law issues rarely fit neatly into this format, Chayes presents a second set of characteristics which define public law litigation. They include the following elements of particular relevance to the present paper.

(1) The party structure is not rigidly bilateral.
(2) The fact inquiry is not historical and adjudicative, but predictive and legislative.
(3) Relief is . . . forward looking, fashioned *ad hoc* on flexible and broadly remedial grounds.
(4) The subject matter of the lawsuit is not a dispute between private individuals about rights, but a grievance about the operation of public policy (1976: 1302).

The choice of one litigative model over another may in part reflect an attorney's conception of the context from which to argue in order to win the case. Moreover, the choice of one

1970 time period. We obtained full and complete interviews with 55 academically based social scientists.

type of lawsuit over another, in any given circumstance, may imply a certain conception of the underlying dispute. Which of these considerations is likely to dominate? Does the desire to gain tactical advantage (to win the case) lead to a conception of the appropriate litigative model? Or do dramatically different views of what is at stake in such public policy litigation determine tactical choices and resources? More generally, if we think that a desire to win generates a fitting ideology, or reshapes ideology to tactical advantage, then the former interpretation would make more sense. If we think that ideology (or vision) constrains tactical choice, or imaginable choices, then the latter interpretation would seem more sensible.

From a conceptual standpoint, the private law model is most applicable where we understand the key element of a dispute to be the actions of individuals. The locus of responsibility (and remedy) is in these actions, and questions of individual intention and negligence are paramount. The factual inquiry concentrates upon "historical facts"—i.e., facts about what the parties did and failed to do (Horowitz, 1977: 45-50). We shall call this an individual model of the dispute. The public law model is most applicable where we understand the key elements of a dispute to be the organizational or community context within which the parties reside and act. Responsibility (and remedy) lies in organized social relations and their impacts on persons and groups, not in individual purposes. The factual inquiry focuses upon "social facts"—i.e., recurrent patterns of behavior within the situation under investigation (Horowitz, 1977: 45).[8] We shall call this a structural view of the dispute (Sanders, 1980).

These litigative models (public and private lawsuits), and the underlying views of disputes (individual and structural), are ideal types. Although considering these ideal types may clarify our thinking, they do not exist in pure form. The choice of litigative model is not an all-or-nothing affair in any given case or set of cases. As Eisenberg and Yeazell (1980) note, even "normal" civil cases may be structured in a variety of

[8] In *The Courts and Social Policy*, Donald Horowitz argues that courts have a difficult time ascertaining social facts because they see one case at a time, and often the case appears atypical. Moreover, they must get these facts from party experts, who may provide a skewed view (see Chesler *et al.*, 1981). These issues of the quality of evidence are beyond the scope of this paper. What is clear is that a variety of "social facts" are introduced in many desegregation trials.

ways.[9] However, almost all "public" lawsuits (i.e., suits involving questions such as employment discrimination, prisoners' and inmates' rights, electoral reapportionment, antitrust, etc.) present this conflict over appropriate form.[10]

The school desegregation cases, in particular, reflect the continuing contest between these different versions of social life and public policy determination. For instance, a key question at stake in these trials is "What kind of a problem is racial inequality in schooling?" From one point of view, it is a problem in individual prejudice, and in the effects of intentional acts of specific persons. This view is consistent with individual interpretations of the litigation, and the private law model of dispute settlement. From another perspective, inequality is a problem of social structure, and of the operations and effects of historic and socially determined patterns that overshadow any person's intentions or specific acts. This structural view is consistent with the public law model of litigation and controversy settlement. Thus, the evidentiary contest is not simply what facts are true in any given case, but what types of facts are relevant at all. An important part of the contest between the litigants is the attempt to impose a basic understanding of the litigation, to define the "scope of the lawsuit" and the appropriate facts, to make it more or less like public law or private law litigation.

One result of this unresolved contest is conceptual vacillation at various levels of the federal judiciary regarding individual responsibility versus social organization as the key evidentiary and theoretical problem in the desegregation cases. At the violation stage of the desegregation trials, the Supreme Court generally has clung to the de facto-de jure distinction, refusing to adopt a view that segregation, *per se* is unconstitutional. The plaintiff must prove specific intentional acts by the school board to segregate children (or faculty) by race (see *Washington* v. *Davis* [1976]; *Village of Arlington*

[9] Eisenberg and Yeazell (1980) minimize the differences between what they would call "institutional litigation" and more traditional litigation. While we disagree with their emphasis, their article serves as an important reminder that many cases are open to conflict over preferred litigative model and conception of the underlying dispute.

[10] The confusion surrounding these cases, and the belief that they involve the judiciary in matters best left to the legislature, has led some writers to oppose judicial involvement (Glazer, 1975; Horowitz, 1977). Others have been concerned with the limits of the judiciary's actual power, and consequent problems of gaining compliance in the implementation of court orders (*Harvard Law Review*, 1977; Stinchcombe and Taylor, 1980). Still others have been equally forceful in supporting the judiciary's right to consider such cases (Dworkin, 1977) and its emerging technical competence in dealing with such matters (Cavanagh and Sarat, 1980).

Heights v. *Metropolitan Housing Development Corporation* [1977]). Such issues of discriminatory purpose and fault are at the heart of an individual view of social issues and a "private law" model of dispute settlement (Chayes, 1976). However, there are some judicial opinions which appear to adopt a public law view of violation (see, e.g., Justice Powell's dissent in *Keyes* [1973]). At remedy, moreover, the Courts appear to have adopted rulings that more nearly conform to the public law model. Since *Swann* v. *Charlotte-Mecklenberg* (1971) and *Keyes* (from Denver), the courts have tended to diminish the connection between right and remedy. Desegregation orders are tied only loosely to the particular faults of the defendant, and more often address what is needed to alter the structural basis of segregation in the local district (Fiss, 1971). On the other hand, there also are opinions which seem to adopt a view of remedy closer to the private law model (see, e.g., *Dayton Board of Education* v. *Brinkman* [1977] and *Milliken* v. *Bradley* [1974]). The law has been and remains muddled on how to resolve this conflict (see generally Yudof, 1978; Fiss, 1971).

The Purpose of Expert Testimony

A key resource in the school cases is the expertise of social scientists, and we must understand the role and relevance of their testimony in the context of this conflict over the nature of the case. Most of the evidence provided by social scientists is not directly relevant to the issue of whether the school board has intentionally segregated students because of their race. According to the "private" law model, this is the evidence on which these cases should turn. Indeed, since *Brown*, the Supreme Court has steadfastly maintained that the heart of a school case is whether the school board has engaged in intentional acts of discrimination. In southern cases the existence of statutes and constitutional provisions requiring a dual school system is proof of this point. In northern, *de facto* cases, however, the proof cannot be made in this fashion. State governments have no such provisions (or have had none for 50 years or more), and the announced policy of school boards has been to not segregate students by race. In the absence of admitted segregative purpose, plaintiffs must put together testimony which examines the actions of a school board and imputes to them both a segregative purpose and effect. The plaintiffs do this by looking at boundary shifts, feeder patterns, choice of school construction sites, optional attendance zones,

teacher assignment policies, intact busing, and the like, which cause or maintain segregation. This, they argue, is evidence of segregative purpose. In turn, defendants try to explain such decisions in terms of other, legitimate purposes of decisions, such as a neighborhood school policy or the relief of overcrowding. Although this type of evidence is most directly probative as to school board intention, almost *none* of it comes from social science experts. Of the 19 violation-stage witnesses for both plaintiff and defendant in our cases, only two were called primarily to testify about the segregative purpose and effect of discrete acts of the school board.

Most of the expert testimony addresses two different sets of issues: (1) the educational and psychological effects of segregation, and (2) the nature, causes, and effects of residential segregation.[11] Testimony on educational and psychological effects appeared in 9 of the 17 cases we examined. It covers such issues as the academic achievement of white and black students in segregated and desegregated schools; the long-term effects of desegregation in terms of college admissions and employment; and the impact of desegregation on the values and beliefs of white and black students in their later life (learning to live together). None of this testimony is essential to the legal issue of violation.

Testimony on the nature, causes, and effects of residential segregation appear in 11 of the 17 cases we examined. It addresses such topics as: the demographics of residential housing patterns in American cities; the effects of federal, state, and local governmental decisions on housing segregation; the degree to which housing segregation can be explained by economic factors such as proximity to jobs, housing costs, and income differences between white and black families; the preference of whites and blacks for neighborhoods of different racial composition; the history of housing discrimination in a city; and the reciprocal effect of housing and school segregation on one another. While attorneys intend some of this testimony to speak indirectly to school board intentions, or to school board disregard of the consequences of their actions, most of the testimony is not directly relevant to the legal issue of whether the school board engaged in specific acts designed to

[11] As this testimony is not directly necessary to the question of violation, narrowly defined, it might be excluded as irrelevant. While a few judges have in fact attempted to exclude such testimony, most judges have let everything come in with the view that they could sort it out later. This is in line with Chayes' observation that in any litigation with public law overtones the boundaries of appropriate evidence become murky.

segregate schools. Rather, it focuses on the broader setting within which the specific acts occur. It reflects a structural emphasis that is consistent with a public law model of the case.[12] Within this model, matters in dispute are not limited to an incident, or even to a set of incidents taken by themselves. The incidents are but parts of a larger set of social relations and organizational dynamics which affect school segregation. According to Owen Fiss:

> These incidents may have triggered the lawsuit. They may also be of evidentiary significance; evidence of a "pattern or practice" of racism or lawlessness. But the ultimate subject matter of the . . . judicial inquiry is not these incidents, these particularized and discrete events, but rather a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition (1979: 18).

The purpose and relevance of expert social science testimony becomes apparent from this wider perspective. The educational and psychological well-being testimony examines the existing situation within a school system and outlines the probable consequences of a segregated or desegregated system. These conditions are the result of segregation *per se*, not necessarily *intentional* segregative acts of the school board. The residential segregation testimony establishes the nature of the social and demographic arrangements within which school board policies operate, and, therefore, the likely outcomes of these policies. For example, policies which may be neutral on their face, such as neighborhood schools, a tracking system, or construction of schools in new subdivisions, may be shown to have segregative consequences. All of this testimony examines the outcomes of school board policies within the context of structural arrangements in the district or the larger society. It shares a public law perspective insofar as it is basically predictive and legislative rather than historical and adjudicative, and insofar as it goes beyond the activities of the board to examine the behaviors of other relevant groups in the society (Chayes, 1976). Social science evidence has been the key resource for those wishing to promote a structural view of school segregation.

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[12] "In the latter [public law] case, the inquiry is only secondarily concerned with how the condition came about, and even less with the subjective attitudes of the actors . . . . Indeed, in dealing with the actions of large political or corporate aggregates, notions of will, intention, or fault increasingly became only metaphors" (Chayes, 1976: 1296).

III. PLAINTIFF-DEFENDANT DIFFERENCES IN THE USE OF SOCIAL SCIENCE WITNESSES

If social science evidence is primarily a resource for the public law view of segregation, it is also a resource employed primarily by plaintiffs.[13] In the 17 cases we examined, plaintiffs used 14 different experts at the violation stage, while defendants used only five. Moreover, counting individuals substantially underestimates this difference, because some plaintiff witnesses have testified in numerous cases, while only a few defense witnesses have testified in more than one or two cases. If we count person-appearances rather than persons, we find there have been 33 person-appearances for plaintiff experts and only seven person-appearances for defendant experts. Finally, if we use cases as the unit of analysis, in 11 of the 17 cases plaintiffs presented experts at violation, while defendants presented experts in only three.[14]

Table 1. Plaintiff and Defendant Use of Academic Experts at Violation in Seventeen Cases

	Plaintiff	Defendant
Number of Experts	14	5
Number of Person-Appearances by Experts	33	7
Number of Cases in Which Experts Appeared	11	3

Why are plaintiff lawyers so much more likely than defense lawyers to use academic social scientists to advance a public law model at the violation stage? The answer appears to have three parts. First, the courts have created some evidentiary

[13] The terms plaintiff and defendant must be used cautiously, for the formal position of parties sometimes masks their objectives and positions. Moreover, their position may change in the course of litigation. Most typically, inner-city school districts like those in Detroit, Richmond, and Wilmington may begin and even remain as formal defendants in litigation. But at a later stage, as when cross-district violations and remedies are considered, they share a point of view with the formal plaintiffs. We have adopted the convention of treating them according to the substantive position they advance at a given stage of the trial. Thus, for example, Detroit school board attorneys bringing experts to testify for the necessity of a metropolitan remedy in Detroit are treated as plaintiff lawyers, although they are formally defendants.

[14] In most cases, apportioning experts to violation or remedy hearings is a straightforward process, since the trial is bifurcated. In some cases, however, this is not so. For example, in St. Louis the judge heard evidence on violation and remedy simultaneously. In Omaha and Dayton there was a special hearing after remand from the Supreme Court to determine the incremental segregative effect of school board acts on the overall segregation of the system. When confronted with such situations we have used our best judgment to assign witnesses to violation or remedy. In particular, we have treated incremental segregative effect testimony as part of the violation stage, since it speaks to whether the board's actions had a significant impact on segregation in the school system.

roadblocks to the admission of testimony which threatens the *Brown* holding that segregated schooling is inherently unequal. Second, even where there is no evidentiary difficulty, plaintiff attorneys seem to have much easier access to experts. Finally, plaintiff and defense lawyers have different conceptions of the litigation and the underlying nature of segregation; these views cause them to see social science evidence as more or less useful from a tactical standpoint.

Evidentiary Admissibility

For a brief period after *Brown*, defendants attempted to use a few experts such as Ernest van den Haag and Henry Garrett to suggest that black children might be harmed by desegregated education, that each race has "distinguishable educability capabilities," and that desegregation would affect the educational standards of schools (Newby, 1967; Gregor, 1963; van den Haag, 1960). In *Evers* v. *Jackson Municipal School Districts* (1964) and *Stell* v. *Savannah-Chatham County* (1963) the Fifth Circuit rejected such testimony as a factual attack on *Brown*.

Table 2. Types of Testimony by Plaintiff and Defendant Experts at Violation in Seventeen Cases

	Plaintiff	Defendant
Number of Experts Testifying On:		
a) Educational and Psychological Effects	6	0
b) Residential Segregation	6	5
Number of Person-Appearances On:		
a) Educational and Psychological Effects	11	0
b) Residential Segregation	17	7
Number of Cases Where Experts Testified On:		
a) Educational and Psychological Effects	9	0
b) Residential Segregation	11	3

However, by the 1960's and certainly in the 1970's, such evidence was rarely presented by the defendants. As can be seen from Table 2, none of the experts for the defense in the 17 cases we examined testified as to the educational or psychological effects of segregation on children. Even if such testimony were admissible, many defendant lawyers reported they would not use it. According to one defense lawyer:

> There were some people, and I can't even remember the guy's name, that I think was available and had written some things that said that black people genetically were inferior and couldn't learn as well as white people. We were certainly not interested in anything like that. We thought that would not be a credible position to take and it wasn't

> the position that we were taking at all. So we wouldn't have been interested in anything like that.

Even less pointed testimony on these issues, however, has sometimes met a similar legal fate. One of our social scientists reports the following experience:

> The legal doctrine is cast in concrete, and that's been one of my frustrations—that it's as though the evidence is really immaterial. A legal doctrine makes certain assumptions of facts—as to the effects of desegregation. I remember in one case, I was talking with the judge from the witness box, and questioning some of the testimony in *Brown*. He asked me, "are you questioning the facts of *Brown*?" And I said, "yes," and he said, "Well, that's not admissible for you to be doing that." So it kind of stymies a person when the evidence in *Brown* argues that desegregation will change attitudes, increase self-esteem, and improve school performance, when in fact that doesn't happen. We know that it doesn't happen, but there's difficulty in making that point with the judge.

As this expert's comments imply, the failure of defendants to introduce evidence on these matters is not due to a lack of "facts" available to support a defense position. There is social science evidence on both sides of the educational and psychological harm arguments; likewise, there are social science "facts" which tend to support a defense position on the relationship of residential and school segregation (e.g., school segregation is usually less extreme than housing segregation, housing segregation is the result of individual black and white preferences for types of neighborhoods, etc.).

The admissibility factor does help explain why defense attorneys do not use evidence relating to psychological harm. But it does not explain the absence of defense experts called to rebut plaintiff experts testifying as to harm, or to the educational benefits of desegregation; nor does it explain the common failure of defense attorneys to cross-examine plaintiff experts testifying as to the benefits of desegregation. The admissibility factor does not at all help explain the lower frequency of defense experts testifying on the nature and effects of residential segregation. For as Table 2 indicates, plaintiffs utilize experts more often not only with regard to the harm argument, but also with regard to residential segregation arguments, where there is no issue of historic inadmissibility of evidence. To explain these results we must look further.

Access to Experts

Defense lawyers report that it is relatively difficult to find social scientists who will testify for their side of the dispute. They perceive a bias within the academic community which results in high costs for any academically based expert willing to testify for a school board. They mention occasions where

experts, both prominent and less well known, have refused to testify for them because of a fear of the effects on collegial associations or job prospects. According to one lawyer for the defense:

> [Expert X] was one of the few people who would be willing to talk to us even though we were on the "wrong side." It's not fashionable to be defending these lawsuits. It's fashionable to be on the other side. After talking to one or two of the local sociologists, we did not find somebody who would go along with us. We would find people who because of peer pressure did not want to testify for the defendant, regardless of what the facts were or anything else . . . . We were told, off the record, that if they did work for our side, they were categorized as a defense witness. Their access to grants, to promotions, to new relationships in their professions would be greatly jeopardized. If a man is doing a study showing how blacks are being mistreated, that's great. The Ford Foundation will give money, the government will give money, so forth and so on. If they are doing a study, not quite as bad as Dr. Shockly, but a study showing that blacks deserve what they get, no money will be forthcoming. I thought it was fear on their part.

Another reports:

> We weren't going to get any sociologists that were going to agree with us. Although we looked around and tried some folk, we were not successful.

We should note that the defense's perception of lesser availability is shared by plaintiff lawyers. They occasionally report the advantage they have, due to the relative availability of social scientists.

> I'd have to say there is a little bias in the field. If you testify on behalf of plaintiffs then you aren't as nasty a person as somebody who testifies on behalf of the school boards . . . . I certainly picked that up just talking to experts at various universities. There's a certain distaste about people who will help a school board out. I'm sure it goes back to this whole claim that these are constitutional rights and these are discriminators you are helping. [Expert Y] is a guy that loves minorities. That makes you very unpopular in some circles, but in a court of law there is nothing dishonorable about someone who's trying to help the downtrodden. That works to our advantage, there's no question about it.[15]

Social scientists also confirm these perceptions. Many scholars were reluctant to testify for the defense in school cases, and some who did reported political conflicts of a personal and professional nature (Chesler *et al.*, 1981).

Defense lawyers' difficulty in finding experts is not due entirely to social scientists' reluctance, however. A related problem is the defendants' relative inexperience in this area of

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[15] This is not to imply that the experts in these cases are themselves biased in any pejorative sense, or that they would say anything for the "cause." Indeed, our data from both lawyers and social scientists would suggest that this is not the case. We must keep separate the general bias within a discipline and the personal bias or integrity of specific individuals. There is now a body of literature as to whether social science is biased in either of these ways, and whether and how it should be used. More recent writers speaking specifically to these issues in desegregation litigation include: Kalmuss, 1980; Rossell, 1980; Pettigrew, 1979; Rist, 1978; Wolf, 1977; Rosen, 1972; Kelly, 1965.

law and their lack of social and political connections to others in the area. Less than 20 percent of the defense lawyers we interviewed had prior experience in desegregation cases. Typically the school board is represented by a major law firm in the defendant city. The firm is chosen because it had represented the school system in the past, but this work usually involved such matters as managing labor relations, acquiring property, drawing up contracts, organizing pension funds, and the like. Rarely had it involved federal court trial work, and rarely had it dealt with civil rights matters. Thus defense lawyers have little advance preparation for a school desegregation case.[16]

Plaintiff counsel present a different picture. In most of the cases we studied, at least one of the party plaintiffs was a national organization (i.e., the NAACP, the Legal Defense Fund, the ACLU, or the Department of Justice), and each of these groups had tried many school cases.[17] Seventy-five percent of the plaintiff attorneys we interviewed had prior experience in school desegregation litigation. Prior experience builds networks to particular social scientists and to the academic community as a whole, as well as to other lawyers who have such contacts. Thus, plaintiff lawyers are more likely to know who can and will testify to some point. Of equal importance, they have contacts within the social science academy who can tell them who would be a good witness on some point. Prior experience also builds a trusting relationship between lawyers and experts, which makes it easier to recruit the expert for the next trial.[18] Two plaintiff lawyers report:

> We've used a number of social scientists. Every case, every school case in which we're involved, we'll use social scientists because we really can't conceive of a school desegregation case that is one dimensional. And therefore, we have developed over time a knowledge of the field. We know who is active, we know who is doing what, we know those who have written analytical work, who have conducted surveys and studies. We know who the people are.
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> There's a real good network of social scientists set up for plaintiffs. These are people who have consistently been there. If they can't do it, they know a lot of others.

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[16] The lack of experience has caused some firms to employ attorneys specializing in federal trial work.

[17] One finds clear parallels in this regard in Sorauf's work on the establishment clause of the First Amendment. There, too, an organized group of plaintiffs (the ACLU, the American Jewish Congress, Americans United) faced an inexperienced and reluctant set of unorganized defendants (usually school boards). See Sorauf, 1976: Chapters 4 and 8.

[18] Marc Galanter notes the many advantages "repeat players" enjoy over "one shotters." In this terminology the plaintiffs' lawyers are the repeat players, since they try case after case, while defense lawyers are one-shotters. Among the advantages Galanter mentions is the ready access to specialists and expertise (1974: 98).

Sometimes this network becomes particularly obvious. The NAACP has what has been called a "traveling road show" or a "dog and pony show." Since the same experts appear in numerous cases, new cases do not require new recruits, new learning, and new trust relationships. The lawyers do not have to repeat the difficult task of determining what the social scientists have to offer and then preparing them for the witness stand. Defense lawyers, on the other hand, often must start from scratch in each trial, attempting to recruit and prepare a person with whom they have never worked.

The differential experience with these cases and with social scientists in particular has another effect. The defense lawyer may not be sure exactly what testimony he or she wants. It takes time to come to an understanding of the full potentials of a body of law, and of the ways in which social science testimony may prove useful. Defense lawyers often have little time for reflection and conceptualization. One leading defense attorney told us that this is not a problem, as a major law firm should be able to mount a full defense of any issue within a reasonable period of time. Perhaps this is true, but the view of the case most frequently presented by defense lawyers suggests that they possess a relatively traditional conception of the dispute.

Differing Conceptions of the Case

While the factors of admissibility and relative access to resources are important in explaining why plaintiffs make greater use of social science experts, our interviews with lawyers from both sides suggest that differential usage must also be understood in terms of their vision of the litigative models themselves. Plaintiff lawyers seek out social science evidence precisely because it fits into a public law model of the litigation, while defense lawyers eschew this evidence partly because it does not fit a private law model. Plaintiff and defense lawyers appear to prefer different models for both tactical and ideological reasons.

Tactical Reasons

As all plaintiff lawyers know, northern desegregation cases are more difficult to prove within the context of a private law model than are southern cases. The key element of intentional wrongdoing is not embodied in a statute, and no one volunteers a desire to discriminate as a motivation for action. Plaintiffs have been advancing arguments designed to move the courts

away from a private law model of violation, by easing or abolishing the proof of intent, for many years. In early northern cases they attempted a straight *de facto* theory that segregated schools were sufficient to require desegregation, mainly on the *Brown*-like premise that such schools deprived minority students of equal education. Several cases were lost on this theory (See *Bell* v. *School City of Gary* [1963]; *Springfield School Committee* v. *Barksdale* [1965]). In another attempt, plaintiffs advanced the argument that proof of intention should not be required, that it should be sufficient to prove that the school board made a set of decisions which had the foreseeable impact of segregating schools (*Oliver* v. *Michigan State Board of Education* [1974]). The Supreme Court also rejected this standard in *Washington* v. *Davis* (1976), and in *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation* (1977). Finally, plaintiffs advanced the argument that segregative purpose on the part of governmental groups other than schools should be sufficient to support a finding of unconstitutional segregation. The Supreme Court has never formally rejected this line of argument, but it also bypassed opportunities to accept it in the *Keyes* and *Milliken* cases.

Even without a clear Supreme Court victory which would change the legal rules in desegregation cases, plaintiffs believe the social science evidence provides a tactical advantage. They see it as undermining the defendant's position that its actions were in pursuit of a neighborhood school plan and, therefore, not motivated by segregative purposes. Testimony about segregation in housing or jobs undermines the defendant's case, because it establishes the context within which apparently neutral acts lead to further discrimination. Further, it insinuates that if other individuals and organizations discriminate, school boards must discriminate as well. To quote three plaintiff lawyers:

> Part of putting on a housing case is as a means of countering a pat defense that the school board uses. Their pat defense is that all they did was build the school where the kids were.
>
> You show the whole housing phenomenon, the whole business. Because when the school board comes on with their proof about the neutral reasons, the non-racial reasons, why they did all these things—by the time you have finished setting the scene in which those things happened, the real world, then the judge, in order to believe that race was not a factor in those decisions, has to believe that there was a magic door in the schoolhouse.
>
> Part of the reason we need to use these people is to anticipate the defense. The defense generally has very little to say other than "we haven't done it." So part of what we present with social science testimony is "the board of realtors has done it, the governor's office has done it, and if everybody is doing it, how can it be reasonable that in

> the same time frame the educational institution wasn't doing it?" It's a tactic, part of what we're presenting. Beat them before they can even come in and say it. Make them look silly.

Defense counsel would prefer, to use Chayes' terms, that all evidence be historical and adjudicative, directed at alleged acts of specific wrongdoing of *their* school board. Then they can meet each charge of intentional segregation with an alternative explanation. If a few facts are difficult to explain (segregated schools, black-white achievement differentials), they can be argued as nonintentional, or as nonalterable by reasonable actions of the school board. And even if a few actions are difficult to explain, they can be presented in ways that argue they are not really part of a pattern, or that they have minimal impact on the whole system. If there is little pattern or impact, there can be only minimal consequence, regardless of intent. Senior and respected school officials testify to this line of defense, and social science experts cannot add much.

Indeed, when experts are used by the defense, it often is explained by these lawyers merely as a reactive tactic, as an attempt to confuse the points plaintiffs were trying to make.

> We only use them because the other (side) did. We thought they were full of bull, if you really want to know. From a legal standpoint, we felt we had to have a sociologist to counter their sociologists. It just got down to all the sociologists wanted, in my opinion, was to prove their own point regardless of what the premise was to start out with. As long as they could prove their own point, they were happy as larks, they didn't care about anything else. And I thought the whole thing was just a waste of time. I thought we would have been better off if we could agree that they would have no sociologists and we would have no sociologist and we would just present our facts to the court and let (it) come up with a decision. But you can't do it that way—they have a sociologist and we have to have one.

The preferred models that plaintiff and defense lawyers use in litigation are not dictated solely by tactical considerations, however. Defendants' decisions not to use social science evidence, and plaintiffs' decisions to use it, have not always proven to be good tactics. First, defense tactics that ignore or overlook the utilization of social science evidence have not worked. Second, plaintiff tactics that use this evidence have also encountered risks.

One might argue that given the legal and political climate of the 1970's, no defense would have worked in the defendants' favor, regardless of social science evidence and legal model. But certainly the tactic of keeping the defense at a private law level has failed. Moreover, in at least one case in our study, the metropolitan suit in Atlanta, defense lawyers were rewarded with victory after pursuing a proactive strategy of using social

science testimony (*Armour* v. *Nix* [1979]). In so doing they came quite close to developing a public law model of the relationship between housing segregation and school segregation in the Atlanta area.[19] Since efforts to use a public law model have been rare among defendant groups, one cannot yet generalize about this alternative, but certainly the defense tactic of a strong social science presentation or rebuttal has not been rejected solely because it has proven to be a *tactical* failure.

On the plaintiff side, the situation is less obvious, but there have been tactical risks in its approach as well. Before the *Keyes* case in Denver a whole series of northern cases were lost when plaintiff lawyers relied upon a straight *de facto* theory that segregated schools deprived minority students of an equal education. More recently, the plaintiff effort to tie school segregation to housing segregation has opened the way for the incremental segregative effect argument in the *Brinkman* case. Despite these examples of its negative outcomes, plaintiffs continue to use the public law model.

Ideological Reasons

Our interviews with lawyers from both sides suggests that litigation tactics are not solely opportunistic; they are also a reflection of a lawyer's ideology. Attorneys are not necessarily neutral actors who are equally open to all litigative theories and strategies. Plaintiff lawyers, for example, often have strong ties to the local and national civil rights movement. They have helped create, and in turn have been influenced by, a view that explains racial inequality in terms of institutional discrimination. Many believe that, as one informant said, "school segregation is part of a caste system in the United States." School segregation is but a part of this system, and academic testimony establishes the connection between schools and the structural problem of racial injustice. One plaintiff attorney put forth the relevance of this widely held ideology in the following manner:

> We use social science evidence because it is not possible to talk about or deal with racial discrimination or racial segregation in a societal vacuum. The purpose of segregation was to create, maintain and protect a sociological, ideological, to some extent a religious and philosophical, point of view. Segregation and discrimination became

[19] Indeed, the Atlanta case accounts for 3 of the 5 defense experts, 3 of the 7 person-appearances of defense experts, and 1 of the 3 cases in which defense experts were used (see Table 1). This may be the start of a trend, because several of these same experts and testimony were used by the defense in the Omaha trial.

> the political and logistical vehicle by which this was done. Therefore, to fully assess and describe the impact of the schools now, segregation as it was created and maintained and carried out by the school system, you have to look at not just the fact of segregation, but its effects as well . . . . We figure it's important for a judge to understand the context within which the individual actions produced the segregation, and to characterize the discrimination that took place. Whether this is testimony having to do with the impact of school segregation on black children's learning ability, or anything else, doesn't make a difference. The effort is to present the full context within which the public officials who created segregation carried out their game plan.

This view minimizes the element of intention and, therefore, the distinction between *de facto* and *de jure* segregation.[20]

To argue that plaintiff lawyers adopt this structural view solely because academic experts are available to them is to simplify the relationship between access and ideology. If plaintiff lawyers have much greater access to social scientists, it is in part due to the fact that they have been ideologically committed to a public law, structural view and have actively solicited academic help for many years.

Defense lawyers come to the problem from a different background and with a different point of view. They are likely to have ties to the (white) power structure of the local community. While they are not as explicit as the plaintiff lawyers about the social roots of their ideology, they clearly believe in a more individualistic interpretation of race relations: the cases should be restricted to a focus on what their specific client did. Anything that steps beyond this narrow definition of the judiciary's functions unfairly burdens their clients with the alleged wrongs of the whole society. Thus, they often feel that social science experts lead the courts in a public law direction and would prefer that social scientists play no role in the litigation.[21] Consider the following statements by two defense attorneys:

> But in this case the question was, was there (intentional) segregation at all? Social science really doesn't get into that question very much. In fact, we argued that it was inappropriate to have any expert testimony on the educational effects of segregated schools until it came to the remedy phase, what to do about it if it was. We didn't offer experts. We didn't even make a "beachhead" or an issue of the question of whether or not segregation if it did occur, or racial imbalance if it had ever occurred—was or was not harmful. That just didn't seem to me like that was the question raised at trial.

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[20] This does not mean plaintiff attorneys are not mindful of the necessity of evidence concerning specific school board acts. Plaintiffs do present testimony concerning specific violations. The point is, they also do more.

[21] It is important not to create straw men on either side of this discussion. Defense lawyers, especially, must not be portrayed as bigots or as too naive about race relations. They know schools are segregated, and they would prefer that this were not so. But they are often also committed to the point of view that the courts are not the place to remedy inequality without a determination of intentional wrongdoing.

Defense experts may be more difficult to find, but many defense attorneys do not make a serious effort to obtain social science testimony. In some cases, they do not even make an effort to cross-examine experts produced by plaintiffs. As one defense attorney reports:

> I can't recall asking [a plaintiff's experts who testified on residential segregation] any questions . . . . I know we didn't give any great concern to their testimony insofar as we didn't think their testimony was crucial to the issue of [our] liability.

In the preceding pages we have discussed four factors which divided plaintiff and defense lawyers in their use of social science experts: admissibility, availability, tactics, and ideology. These factors are not mutually exclusive, and thus it is impossible to apportion precisely the influence of each of them on plaintiff-defendant strategies. What is clear, however, is that admissibility, availability, tactics, and ideology have all combined to produce markedly different tactics and beliefs on the part of plaintiff and defense counsel. While defendants have chosen to maintain a private law and individual view of these cases, plaintiff lawyers have introduced extensive social science evidence in an attempt to create a public law and structural view of the cases. What impact has this testimony had on the outcomes of litigation?

IV. THE IMPACT OF EXPERT TESTIMONY

The objective of social science testimony is, of course, to persuade judges to adopt a particular view of race relations and school desegregation. Many plaintiff lawyers are quite explicit about the need to sensitize judges to a structural view of these matters. Consider the following statements:

> Most judges come from conservative traditional backgrounds. They have sort of a "gut" reaction about uprooting and busing and that kind of thing. So you have a problem of convincing and educating a judge to do something which goes against his gut. In order to really be able to do this, you can argue the law—but the law is not going to get to that visceral part—it takes the crafting of a lot of different kinds of information. Also you have got to deal with the emotional aspect.
>
> This was the situation where a judge started off with every preconceived idea about education: why kids learn, why races are separate, so forth and so on, every Sunday Supplement type belief. A case like this is a mosaic, and the first thing that you work on is the built-in attitudes that you perceive the court has.
>
> So it is a teaching experience. The best kind of expert witness that you can have is somebody who suffered sometime. What you do with a Judge X is put on a guy like Expert X, one who he knows is very bright, very articulate, tremendous educational background, extremely knowledgeable about education and usually gifted in its expression. I asked Expert X three or four questions after I got his background. The rest of the time he and the Judge talked to each other. It was just a full exchange; when it was over the Judge had some idea what it might be like to be discriminated against in this society.

> The experience in other communities has been that they've had to train the judge, teach the judge, educate the judge. I think some of that had to happen here.

One of the plaintiff witnesses described the purpose of his own testimony in the trial in the following terms:

> I think maybe it has played a part in kind of an overall impression that the judges get that virtually every level of society, from the federal government to the local school board, conspire wittingly/unwittingly to cause this awful situation we're in right now. But they haven't been able to see, so far as I can determine, legal relevance to my testimony. To the extent it's helpful at all, it is so by adding to the panoramic picture of a society in which for years everything led to segregation.

Has plaintiff's expert testimony generally had the desired effect of persuading judges to accept this structural and public law view of the cases? There are at least three kinds of evidence that it has. One source is what judges have told us in interviews, or have written in the public press. A second source is what the judges write in their opinions. A third source is what can be inferred from the remedies they order.

First, a number of judicial comments express viewpoints compatible with a public law view of violation.[22] In some cases, moreover, a judge has stated openly that he has been influenced in this regard by social science testimony (McMillan, 1975). As one of the judges we interviewed noted:

> I think it's true [that part of their job is educating the judge]. Of course blacks have suffered some systematic and institutionalized racial animus. If you had someone on the bench who doesn't have this kind of knowledge, I suppose if I were a plaintiff's counsel, I would want to make sure in an important case like this that the judge is thoroughly familiar with racial problems in a large city and all the demographics that go with it. So if some or a large amount is irrelevant, then that is just something we have to go through.

Thus, social science evidence may give the judge some new insight into the general condition of minorities (Wisdom, 1975). However, in some cases the effect may be to bring about a wholesale conversion. The most noteworthy example is certainly the Pauline-like conversion of Judge Steven Roth in the Detroit case. In the plaintiff's view, Judge Roth began the trial hostile to their position. They began their case with witnesses who discussed how structural discrimination created segregated housing in the Detroit area and how this led to school segregation. Other witnesses testified to the harmful effects of segregation on black children. None of this evidence

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[22] To be sure, some trial level judges have stated that they find little use in social science testimony at the violation stage (Doyle, 1977). And as one of the judges we interviewed put it:

> I told him [the expert] that when he got things straightened out in Boston he could come here and tell me how to do things. I don't need social science evidence. I only need to decide a constitutional right, not the social aspect of these cases.

was legally relevant in a narrow, private law model; it did not prove school board intention. Near the end of this testimony, before the plaintiffs had even introduced evidence on school board violation, a lawyer for a white parent told the school board attorney he thought the case was lost. Evidently the testimony helped to convert Judge Roth to a structural understanding of race relations in his community, and thus to a public law view of the case. Eleanor Wolf quotes the judge as saying, later:

> It is unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation is an evil, it should make no difference whether we classify it *de jure* or *de facto* . . . . Our objective . . . should be to remedy a condition which we believe needs correction (Wolf 1976a: 109).

Nor does Judge Roth stand entirely alone as an example of conversion. As another of the judges we interviewed indicates:

> I thought segregation was an incidental question until I began to learn something about it from the testimony. It took several months of studying to recognize that, as far as race was concerned, all these things took place with the action of the state, county, city, school board, and federal authorities.

Second, from time to time a lower federal court writes an opinion which openly adopts a more structural view of violation. For example, consider the Fifth Circuit's opinion in the Austin case:

> Whether or not the residential isolation of whites, blacks and Mexican-Americans in Austin is . . . the result of state action, the acts of the school authorities in taking official action, including assigning students . . . and drawing zone lines on the basis of these segregated housing patterns were violative of the Fourteenth Amendment (*United States v. Texas Education Agency* [1972]).

Or the following holding by the three-judge panel in the Wilmington case:

> Governmental authorities condoned and encouraged discrimination in the private housing market and provided public housing almost exclusively within the confines of Wilmington. . . . We . . . conclude that governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades. This conduct constitutes segregative action with inter-district effects (*Evans* v. *Buchanan* [1975]).

Even in cases where the opinion has been less explicit, the judiciary has been willing to accept a limited set of incidents as proof of segregative purpose, and to place upon the defendants the burden of showing that these incidents were not undertaken with any racial animus (see *Brinkman* v. *Gilligan* [1978]). This is a relatively open acknowledgement that structures of racial inequality operate and have impact almost regardless of the deliberate behaviors of key actors. The two Ohio cases from the summer of 1979 reinforce this line of argument. They have suggested an affirmative action duty to

desegregate for nearly every school system which contained segregated black students in 1954 (*Columbus Board of Education* v. *Penick* [1979]; *Dayton Board of Education* v. *Brinkman II* [1979]). At least with respect to intra-district cases, it has become difficult for a school board to succeed with neutral explanations for any act which has the effect of segregating students.

Third, we have already noted the emergence of a public law point of view at the remedy stage. "Root and branch" desegregation can only be understood from the perspective that there is more at stake than correcting the individual acts of school officials. A plan which calls for the approximate racial balance of all schools in a district remedies much more than the segregation caused by intentional acts of the board (Fiss, 1971). It calls upon the school system to take affirmative actions to overcome the segregation and inequality caused by the social, organizational, and demographic (structural) factors which separate white and black children.

The social science evidence presented at the violation stage is thus one of the factors moving the judiciary, often with considerable reluctance, toward adoption of remedies which are, in Eisenberg's terms, more legislative than adjudicative (Eisenberg, 1978). As one of the judges we interviewed comments:

> From the calm sit-back judges of adversarial interactions, we had to become activists, we had to become innovative, we had to look for practical solutions rather than legalistic rulings.

Early in the process of litigation, social science evidence may begin to sensitize the judge as to what will be necessary if the remedy is to be "just and viable." It reflects an understanding on the part of plaintiff counsel that:

> [J]udges who were asked to decide questions of social and economic policy ought to be educated about the social and economic "facts of life," since their decisions necessarily would reflect their attitude toward these matters (Schubert 1964: 2).

Of course it hardly needs saying that this movement toward a public law view of school cases is the product of many factors other than the social science evidence. But such evidence has played a role in widening some trial judges' vision and altering their perceptions.

V. CONCLUSION

Over the last 25 years, social science testimony has played an important role in the trial of school desegregation cases. However, when scientific experts appear they almost always

testify to facts and issues which do not seem to be directly relevant to the issue of school board intention to segregate. Rather, their testimony is about the academic and psychological effects of segregation, and the demographics of American cities. Most of this testimony has appeared on the side of the plaintiffs. This is in part due to problems of admissibility, to the unwillingness of some experts to testify for school boards, and to the relative inexperience of defense lawyers in identifying, recruiting, and using academic experts.

There are, however, two further reasons for the relative absence of defense expert testimony at the violation stage. One is the set of tactics with which defense counsel believe they can win a case. A second is counsel's ideology or vision of the case, and the issues on which it rests. Most defense counsel adopt a private law model of the school cases, wherein the only relevant issues are those which speak directly to school board intentions and the direct effect of their actions. Plaintiff counsel, on the other hand, usually have a more structural view of race relations and education, and attempt to impose a public law model on the cases. This perspective is less concerned with school board intentions and more concerned with the outcomes of school system policies and programs. These policies, such as a neighborhood school system, must be understood from a wider frame of relevance, one which examines the school system within the context of surrounding social, organizational, and demographic conditions. Only in this model does most of what academic social scientists have to offer become relevant. Only then does it become an appropriate (effective and reasonable) tactic to use such evidence actively and aggressively.

The Supreme Court has never adopted a fully structural view of what constitutes a constitutional violation in the school cases. It has held steadfastly to the requirement that the plaintiff must prove some school board intent to segregate. Under this private law model of the cases, strictly defined, much expert testimony is of marginal relevance. But the plaintiff's "irrelevant" testimony has played an important role nevertheless; it has helped present trial and appellate judges with an alternative way to define the problem, assess the evidence, and think about potential remedies (Rossell, 1980; Sanders, 1980). By educating some judges to a more structural view, the testimony has eased the proof of violation and extended the scope of possible remedies. In this sense it may have been the most relevant testimony of all.

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