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SCHOOL DESEGREGATION REMEDIES AND THE ROLE OF SOCIAL SCIENCE RESEARCH

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Justice Frankfurter: . . . [W]e are here in a domain which I do not yet regard as science in the sense of mathematical certainty. This is all opinion evidence.

Mr. Greenberg: That is true, Your Honor.

Justice Frankfurter: I do not mean that I disrespect it. I simply know its character. It can be a very different thing from, as I say, things that are weighed and measured and are fungible. We are dealing here with very subtle things, very subtle testimony.¹

INTRODUCTION

Almost since the day *Brown v. Board of Education*² was decided, the extent to which the Supreme Court's decision rested upon the social science evidence cited in footnote eleven³ of the opinion has been vigorously debated.⁴ It is undeniable, however, that, since *Brown*, social science research findings have played a role in school desegregation litigation. This article examines the significance of social science research evidence in the judicial decisionmaking process.

A review of recent school desegregation cases and of the evidence introduced in those cases reveals a very mixed reception to social science research. Research findings—even in cases where social scientists are in agreement on the findings and on the implications to be drawn from those findings—often play only a minor role in the resolution of many of the legal issues raised by segregated schooling. For example, social science research has been of little importance in determining whether or not the equal protection clause has

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1. Oral argument in *Gebhart v. Belton*, 347 U.S. 483 (1954), quoted in ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-1955, at 172-73 (L. Friedman ed. 1969).

2. 347 U.S. 483 (1954).

3. *Id.* at 494-95 n.11.

4. See Levin & Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW & CONTEMP. PROB., Winter 1975, at 53-56 & nn. 19-32.

been violated.⁵ In devising appropriate remedies for a proven constitutional violation, however, trial courts are more likely to have considered social science evidence. Yet even in the remedy phase social science research findings are not the primary factor in the decision to order the adoption of a particular plan.

For this article, some recent lower court cases concerned with developing remedies for unconstitutionally segregated school systems were reviewed. In each case, the court was faced with one or more of the four following issues: the extent to which a busing order should be limited because of the age of the children or the distances involved; the extent to which a desegregation plan should be modified because of the potential for white flight; whether the magnet schools concept is a feasible alternative to a mandatory busing plan; and whether educational components must be included in a remedial order. Where they were available, transcripts of the court proceedings in the remedy phase of the litigation were reviewed.⁶ It is clear from an analysis of these cases that, just as social scientists have sharply differed about the scientific validity of social science research findings and the policy implications to be drawn from those findings, judges have disagreed, and will continue to disagree, about the weight to be accorded social science evidence.⁷

I

BUSING

The most controversial of the remedial tools used by courts to eliminate deliberately maintained dual school systems is busing—the reassignment of pupils by transporting them from schools in one part of the district to schools in another part of the district to achieve desegregation. In *Swann v. Charlotte-Mecklenburg County Board of Education*,⁸ the Supreme Court explicitly approved intradistrict transportation to achieve a unitary school system, but noted that there were limits to the use of that remedy. Busing may be used, according to the Court, where “feasible,”⁹ but its use is limited by regard for times and dis-

5. The principal exception is in the determination of the present effects on a school system of past intentional segregative acts. Research in the areas of urban demography, urban geography, sociology, and even psychology have been introduced in school desegregation cases. See, e.g., *Armstrong v. O'Connell*, 463 F. Supp. 1295 (E.D. Wis. 1979).

6. The transcripts for many of the cases were made available through the good offices of several attorneys at the United States Department of Justice. Other transcripts were obtained with the help of private attorneys. To all of those who so generously gave of their time—too many to list here—the author expresses her thanks. The transcripts on file at the Justice Department were culled and summarized by Alan Vollman and Nancy Reder, law students at Catholic University School of Law.

7. Compare Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB., Winter 1975, at 150, with McMillan, *Social Science and the District Court: The Observations of a Journeyman Trial Judge*, 39 LAW & CONTEMP. PROB., Winter 1975, at 156.

8. 402 U.S. 1 (1971).

9. *Id.* at 31 (quoting *Green v. School Bd.*, 391 U.S. 430, 439 (1968)).

tances that would "either risk the health of the children or significantly impinge on the educational process."¹⁰

With this limited guidance from the Supreme Court, lower courts have taken different approaches to the use of social science evidence in determining the ages at which children will be bused, the time and distance to be traveled, and other factors. Where courts have considered social science evidence, they have not been consistent in the types of evidence considered and how much weight that evidence is to be accorded.

A. Age of Children

Some courts have exempted young children from busing plans without considering any evidence whatsoever. The district court in the Springfield, Illinois case¹¹ chose one plan from several options because, among other things, it exempted kindergarten children from busing. The court's judgment—in the absence of any evidence on the matter—evidently was that the kindergartners should not be subjected to busing because of their young age. The court noted that the plan "takes into account the 'physical and psychological health' of the children and maintains the 'neighborhood school concept' where its rationale is strongest."¹² In general, however, courts have not limited busing for certain age groups without some evidence that suggests a limit is needed,¹³ although in most cases the evidence is opinion evidence from school administrators or pediatricians rather than evidence based on social science research.

In *Thompson v. School Board*,¹⁴ the Fourth Circuit upheld an order by the district court that a desegregation plan that involved long bus rides for first and second graders was not "feasible."¹⁵ A pediatrician had given testimony for the defense concerning the possible harmful effects of busing on young children, which the plaintiffs left uncontroverted.¹⁶

10. *Id.* at 30–31.

11. *McPherson v. School Dist. No. 186*, 426 F. Supp. 173 (S.D. Ill. 1976).

12. *Id.* at 188.

13. The Court of Appeals for the Fifth Circuit rejected a plan that would have limited desegregation to grades six and above in *United States v. Texas Educ. Agency*, 532 F.2d 380 (5th Cir. 1976), *vacated on other grounds*, 429 U.S. 990 (1977), *reaff'd*, 564 F.2d 162 (5th Cir. 1977). The court chided the Austin Independent School District for its "vague, conclusory, and unsupported assertion that children under 10 years old should not be bused for the purpose of desegregation." *Id.* at 393. Since busing is a "'normal and accepted tool of educational policy,'" *id.*, quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29 (1971), it "cannot be rejected [for grades K–5] without an evidentiary showing that 'the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process.'" *Id.* (quoting *Swann*, 402 U.S. at 30–31).

14. 498 F.2d 195 (4th Cir. 1974).

15. 498 F.2d 195, 196–97. The plan involved up to two and one-half hours of travel time a day for some pupils.

16. The pediatrician had testified that young children would be "physically and psychologically affected by any suggested compulsory bus transportation for long periods of time." 363 F. Supp. 458, 460 (E.D. Va. 1973). This decision was upheld on appeal, 498 F.2d 195, 197, with a

The same sort of uncontradicted testimony from a pediatrician and a school administrator was the basis for the exemption of first graders from a busing order in *United States v. School District of Omaha*.¹⁷ The pediatrician had testified that a thirty-minute bus ride would increase a six-year-old child's level of fatigue, which could make the child more prone to illness and could also affect his capacity to learn. He suggested that the effect would be most pronounced with the youngest children—first graders, as opposed to older children.¹⁸ The assistant superintendent of schools also testified in opposition to the busing of first graders, saying, "A child is better served, will be more comfortable and feel more accepted and have a more positive self-concept in a school of his immediate environment," noting that second graders can handle necessary adjustments to busing far better than first graders.¹⁹

On the basis of this uncontradicted testimony,²⁰ the district court adopted a desegregation plan that exempted first graders. The court regarded the evidence as persuasive "that children who are attending a full day of school for the first time are subject to a high risk of failure (or retention)."²¹

Similarly, in considering a plan for the desegregation of the Dallas schools,

dissenting opinion objecting to reliance on the pediatrician's testimony. 498 F.2d 195, 198-99 (Winter, J., dissenting).

17. 418 F. Supp. 22 (D. Neb. 1976), *aff'd*, 541 F.2d 708 (8th Cir. 1976), *vacated on other grounds*, 433 U. S. 667 (1977), *reaff'd*, 565 F.2d 127 (8th Cir. 1977).

18. Record at 7-8. The pediatrician, Dr. John M. Thomas, who had practiced for 25 years in Omaha, testified that six-year-olds differ from older children in their physical and emotional characteristics. The younger the child, the more easily the child becomes fatigued, both physically and emotionally. A child is more accustomed to school after one year and is better able to handle a full school day away from his or her own neighborhood.

On cross-examination, though, Dr. Thomas said that he had neither conducted studies nor read literature concerning the effects of reassignment on first-grade children, and that he had no knowledge of how the situation was handled in other school systems. Record at 3-14.

19. Record at 273. Assistant Superintendent for Instruction, Dr. Craig K. Fullerton, noted that in his view the reassignment of any primary-grade child away from his home (neighborhood) school would be educationally unsound. Record at 279.

Dr. Norbert Schuerman, Director of General Administration for the Omaha Public Schools, also testified for the defense. He had served as chairperson of the Integration Task Force, appointed by the Superintendent of Schools to assist the Board of Education in developing a desegregation plan to be submitted to the court. In testifying on the plan, he noted that the rationale for retaining all kindergarten and first-grade students in their neighborhood schools was that the students, being younger, had a greater need to be closer to home for security and comfort. Also affecting the decision was the reluctance of parents to send younger students further away. He also noted that the task force had taken into consideration that one learns to read in the first grade. Transcript at 71.

20. The evidence was uncontradicted, according to Robert Brown, Omaha Legal Aid attorney, because it was a surprise and because the United States had agreed to exempt first graders anyway. Telephone communication, July 1978.

21. 418 F. Supp. at 25 n.5. The decree was affirmed, 541 F.2d 708 (8th Cir. 1976), with a concurring opinion emphasizing that the first grade exemption was "only for a one year transition period and that before another year the Board under the guidance of the district court should reassess its operations and revise its plans so as to integrate fully the first along with all other grades." *Id.* at 709 (Henley, J., concurring).

the district court heard testimony from the superintendent of the Dallas Independent School District, Dr. Nolan Estes, that children in kindergarten and grades one through three “had not matured sufficiently to cope with the problems of safety and fatigue associated with significant transportation.”²² The court noted that “several educators, including Dr. Hall [Dr. Josiah C. Hall, a desegregation expert from Miami appointed by the court], testified that children could be transported as early as the first or second grade without any detrimental effect.”²³ The court stated, however, that in its opinion, “children in grades K–3 will be best served by having the parental and community involvement which is made possible by remaining in neighborhood schools.”²⁴

The plan adopted by the court actually involved assignment of these younger students “to the nearest school which would promote integration, not to exceed four miles from home.”²⁵ On appeal, however, the Fifth Circuit court remanded the plan, urging the district court to reconsider the techniques for desegregation approved in *Swann*, or, at least, to make specific findings as to the feasibility of the *Swann* techniques where there are many one-race schools remaining under the plan.²⁶ The circuit court did not speak specifically to the part of the plan that applied to grades K–3.

The federal district court in the Louisville case exempted first graders from the busing plan.²⁷ According to the Sixth Circuit, the district court found that first-grade children

who have not had the benefit of previous formal education [i.e., kindergarten] are subject to a high risk of failure because such children are experiencing a transitional period from a sheltered home environment to a public environment at a time when they are very young, physically weak, emotionally immature, and easily excitable.²⁸

The court also found that if these children were included in the busing plan, 36 percent of the first graders would have a one-way trip of at least forty-five minutes. The district court thus concluded that first-grade students who had

22. *Tasby v. Estes*, 412 F. Supp. 1192, 1204 (N.D. Tex. 1975), 572 F.2d 1010 (5th Cir. 1978).

23. 412 F. Supp. at 1211.

24. *Id.* The court's order requires substantial busing for students attending grades four through eight. *Id.* at 1202.

25. *Id.* at 1202.

26. *Tasby v. Estes*, 572 F.2d 1010, 1014 (5th Cir. 1978). In remanding the case for further findings, the court of appeals noted that, in general, with regard to the district court's order on busing:

There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing.

Id.

27. *Haycraft v. Board of Educ.*, 585 F.2d 803 (6th Cir. 1978).

28. *Id.* at 804.

not attended kindergarten "would be subjected to such significant additional risk of failure by their participation in the busing program that an order to bus those children could not be justified."²⁹

The Sixth Circuit reversed the district court, pointing out that the principle of *Brown* applies to first-grade pupils as well as to older students, and that where there has been a finding of state-imposed segregation in the public schools, a district court must provide a remedy.³⁰ Nor may a district court order a limited remedy that leaves many without redress of violated constitutional rights.³¹ The order of the district court exempting first-grade pupils from the busing plan until such time as the kindergarten program would be available on a systemwide basis was therefore reversed, as the district court had made no findings about when or if there was any intent on the part of the school board to institute such a system.³²

The district court's opinion is unpublished, and there is no indication in the circuit court opinion of the testimony the district court might have heard on the effects of busing on children attending kindergarten and grades one through three. It is clear, however, that the circuit court gave little weight to any such testimony.

B. Time and Distance of Busing

In formulating a plan for desegregating the Memphis schools, a federal court rejected a plan with bus rides of up to sixty minutes, which would have produced total desegregation, in favor of a plan that left 25,000 black students in all-black schools, but reduced the average bus ride to thirty-eight minutes, on the ground that more busing was impractical.³³ After remand and reconsideration, the Sixth Circuit approved a plan leaving these schools segregated, noting with approval that a psychologist had testified that "a shortening of the times and distances of transportation would inure to the benefit of many school children, especially the younger ones."³⁴ The court permitted a "lesser degree of desegregation" on the basis of four factors: "time and distance traveled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability."³⁵

In *NAACP v. Lansing Board of Education*,³⁶ in response to school board ob-

29. *Id.*

30. *Id.* at 804-05.

31. *Id.* at 805.

32. *Id.* at 806.

33. *Northcross v. Board of Educ.*, 341 F. Supp. 583 (W.D. Tenn. 1972), *aff'd*, 489 F.2d 15 (5th Cir.), *cert. denied*, 416 U.S. 962 (1973). This aspect of the opinion is discussed in greater detail in Levin & Moise, *supra* note 4, at 84 & nn. 205, 206.

34. 489 F.2d. at 17.

35. *Id.* (quoting the district court's memorandum decision).

36. 429 F. Supp. 583 (W.D. Mich. 1976), *aff'd*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977).

jections to the proposed busing plan, the district court cited an article published in *Inequality in Education*³⁷ as evidence that “an overall one-hour one-way standard has generally been recognized as acceptable, though of course schools should always seek to minimize travel time.”³⁸ This article is not based on any research; it simply footnotes the statement with a reference to an educational handbook published in 1941.³⁹

The Newark school district opposed the interdistrict busing remedy ordered in the Wilmington, Delaware case,⁴⁰ on the ground that the transportation time would be too great. The district court, on the basis of no social science testimony from either plaintiffs or defendants,⁴¹ declared that “transportation times even on the longest and most unlikely routes were not so significantly long as to endanger health or welfare of students.”⁴²

C. Other Factors

Although travel time and the age of students are usually the most important factors in considering the extent to which busing is used as a remedial tool, courts have also considered such factors as geographic barriers and safety hazards. Clearly, as indicated by several of these cases, social science research does not play a role in such decisions.

After the decision in *Davis v. Board of School Commissioners of Mobile County*,⁴³ in which the Supreme Court held that the fact that the metropolitan Mobile area was divided by a “major north-south highway” was not sufficient to preclude consideration of a cross-town busing remedy,⁴⁴ the existence of geographic barriers has usually been considered an insufficient reason to exclude certain areas from a busing plan.⁴⁵ There have, however, been some extreme cases in which the barriers were considered a sufficient justification for refusing to order busing. In *Stout v. Jefferson County Board of Education*,⁴⁶ the district court refused to order busing to integrate an all-black school that was located ten miles from an all-white school, noting that a chain of small

37. Smith, *Pupil Transportation: A Brief History*, *INEQUALITY IN EDUC.*, March 1972, at 6.

38. 429 F. Supp. at 628-29.

39. Smith, *supra* note 37, at 17 & n.47.

40. *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976), *modified*, 555 F.2d 373 (3rd Cir.), *cert. denied*, 434 U.S. 880 (1977).

41. Paul Dimond, counsel for the plaintiffs. Telephone communication, July 1978.

42. 416 F. Supp. at 354.

43. 402 U.S. 33 (1970).

44. *Id.* at 38.

45. A situation similar to the *Mobile* case, 402 U.S. 33 (1970), was before the Fifth Circuit Court of Appeals in *Lee v. Demopolis City School System*, 557 F.2d 1053 (5th Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978): “A substantial highway does divide [the town’s two schools], but it is controlled by traffic lights.” Thus the district court’s failure to order a pairing plan was reversed. *Id.* at 1054.

46. 537 F.2d 800 (5th Cir. 1976).

mountains separated them. The court of appeals affirmed the trial court's refusal, observing that of the two roads that crossed the chain:

One is a major truck route which, as it descends the mountain, has produced more accidents than any segment of road of similar length in Alabama. The other is steep and winding and carries a heavy volume of automobile traffic during the morning school hours.⁴⁷

D. Summary

From this review of recent cases, it is evident that social science research studies are not considered when the issue to be decided is the extent to which busing would "either risk the health of the children or significantly impinge on the educational process."⁴⁸ Where evidence is considered at all, it has been opinion evidence of school administrators, or of pediatricians and psychologists. These expert witnesses generally have not referred to any social science research that has systematically analyzed these issues. Indeed, the research on the effect of desegregation on achievement levels of minority children, to the extent that it shows which grades should be desegregated for maximum positive effect, has largely been ignored in the judicial process. Robert Crain's review of the research on desegregation and academic achievement indicates that desegregation has the most positive effects on achievement when undertaken in the earliest grades, and the least positive effects when undertaken in the fourth through eighth grades.⁴⁹ Yet many court decrees exclude the earliest grades from a busing plan and concentrate on the later grades.⁵⁰

II

WHITE FLIGHT

The question whether a court may consider the phenomenon of "white flight" in shaping a desegregation remedy has met a mixed response. Some courts have indicated that even when a court-ordered desegregation plan seems likely to induce "white flight" from the community or from the public school system to such a degree that desegregation would become infeasible, it is constitutionally impermissible to substitute a lesser remedy, and hence have rejected evidence proffered on white flight. Other courts, as a result of hearing social science evidence, have adapted their remedies to take the factor of

47. *Id.* at 801.

48. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971).

49. Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 *LAW & CONTEMP. PROB.*, Summer 1978, at 17-76 & Table 4.

50. *See, e.g., Crawford v. Board of Educ.*, No. C 822 854 (Super. Ct. of California, Feb. 7, 1978) (minute order adopting first phase of the Los Angeles City Board of Education's Plan for Student Integration). *See also Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1975), *remanded for further findings*, 572 F.2d 1010 (5th Cir. 1978).

white flight into account. The Supreme Court has not addressed the question of white flight directly.

A. The Supreme Court and "White Flight"

The Supreme Court has yet to hear a case in which the question for decision was whether, when a systemwide violation is found, a less than comprehensive desegregation plan is permissible if the more limited remedy is likely to retain whites who otherwise would leave the public school system. The white flight issue, as presented to the Supreme Court, has arisen in a somewhat different context. In *Wright v. Council of the City of Emporia*,⁵¹ the Supreme Court *prohibited* a city from withdrawing from an existing county school district when the combined system was under a federal court order to desegregate. The Court held that since the dual school system found to violate the Constitution was the single city-county unit, it should be treated as a single unit for the purpose of dismantling that system.⁵² The possibility of "white flight" from the county system to the proposed city school system was one of the factors the Court felt "would actually impede the process of dismantling the existing dual system."⁵³ And in *United States v. Scotland Neck City Board of Education*,⁵⁴ the Supreme Court noted that "while [white flight] may be cause for deep concern to the [school boards], it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."⁵⁵ Some lower courts have read these cases as prohibiting the consideration of white flight in formulating a desegregation remedy under *any* circumstances. Other courts, however, have deemed it appropriate to modify a desegregation plan in certain situations.⁵⁶

B. Courts That Have Refused to Consider White Flight in Formulating a Desegregation Remedy

In the Louisville case, the Sixth Circuit Court of Appeals held that the Jefferson County Board of Education could not justify its failure to

51. 407 U.S. 451 (1972). See also *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968).

52. 407 U.S. at 459-60.

53. *Id.* at 466.

54. 407 U.S. 484 (1972).

55. *Id.* at 491.

56. Some courts have held that school districts can consider the likelihood of white flight in adopting a desegregation plan when that plan is voluntary rather than court ordered. See, e.g., *Higgins v. Board of Educ.*, 508 F.2d 779, 793-94. (In the absence of de jure segregation in Grand Rapids, local board should have broad discretion in controlling its voluntary integration programs and lower court could consider possible white flight.) See also *Parent Ass'n of Andrew Jackson High School v. Ambach*, No. 78-7274 (2d Cir. Apr. 17, 1979) (slip opinion), discussed at notes 110-12 *infra* & accompanying text.

desegregate several schools on the basis of white flight.⁵⁷ The court conceded that there was a trend towards white flight out from the city limits of Louisville. This phenomenon, however, would not absolve the Jefferson County Board from its obligation to remedy past discrimination.⁵⁸

In Boston, school desegregation was predicted to have and did indeed have a substantial effect on white flight.⁵⁹ Nevertheless, the court refused to limit the extent of the desegregation plan. The district court's response to the request was that accommodating the plan to the possibility of white flight would trade away the rights of children in an effort to appease the opposition of irate parents and voters.⁶⁰ The court did note, however, that the potential for white flight is a "problem, of course, which the desegregation plan must confront in its implementation."⁶¹

On appeal, the First Circuit initially agreed to admit "voluminous affidavits and other materials by social scientists on the subject of white flight."⁶² Affidavits were submitted by Professor James S. Coleman of the University of Chicago and Professor Christine H. Rossell of Boston University, among others.⁶³ On further reflection, however, the appeals court rejected the materials as irrelevant, because it understood its choice to be between an unlawfully segregated system and several lawfully segregated systems. "What the layman calls 'resegregation' is not constitutionally recognized segregation. It is racial isolation imposed by historic school district boundaries . . . or by individual choices to attend private institutions."⁶⁴

The First Circuit court did comment on the evidence, however:

Throughout this series of submissions this court has been burdened with reports written for sociologists by sociologists utilizing sophisticated statistical and mathematical techniques. We lack the expertise to evaluate these studies

57. *Newburg Area Council, Inc. v. Board of Educ. of Jefferson County*, 489 F.2d 925 (6th Cir. 1973).

58. *Id.* at 929. *But see* *Mapp v. Board of Educ. of Chattanooga*, 525 F.2d 169 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

59. *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

60. 401 F. Supp. at 234. *Cf.* *Brunson v. Board of Trustees*, 429 F.2d 820, 827 (4th Cir. 1970) (Sobeloff, J., concurring):

"White Flight" is one expression of resistance to integration, but the Supreme Court has held over and over that courts must not permit community hostility to intrude on the application of constitutional principles. . . . [D]issidents who threaten to leave the system may not be enticed to stay by the promise of an unconstitutional though palatable plan. . . . More to be feared than white flight in Clarendon County would be any judicial countenancing of the suggestion that abandoning or qualifying a desegregation program is a legally acceptable way to discourage flight.

61. 401 F. Supp. at 234.

62. 530 F.2d 401, 420 n.29 (1st Cir. 1976).

63. *See* Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1, 43-45 (1976). *See also* Rossell, *School Desegregation and Community Social Change*, 42 LAW & CONTEMP. PROB., Summer 1978, at 133.

64. 530 F.2d at 422.

on their merits. We do come to one conclusion, however. The relationship between white flight and court-ordered desegregation is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged.⁶⁵

In devising a remedy for segregation in the Indianapolis school district, the district court was told by the Seventh Circuit that “white flight considerations “ could not “unduly” delay complete desegregation.⁶⁶ The district court, on remand, stated that it concurred that “white flight may not be used as an excuse for inaction” but noted that potential white flight might dictate “a particular kind of action.”⁶⁷ Thus, although 42.43 percent of the school-aged population of Indianapolis was black, the district court ordered the system to desegregate only to the extent that each school had a minimum black percentage of 15 percent because “to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.”⁶⁸

While a decision was pending on the appropriateness of an interdistrict remedy, the plaintiffs and the school commissioners sought to implement an interim Indianapolis-only desegregation plan. This, however, was rejected by the district judge, who called it “counter-productive.”⁶⁹ The Seventh Circuit reversed and remanded that order, tersely asking, “What is the explanation for it being termed ‘counterproductive’ to put the Proposed Intradistrict Plan into effect for the year 1978–1979 (assuming the plan is sound), while the question remains open whether an interdistrict remedy may ultimately but probably not immediately be put into effect?”⁷⁰ The district judge reaffirmed his order, referring to his earlier finding that resegregation would take place if the district were mixed in a “fruit basket” style⁷¹ and noted that “all witnesses who testified on this point at the hearing of May 30–31, including the defendant Superintendent of Schools of IPS, agreed with this statement.”⁷²

During the trial of the Indianapolis case,⁷³ several academic social scientists

65. *Id.* at 420–21 n.29.

66. *United States v. Board of School Comm'rs*, 503 F.2d 68, 80 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

67. 419 F. Supp. 180, 184 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated on other grounds*, 429 U.S. 1068 (1977).

68. 419 F. Supp. at 185.

69. No. IP 68-C-225 (S.D. Ind. Apr. 7, 1978), *quoted in* *United States v. Board of School Comm'rs*, No. 78-1558 & 78-1626, at 3 (7th Cir. May 17, 1978) (unpublished order).

70. *United States v. Board of School Comm'rs*, No. 78-1558 & 78-1626, at 4 (7th Cir. May 17, 1978) (unpublished order).

71. *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 678 (S.D. Ind. 1971).

72. *United States v. Board of School Comm'rs*, No. IP 68-C-225, at 9 (S.D. Ind. June 2, 1978) (unpublished order).

73. *United States v. Board of School Comm'rs*, 368 F. Supp. 1191 (S.D. Ind. 1973).

had testified about white flight research. The district court, relying primarily on the testimony of Dr. Charles A. Glatt,⁷⁴ director of the Midwest Institute for Equal Educational Opportunities and professor of educational development at Ohio State University, found as a fact

74. *Id.* at 1197-98. *See generally* Transcript vol. 4, at 729-854, June 18, 1973. Dr. Glatt's major sources of data for the demographic study he undertook for the Indianapolis Public Schools (IPS) were the 1960 Census and the preliminary data from the 1970 census. He testified that based on his experience in working in school districts around the country and on the opinions of his colleagues, "the general professional view is that when a district or a particular school attendance area becomes somewhere between 25 to 33 percent black, that's when the white residents begin to panic and that's when a certain amount of movement out begins to increase." *Id.* at 759. Glatt noted that in cities where desegregation had not occurred whites have also been leaving, but the exodus from cities speeds up when the city schools alone are desegregated. *Id.* at 759-60. IPS, in his opinion, was "flirting with disaster" since its black population was 40-41%, well above the 25-33% tipping point. Any effort to desegregate within the district itself would lead to resegregation in a short time. *Id.* at 761-64.

On cross-examination, Glatt was asked about other factors that explain why people move, *e.g.*, housing, income, personal motivation, associational ties. He stated that such factors were not demographic data. Demographic conclusions are limited to predictions of what will happen in the future based on what has happened in the past. He said that these other factors were important and that he was not "absolutely certain" an Indianapolis-only plan would result in an all-black system. On further questioning, he stated that the probability of this situation occurring depended on the "intangible factors." *Id.* at 765-68. Although no desegregation plan had been put into effect in Indianapolis, there had been a 1971 court order mandating desegregation. Glatt did not know the effect of the court order on white flight but stated that he suspected some whites had been leaving. He refused to guess how quickly or in what numbers the exodus would occur. *Id.* at 768.

Dr. John Liell, Director of the Consortium for Urban Education and Director of the Office of Metropolitan Studies at Indiana University-Purdue University, was also called as a witness. Transcript, vol. 5, at 1013-73, June 19, 1973; Transcript, vol. 6, at 1076-1128, June 20, 1973. He had analyzed the 1970 census data, as it related to population trends in the Indianapolis metropolitan area, according to an "index of dissimilarity" so as to measure the amount of segregation in the census tracts of each county. *Id.* at 1022. He defined the index as "an indication of the proportion of the total population that would have to move to bring about a zero ratio or in order to bring about an equal distribution of whites and blacks in all the census tracts in the area." *Id.* at 1029-30. *See* Rossell, *supra* note 63, at 133; Farley, *Residential Segregation and its Implications for School Integration*, 39 LAW & CONTEMP. PROB., Winter 1975, at 164.

The court accepted as evidence his exhibits, which consisted of dot maps showing the change in the white population of Marion County (by 1970 census tracts) when compared with the white population in 1960. He testified that, assuming the trend of decreasing white population, "it would be difficult at first and eventually impossible for the public school system to develop and sustain a desegregation plan because of the population changes and the concentration of blacks and whites." Transcript, vol. 5 at 1050.

On cross-examination, Liell was asked if a change in the black-white pupil ratio of a particular school unit precipitated demographic movement. He testified that sociologists since the 1920s have talked about invasion-succession cycles and that while a change in racial balance creates a disequilibrium, he could not estimate within what percentage range a demographic change would be commenced or expedited. *Id.* at 1060. When asked if schools follow rather than lead segregative patterns in housing, he answered that he was unaware of any research to establish or refute the proposition. *Id.* at 1079-81.

Dr. Liell noted that the index of dissimilarity is based on residential patterns, not school enrollment patterns. In his opinion, considering IPS as a geographical unit, it could not be effectively desegregated by itself. *Id.* at 1091-95.

that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS [the Indianapolis Public Schools], the white exodus from such a school district becomes accelerated and continues. . . . [O]nce a school becomes identifiably black, it never reverses to white. . . . Therefore, progressions from white to black are irreversible once the critical percentage has been reached. . . . Below the critical percentage, however, schools tend to remain stable.⁷⁵

Other social science testimony, in the opinion of the court, either supported this point,⁷⁶ had no relation to the situation in Indianapolis,⁷⁷ or was

75. 368 F. Supp. at 1197.

76. *Id.* at 1198. Dr. Dan Dodson, Professor of Sociology at Southwestern University in Texas, was called as a witness for the government. Transcript, vol. 14, at 2552-613, July 5, 1973. He had worked as a desegregation consultant for school districts since 1954. Based on his experience, he testified that he believed school desegregation was not a significant factor in the problems of maintaining racial balance in the inner-city schools, *id.* at 2557, although he noted that he knew of no studies which would either support or contradict his conclusions. *Id.* at 2557-58. When asked about Washington, D.C., he noted that whites were rapidly moving to the suburbs before desegregation of the schools. Blacks did not have the range of housing choices open to whites, and thus they were isolated in the city. *Id.* at 2559-60. School desegregation is only one and a "relatively minor" factor in the great demographic changes that take place in society. *Id.* at 2563.

In examining the student enrollment statistics of a particular school district to measure the extent of in- and out-migration of students as well as the fluctuations in birth rate, Dodson used the following two measures. (1) By following the population of a first-grade class between 1968 and 1972, he calculated an attrition rate of 15%. Since there were not enough new students to replace those lost, he concluded there was no massive in-migration during this period. *Id.* at 2569-72. (2) By comparing the number of births in 1966 with school enrollment in 1972, he calculated an attrition rate of 31% for white students. *Id.*

On cross-examination, Dodson stated that the out-migration of white families was often more pronounced where there were no blacks in the schools. Ten out of eleven Indianapolis schools with a 20-25% black student composition in 1968 appeared to have remained stable between 1968 and 1972. Factors other than school desegregation must, therefore, be considered in evaluating the stability of urban populations. *Id.* at 2590-92. Dodson also noted on cross-examination that the "tipping point" theory of white flight had lost a lot of its vitality. *Id.* at 2602-03. Finally, while he could not guarantee that an Indianapolis-only desegregation plan would remain stable, he thought it was possible. A countywide desegregation plan would be more viable but he would not "use it as an excuse for not meeting present responsibilities in Indianapolis." *Id.* at 2611-12. It appears that the district court focused on the computed attrition rate for white students and played down the significance of the rest of Dodson's testimony.

77. 368 F. Supp. at 1198-99. Dr. Jane R. Mercer, Professor of Sociology at the University of California at Riverside, was called as a witness for the government. Transcript, vol. 12, at 2274-353, July 2, 1973. When Riverside, California, voluntarily desegregated its schools in 1965, she conducted a longitudinal study of the effects of desegregation on the lives of 1,700 children in the school system. Three years later she initiated a statewide project to study 12 to 15 desegregated school districts.

In preparation for her testimony in the Indianapolis trial, she had examined data from a survey of 94 California school districts for a period of six years. The districts, selected because they had an average daily attendance of at least 2,500, included schools from kindergarten through twelfth grade, and had at least a 10% minority population (including blacks, Mexican Americans, Asian Americans, and American Indians). For purposes of her study, she relied on the California guidelines, which describe a school as desegregated "when its student population or any ethnic group does not vary more than fifteen percent from the proportion for what that ethnic group in the district is as a whole." *Id.* at 2283. Thus, in a district with a 30% black population, the student population at a particular school must be 15-45% black before it is considered desegregated. By

without credibility.⁷⁸ The case is still pending on the issue of an interdistrict

comparing the white populations of districts that made an active effort to desegregate with the white populations of the districts that made no effort, she reached the following conclusions: (1) whether or not the districts desegregated their schools, there was a decline of 4-5% in the Anglo population for the period studied, *id.* at 2290; (2) desegregation did not have any major effect on the population trends of the communities surveyed, *id.* at 2314; (3) the most significant factor to account for the decrease in white population is the drop in the white birth rate in comparison to the relatively slower drop in the black birth rate—in California, migration had slackened “clear across the board,” *id.* at 2323.

Dr. Mercer refused to make predictions about Indianapolis since she did not have any special knowledge of the area. The demography of any city, she explained, should be evaluated in terms of its own unique history—not in terms of another city's population trends. *Id.* at 2314-15.

In light of her familiarity with school systems that have been desegregated, Dr. Mercer testified that, immediately following the implementation of a desegregation plan, 1-2% of the public school children initially are enrolled in private schools. After the first year, parents return their children to the public schools if the educational program appears to be stable. Specifically, in Riverside she found that there was no move to resegregate after 1966 and that housing desegregation ensued as parents moved closer to the schools to which their children were bused. *Id.* at 2311-13. Dr. Mercer also testified that the quality of education in the schools after desegregation may have an effect on the racial stability of the community. She noted that in Berkeley, where the school board introduced a number of innovative programs, the community did not change in its racial composition. She said that it would be “hard to tell,” however, what would have happened to the racial stability of the community if the new programs had not been offered. *Id.* at 2319-22.

The court concluded that the situation in Riverside bore no relation to that in Indianapolis: the Riverside plan was put into effect voluntarily—i.e., it was imposed by the school board rather than ordered by a court (although there was no testimony to the effect that this would make a difference in the extent of white flight), and the percentage of minority race students in the Riverside system was less than 25% (compared to more than 40% in Indianapolis). Moreover, her figures showed a “sharp and dramatic drop” in Anglo students in Inglewood, Pasadena, and San Francisco once it was revealed that their schools would be required to desegregate. 368 F. Supp. at 1198-99.

78. 368 F. Supp. at 1199. Dr. Clifford Hooker, Professor of Educational Administration at the University of Minnesota, was called as a witness for the defendants. Transcript, vol. 11, at 2077-2179, June 28, 1973. He testified that black and white enrollments in urban schools were stabilizing. *Id.* at 2096. Those who claimed the Northern cities were turning all-black, he noted, were basing their conclusions on “straight-line” projections that showed high birth rates and in-migration that did indeed exist in the 1960s. The most recent census data, however, indicated a declining black birth rate. In addition, blacks had begun moving to the suburbs. *Id.* at 2092-95.

On cross-examination, Hooker admitted that the black population in Indianapolis, as a percentage of total population, had risen each year. He attributed the decline in the white population to the decreasing white birth rate that began seven years before. The black birth rate had only just begun to decline. He speculated that it was “perhaps true” that the white decline was not evident in the high schools, but his statistics showed a decline in white enrollment over a ten-year period. *Id.* at 2133-34. When pressed by the court to explain where these white people had gone he suggested the suburbs. *Id.* at 2135.

On cross-examination, Hooker was referred to an article he had written in 1968 in which he stated that “the departure of affluent families, together with faulty state aid distribution formulas” produced racial stratification as well as geographical separation of schools. *Id.* at 2150. When asked if it was significant that 27% of the people who live within IPS boundaries were black, while 40.8% of the school population was black, he answered that blacks had larger families than whites and that many more white families than black families in Indianapolis had no children. He also suggested that more white parents than black parents sent their children to private schools. *Id.* at 2164-65. In general, he thought that the prediction of racial demographic patterns was a “speculative” subject. *Id.* at 2170.

remedy, but this review of the various court opinions on the question of an Indianapolis-only remedy suggests that the Seventh Circuit, regardless of testimony on white flight research, would not permit a desegregation plan to be limited because of considerations of white flight.

C. Courts That Have Considered White Flight in Formulating a Desegregation Remedy

1. *Desegregation Plans Limited Because of White Flight Evidence*

A desegregation plan ordered for Chattanooga, Tennessee, would have provided for a maximum black enrollment of 75 percent in the city's predominantly black high schools, and a maximum white enrollment of 68 percent in the other city high schools.⁷⁹ But when the plan was implemented, white enrollment plummeted, and two of the schools remained 99 per cent black.⁸⁰ The district judge found that the failure of the desegregation plan was due to "changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system."⁸¹ The court therefore refused to order further desegregation. The court of appeals upheld this decision, distinguishing it from cases in which the fear of white flight was an illegitimate basis for inaction.

Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan. . . . What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself.⁸²

In *Stout v. Jefferson County Board of Education*, the Fifth Circuit was urged to overturn a district court plan that did not desegregate three single-race schools.⁸³ The plaintiffs claimed that the lower court's decree was impermissibly based on fears of white flight. The court of appeals rejected this contention, agreeing with the district court's holding that a unitary system was established by the plan.⁸⁴ Thus, in the court's view, even if the lower

In considering this testimony, the court noted that Dr. Hooker "was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in [the Indianapolis] case." 368 F. Supp. at 1099.

79. *Mapp v. Board of Educ.*, 525 F.2d 169, 170 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

80. *Id.*

81. Unpublished memorandum opinion, Nov. 16, 1973, *quoted in* 525 F.2d at 171.

82. 525 F.2d at 171-72.

83. 537 F.2d 800 (5th Cir. 1976).

84. *Id.* at 803.

court chose the particular plan out of fear of white flight, it had chosen a permissible plan. "We have found no authority declaring that in choosing between various *permissible* plans a chancellor may not elect one calculated to minimize white boycotts."⁸⁵ However, the court went on to note that a chancellor "may not refuse to adopt a permissible plan and elect or confect one which preserves a dual system because of such fears."⁸⁶

In these cases, the issue was not the nature or the appropriateness of social science evidence on white flight. Instead, the issue was whether further desegregation is required when white flight has taken place, or whether, as a matter of law, a judge given several plans, each of which would disestablish a dual school system, may choose a plan with less desegregation in the hope that white flight will be minimized. In addition to the *Stout* case, the Fifth Circuit has suggested on at least one other occasion that lower courts should consider plans that would minimize "the number of students who will leave the public school system rather than participate in the desegregation plan."⁸⁷ Again, however, this advice was given in circumstances where each of the various plans under consideration would have transformed the school system into a unitary system.

Tasby v. Estes confuses rather than clarifies the issue of whether white flight evidence should be considered in developing a desegregation remedy.⁸⁸ The district court, in selecting the desegregation plan to be implemented in the Dallas school district, considered the impact of white flight on attempts to desegregate the district. The court opted for a magnet school concept at the high school level rather than assigning students so that each high school had a certain percentage of students of each race.⁸⁹ The court noted that this latter method of desegregation was used in 1971 with the result that "of approximately 1,000 Anglos ordered to be transported to formerly all-black high schools under this Court's 1971 student assignment plan, fewer than 50 Anglo

85. *Id.* at 802.

86. *Id.* Cf. *United States v. Desoto Parish School Bd.*, 574 F.2d 804, 816 (5th Cir.), *cert. denied*, 99 S. Ct. 571 (1978). (A plan preserving a dual system cannot be retained over a more successful approach because of fear of white flight.)

87. *United States v. Texas Educ. Agency*, 532 F.2d 380, 398 (5th Cir. 1976), *vacated on other grounds*, 429 U.S. 990 (1976), *reaff'd*, 564 F.2d 162 (5th Cir. 1977). *But see* *Lee v. Marengo County Bd. of Educ.*, 454 F. Supp. 918 (S.D. Ala. 1978). In that case, the district court rejected a school pairing plan that would have involved significant busing, citing the danger of white flight. The government's plan would have involved a massive pairing system in which the 20% white student population would be well mixed with the majority black students. The judge objected to "the distinct possibility of white flight in the wake of such pairing." *Id.* at 933-94. A pairing that would reduce the white school population to 30%, the judge said, "would result in the exodus of a large part, if not all, of the white students from the Marengo County School System." *Id.* at 934. The only authority cited by the judge was "this Court's experience." *Id.*

88. *Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1975), *remanded*, 572 F.2d 1010 (5th Cir. 1978).

89. 412 F. Supp. at 1205.

students attend those schools today.”⁹⁰ The court declined to decide whether “forced busing” was the prime factor or whether some other cause was responsible for the decrease in Anglo school population, despite the fact that the submission of evidence on the cause of white flight resulted in what the court called “the battle of the sociological experts.”⁹¹ Nevertheless, the court decided a magnet school approach would be a more effective plan than one that reassigned students.⁹²

On appeal, the Fifth Circuit held that the student assignment portion of the plan had to be remanded to the district court for further consideration. The court of appeals noted that “white flight” was a factor in the lower court’s choice among desegregation plans,⁹³ but held that the district court must advance specific findings as to the effectiveness of the *Swann* remedial tools before a plan that leaves a significant number of one-race schools may be adopted.⁹⁴ It is unclear from the decision of the court of appeals whether white flight evidence is to be given any weight in determining whether or not the utilization of the *Swann* desegregation tools is practicable.⁹⁵

2. *Desegregation Plans Not Limited Because of White Flight Evidence*

In 1974, the Pasadena City Board of Education moved for relief from the district court’s 1970 order desegregating the schools, for dissolution of the injunction that there be no school with a majority of any minority, and for termination of the court’s continuing jurisdiction over the case.⁹⁶ According to the School Board, the court’s 1970 desegregation mandate⁹⁷ was “the sole and proximate cause of ‘white flight’ from Pasadena schools.”⁹⁸ Although the district was in compliance with the “no majority of any minority” order the first year of the plan’s implementation, one school was out of compliance by the following year, and by 1974, five schools were out of compliance.⁹⁹ The Board’s expert witness testified that the precipitous decline in white enrollment since 1970 was due to the court order to desegregate.¹⁰⁰ The judge rejected this testimony on the ground that the witness could not state *why* students left the public schools.¹⁰¹ Moreover, the court, though it made no

90. *Id.*

91. *Id.* at 1205 n.50.

92. *Id.*

93. 572 F.2d at 1014.

94. *Id.* at 1014–15.

95. *See id.* at 1015.

96. *Spangler v. Pasadena City Bd. of Educ.*, 375 F. Supp. 1304 (C.D. Cal. 1974), *aff’d*, 519 F.2d 430 (9th Cir. 1975), *vacated*, 427 U.S. 424 (1976), *on remand*, 549 F.2d 733 (9th Cir. 1977).

97. 311 F. Supp. 501 (C.D. Cal. 1970).

98. 375 F. Supp. at 1305.

99. *Id.* at 1306.

100. *Id.* Dr. Robert Dilworth, the School Board’s expert witness, is Professor of Mathematics at the California Institute of Technology.

101. *Id.*

explicit mention of testimony introduced by the government,¹⁰² noted that Pasadena's experience was similar to that of other California school districts across the state, whether segregated or desegregated, since 1966.¹⁰³ The Ninth Circuit upheld the district court on this point and noted that "the Supreme Court has indicated that the existence of a 'white flight' phenomenon does not excuse a school system from the constitutional duties imposed by *Brown* and its progeny."¹⁰⁴

The three-judge district court in the Wilmington case,¹⁰⁵ in devising an interdistrict desegregation order, considered evidence regarding the "tipping point" for white flight. On the basis of such evidence, the district court determined that any school between 10 and 35 percent black would be considered *prima facie* desegregated.¹⁰⁶ The court noted that a 40 percent black enrollment was likely to produce white flight.¹⁰⁷ However, although both expert witnesses had urged that black enrollment not exceed 30 percent,¹⁰⁸ the court permitted it to approach 35 percent in some schools. The court noted, however, that the real test is whether the use of not less than 10 percent nor more than 35 percent black as a starting point will achieve "the greatest possible de-

102. The testimony of Dr. Jane R. Mercer, Professor of Sociology, University of California at Riverside, was introduced to show that the loss of whites from the Pasadena schools was not unique to that community. Transcript, vol. 3, at 588-624, Feb. 28, 1974; transcript, vol. 4, at 625-65, Mar. 1, 1974. She reported on the results of her study data for 91 California school districts collected over a six-year period. This was the same study (with three fewer districts) about which she had testified in the Indianapolis case a year earlier. See note 77 *supra*. She found that in all districts there was a slight downward trend in the percentage of white students and that the decrease in this population appeared not to be influenced by whether the district was implementing a desegregation plan. Transcript, vol. 3, at 601. From her data, it was not possible to determine why students left the public schools. *Id.* at 609.

103. 375 F. Supp. at 1306.

104. 519 F.2d 430, 435 (9th Cir. 1975), *citing* *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1968).

105. *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976), *as modified*, 555 F.2d 373 (3d Cir.), *cert. denied*, 434 U.S. 880 (1977).

106. 416 F. Supp. at 356-57.

107. *Id.* at 356.

108. Dr. Robert G. Wegmann of the University of Houston testified as follows:

I think that you are probably going to have a more stable situation to the extent that you aim at not going over perhaps 25 percent [black], taking into consideration that there may be some anticipatory flight that occurs and you may end up in fact a little higher than that.

Transcript, November 11, 1975, at 903. Without keeping the percentages low, Dr. Wegmann argued, there would be a "real danger" of flight in the more affluent white sectors. *Id.* at 887.

Similarly Dr. Michael W. Giles of Florida Atlantic University testified on the basis of his research that 30% black enrollment seemed to be a "threshold point" beyond which white flight accelerated: "At least within our sample the rate of rejection is fairly constant and fairly low below 30 percent black, and when a child has moved from below to above 30 percent black, the rejection rate increases." *Id.* at 983. Dr. Giles also noted that busing is not a factor likely to increase white flight in and of itself. If black enrollment is below 30%, "whether a child rides a bus or not is not going to produce rejection behavior." *Id.* at 1008.

gree of actual desegregation, taking into account the practicalities of the situation."¹⁰⁹

3. *Voluntary Plans, Minority Quotas, and White Flight*

Several courts have held that the possibility of white flight may be taken into account when it is not advanced to perpetuate segregation or to thwart mandatory desegregation.¹¹⁰ Thus, in *Parent Association of Andrew Jackson High School v. Ambach*, it was not unconstitutional, where school officials have adopted a voluntary plan designed to prevent resegregation or increasing segregation of the system, to restrict the number of minority children that may attend a particular school.¹¹¹ However, in this case, the appeals court remanded the case for more evidence to justify the assertion of the school system that 50 percent was the "tipping figure."¹¹²

D. The California Experience: White Flight Considered

In California, the state courts have explicitly considered the effects of desegregation on white flight in devising desegregation plans. However, in *Crawford v. Board of Education*,¹¹³ the California Supreme Court held that the state constitution imposes an affirmative duty on school officials to correct de facto racial imbalance as well as de jure segregation. For this reason, the extent to which the California trial courts may consider the effect of white flight may be greater than is the case with federal courts. Since the goal under the state constitution is "the elimination of the varied harms to minority children which have generally flowed from the maintenance of segregated schools,"¹¹⁴ state trial courts may consider the impact of white flight on desegregation:

A court may reject a particular approach if it finds that its implementation is likely to result in a "one-race" or "all-minority" school district and conse-

109. 416 F. Supp. at 357 n.150 (quoting *Davis v. Mobile County School Comm'rs*, 402 U.S. 33, 37 (1971)).

110. *Parent A'ssn of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979); *Higgins v. Board of Educ.*, 508 F.2d 779 (6th Cir. 1974).

111. 598 F.2d at 718-20. *Cf. Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973) (housing authority, in attempting voluntarily to comply with a constitutional and statutory duty to integrate, may limit the dwellings to be made available to minorities upon a showing that such action is essential to promote a racially balanced community and avoid racially segregated residential pockets).

112. 598 F.2d at 720-21. The *Andrew Jackson* court cited several recent articles indicating that social science contributes to judicial decisionmaking. *Id.* at 718 n.11, citing Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB., Winter 1975, at 150; Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROB., Winter 1975, at 134.

113. 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

114. *Id.* at 308, 551 P.2d at 47, 130 Cal. Rptr. at 743.

quently in less ultimate [sic] opportunities for the benefits of a desegregated education.

We do not mean, of course, that the threat of "white flight" may be used as a smokescreen to avoid the constitutional obligations of a school district . . . instead, we simply recognize that in weighing the potential efficacy of alternative programs, a realistic evaluation of the ultimate consequences of a particular course of action cannot be ignored. . . . In the end, if a court finds that certain alternatives are not realistically available or particular goals reasonably attainable, it may require the board to take greater efforts in some other direction in attempting to alleviate the consequences of school segregation.¹¹⁵

Thus the Los Angeles Superior Court, in its initial order, adopted the first phase of the plan submitted by the School Board, which took into account the potential for white flight.¹¹⁶

The trial court in the San Diego case also took the position that "white flight" is a relevant factor to be considered in a realistic appraisal of a school desegregation plan.¹¹⁷ Expert testimony was introduced by both plaintiffs and defendants. The court accepted the analysis presented by the defendants' expert, Dr. David J. Armor, "that all districts with an enrollment of 50% or more minority students are in danger of becoming minority isolated and that future planning must take into consideration every means available to stabilize these schools."¹¹⁸ The plaintiffs' expert witness, Dr. Christine H. Rossell, predicted that under a mandatory desegregation order, "San Diego will be at about the same white enrollment in 1983 or 1984 as it would have if it had not desegregated."¹¹⁹ The court commented on this expert testimony and the predictions of white flight as follows:

A substantial percentage of the trial was consumed in claims and denials concerning "white flight." The evidence, however, provides no significant conflict on the subject. Whereas each opposing expert found the risk great or small, depending upon the cities selected for study and the analysis of the data, plaintiffs' expert admitted that all mandatory busing orders produce some white flight and the phenomenon produces a significant loss of middle class families in 50% of the cases. This is a grave risk.¹²⁰

115. *Id.* at 309, 551 P.2d at 47, 130 Cal. Rptr. at 743.

116. *Crawford v. Board of Educ.*, No. C 822 854 (Super. Ct. of Cal., Feb. 7, 1978) (unpublished minute order).

117. *Carlin v. Board of Educ.*, No. 303800 (Super. Ct. of Cal., March 9, 1977) (unpublished memorandum decision and order).

118. *Id.* at 6.

119. Rossell, *Desegregation, White Flight, and Resegregation* 26 (December 1976) (unpublished study).

120. *Carlin v. Board of Educ.*, No. 303800, at 23-24 (Super Ct. of Cal., March 9, 1977). Dr. David J. Armor testified on the basis of statistical studies that court-ordered desegregation would bring "a very substantial acceleration of white loss based on the experience of other mandatory busing districts." He predicted the loss of 20.4% of all white students in the district, or 16,000 white students, during the first two years of mandatory busing. He predicted a further loss of 12.8% over the next two years. He concluded that "white losses continuing at this rate, combined with continuing increases in minority enrollment, will result in an imbalanced district by 1983."

The court then concluded that "a city-wide mandatory transfer plan is undesirable because of the potential harm to minority youngsters and the grave risk that a 'busing' order will result in resegregation."¹²¹ The court subsequently approved an all-voluntary plan.¹²²

E. White Flight and Interdistrict Remedies

Most social scientists agree that a metropolitan-area desegregation plan will greatly diminish the likelihood of white flight.¹²³ Nevertheless, the Supreme Court's decision in *Milliken* makes it nearly impossible for a court order to extend beyond the city district's boundaries.¹²⁴ In that case, the district court, after finding that Detroit was a de jure segregated system, determined that desegregation remedies confined to the district's boundaries would be useless in a city already 70 percent black.¹²⁵ At trial, an expert witness had testified that 55 percent black was the minimum "tipping point" above which resegregation would greatly accelerate.¹²⁶ Thus, in order to prevent white

given a mandatory plan. Armor, *Segregation and Desegregation in San Diego Schools* 40 (December 1976) (unpublished paper). Armor also noted, however, that with no mandatory plan, given the current rate of white loss, the district would be imbalanced by 1990. *Id.*

Dr. Christine H. Rossell took issue with Armor's analysis, saying that he had failed to distinguish between the level of white flight naturally expected from an urban area and the level of flight that accompanies school desegregation. Rossell, *School Desegregation, White Flight, and Resegregation*, *supra* note 119, at 7-8. Rossell's study indicated that "while there is clearly an implementation loss associated with school desegregation, this trend begins to reverse itself after the first year in most school districts." *Id.* at 19. She therefore concluded that by 1983 or 1984, San Diego would have the same white enrollment as it would in the absence of court-ordered desegregation, and "it would have fulfilled the constitutional obligation to eliminate segregation." *Id.* at 26. Rossell also noted that the fact that San Diego's black student population is so low (14.5% in fall 1976), with the residential dispersion of nonblack minorities from three to ten times that of blacks, may mean that a mandatory plan would result in no white loss—the situation in such comparable cities as Wichita, Kansas, Minneapolis, Minnesota, and Springfield, Massachusetts. *Id.* at 20-21.

121. *Carlin v. Board of Educ.*, No. 303800, at 23-24 (Super. Ct. of Cal., March 9, 1977).

122. *Carlin v. Board of Educ.*, No. 303800 (Super. Ct. of Cal., July 27, 1978).

123. See, e.g., Coleman, *Liberty and Equality in School Desegregation*, 6 Soc. POL'Y 9, 13 (1976); Rossell, *Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation* (1978) (report prepared for the National Institute of Education).

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

125. *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

126. Testimony of Dr. James W. Guthrie, Professor of Education, University of California at Berkeley. Record, vol. 4a, at 109. Dr. Guthrie urged rejection of a city-only plan:

If the effort is to eliminate a segregated school system for whatever reason, if that is the intent that [sic] it is my belief that this will not eliminate a segregated school system, but rather *will lead only to greater segregation in the City of Detroit . . .* should such a desegregation plan be announced, and every year thereafter when it is implemented, my prediction would be that the number of white persons residing in the city of Detroit and the number of white children available to attend its schools would decrease.

Transcript, Vol. 4a, at 111-12 (italics in original). Dr. Betty Ritzenheim, principal of Detroit's Region III Magnet Middle School, supported the "tipping point" concept and testified that a Detroit-only plan would cause resegregation in the Detroit school system. Transcript, vol. 4a, at

flight from Detroit city schools, the court adopted a metropolitan-area desegregation plan.¹²⁷

The Supreme Court, however, ruled that an interdistrict remedy was inappropriate in the absence of proof that there was an interdistrict constitutional violation.¹²⁸ On remand, the district court approached the problem with at least lip service to the "strict exclusion" principle: "It is true that 'white flight,' like the degree of community resistance to a desegregation order, is not one of the 'practicalities' to be considered in formulating a just, feasible and workable plan."¹²⁹ But the court rejected the plan proposed by plaintiffs, which would have brought every school in the district to within fifteen percentage points of the racial ratio of the district as a whole. The court stated that the plan threatened chaos and financial destruction: "The use of such a remedy in these circumstances contains all of the seeds for resegregation, which this court has stated must be avoided at all costs."¹³⁰ The court also rejected a plan offered by the school board and required a new plan to be submitted.

The new plan, accepted by the district court,¹³¹ excluded three inner-city zones from desegregation because of the probability that white flight would result. The district court heard and accepted testimony from Merle

57-58. Dr. Gordon Foster, Director of the University of Miami Title IV Desegregation Center, prepared a Detroit-only plan but stated that in his opinion "a metropolitan solution would certainly be a better one and would offer greater stability in the long run and more meaningful education and desegregation." Transcript, vol. 4a, at 70; *see also* vol. 4a, at 91. These excerpts from the testimony of Dr. Guthrie, Dr. Ritzenheim, and Dr. Foster are quoted in Brief for Respondent Board of Education at 88, 89, 90, *Milliken v. Bradley*, 418 U.S. 717 (1974).

127. 345 F. Supp. at 916-20, *aff'd*, 484 F.2d at 250.

128. In holding that an interdistrict violation is necessary before an interdistrict remedy can be ordered, Chief Justice Burger articulated the following principle: "the scope of the remedy is determined by the nature and extent of the constitutional violation." 418 U.S. at 744. The standards to govern the use of interdistrict remedies were detailed by the Court:

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

. . . .

. . . Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts.

418 U.S. at 744-45, 749.

129. *Bradley v. Milliken*, 402 F. Supp. 1096, 1129-30 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

130. *Id.* at 1125.

131. *Bradley v. Milliken*, 411 F. Supp. 943 (E.D. Mich. 1975), *modified*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

Henrickson, Director of Planning and Building Studies for the Detroit Board, to the effect that exclusion of the inner city was necessary to preserve a racial mix. He predicted that if the inner city were desegregated, white flight would result.¹³² The lower court noted, in accepting Henrickson's testimony without qualification, that in a district that is only 23 percent white, "a remedy that does not take account of the possibility of resegregation will be short-lived and useless if that percentage of whites further decreased."¹³³

The Court of Appeals for the Sixth Circuit agreed with the judgment that the plan initially proposed would "accelerate the trend toward rendering all or nearly all of Detroit's schools so identifiably black as to represent universal school segregation within the city limits."¹³⁴ But the appeals court held that the exclusion of the inner city was not justifiable, given the Supreme Court's command in *Green v. New Kent County* that segregation be removed "root and branch."¹³⁵ The circuit court admitted that it was "unable to give any direction to the District Court which would accomplish the desegregation of the Detroit school system in light of the realities of the present racial composition of Detroit,"¹³⁶ and noted that "genuine constitutional desegregation can not be accomplished within the school district boundaries."¹³⁷

A similar bind faced the courts in desegregating the Indianapolis school system.¹³⁸ The district court, in part because of testimony that white flight is

132. 540 F.2d at 238.

133. 411 F. Supp. at 946.

134. 540 F.2d at 239.

135. 391 U.S. 430, 437-38 (1968).

136. 540 F.2d at 239. On remand, the district court again refused to order desegregation of the three inner city zones. 460 F. Supp. 299 (E.D. Mich. 1978). Merle Hendrickson, the Board's chief demographer and its witness in the 1975 case, *see* notes 132, 133 *supra*, testified that a downward trend in white enrollment would leave the Detroit school system 91.8 percent black by 1981. 460 F. Supp. at 306. This testimony being uncontroverted, the court adhered to its prior conclusion

that a school system cannot be desegregated by making all schools racially identifiably black. This result inevitably occurs when further desegregation is attempted for Regions 1, 5 and 8 collectively. When racial proportions are so extreme that adequate interaction between children of both races cannot be accomplished, further desegregation is not possible and it is unwise to disturb assignment patterns which effectively desegregate the schools in other regions. Moreover, in a school district which has become increasingly black while undergoing a dramatic decline in white student enrollment, it is very important that naturally integrated neighborhoods not be disturbed.

Id. at 309.

As further justification for its ruling, the court reviewed other white flight cases, noting that many have refused to order meaningless mixing of students if desegregation seemed to be working in some places and if resegregation would probably result from the proposed plans. *Id.* at 308-09.

137. 540 F.2d at 239.

138. *United States v. Board of School Comm'rs*, 368 F. Supp. 1191 (S.D. Ind. 1973); 368 F. Supp. 1223 (S.D. Ind. 1973), *rev'd in part, aff'd in part, and remanded*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975) (*Indianapolis II* and *III*); 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973) (*Indianapolis I*).

irreversible when the percentage of black pupils reaches 40 percent,¹³⁹ ordered a hearing on an interdistrict remedy.¹⁴⁰ Based on testimony at that hearing,¹⁴¹ the district court held that an Indianapolis-only solution would not desegregate the school system and ordered an interdistrict plan to be submitted.¹⁴² On appeal, however, the Seventh Circuit held that, in light of *Milliken v. Bradley*, a metropolitan-area plan was not justified without a finding that there had been an interdistrict violation.¹⁴³

On remand, because of the possibility of white flight, the district court ordered a limited interdistrict remedy that required schools throughout Marion County to have at least 15 percent black enrollment.¹⁴⁴ After several more proceedings at various levels, the Seventh Circuit once more remanded the case.¹⁴⁵ The appeals court commented:

The district court when fashioning a remedy was understandably concerned with the problem of "white flight." The [district] court was opposed to a desegregation plan limited solely to IPS because evidence showed that such a plan would accelerate the white exodus with the resultant effect of resegregating the Indianapolis schools.¹⁴⁶

The case was remanded, however, for a determination whether an interdistrict remedy could be imposed. The circuit court concluded that some of the conditions that the Supreme Court, in *Milliken*, had indicated might trigger an interdistrict remedy were present in Indianapolis.¹⁴⁷ On remand, therefore, the district court was asked to determine whether the acts or omissions that gave rise to the segregated school system were motivated by racially discriminatory purposes.¹⁴⁸ Subsequently, the district court found evidence of

139. See testimony of HEW expert Theron A. Johnson, in Marsh, *The Anatomy of a Desegregation Case: The Indianapolis Experience*, 9 IND. L. REV. 897, 923 (1976) (citing Record, vol. V, at 995-96); Gov't Exhibit 178 at 14.

140. 332 F. Supp. at 679.

141. See notes 74-78 *supra*.

142. 368 F. Supp. at 1205.

143. 503 F.2d at 80.

144. 419 F. Supp. 180, 185 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded*, 429 U.S. 1068 (1977). The Indiana legislature had recognized the power of both federal and state courts to order pupil transfers where the court has found *de jure* segregation on the part of a school corporation and a unitary school system cannot be implemented within the boundaries of that corporation. 1974 Ind. Acts, P.L. 94, § 1 p. 345; IND. CODE §§ 20-8.1-6.5-1 to 20-8.1-6.5-10 (1971).

145. 573 F.2d 400 (7th Cir. 1978).

146. *Id.* at 404.

147. *Id.* at 405-10. The Supreme Court, in *Milliken v. Bradley*, had left the door to an interdistrict remedy slightly ajar: "[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. 717, 745 (1974).

148. The Supreme Court had earlier remanded the Indianapolis case for further consideration, 429 U.S. 1068 (1977), in light of *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976).

discriminatory intent¹⁴⁹ and required the transfer of students from one school district to another.¹⁵⁰

F. Summary of the Role of White Flight Social Science Research

In the absence of a clear-cut decision from the Supreme Court on whether courts may provide a less than comprehensive desegregation plan where there is evidence that further desegregation would accelerate white flight, lower courts have taken differing positions. Some courts have indicated that a court can under no circumstances take into account the "tipping point" beyond which white flight is likely to be induced, even if it is to such a degree that desegregation would become practically impossible:¹⁵¹ under this position, social science research is irrelevant. Other courts *have* considered the effects of a desegregation order on white flight without benefit of social science research on the subject, while still other courts have heard extensive testimony based on sophisticated statistical and mathematical analyses. Where there has been disagreement among social scientists over the research findings, or over the implications to be drawn from the findings, some courts have thrown up their hands and used their own judgments, while other courts have treated the testimony as any other testimony and thus have decided which is the most credible on the basis of inexpert evaluation.

III

MAGNET SCHOOLS

The "magnet school" concept has emerged as a technique used by courts both to promote desegregation without the necessity of mandatory busing¹⁵² and to stem white flight.¹⁵³ A magnet school is one organized around a particular teaching method (for example, an emphasis on the basics and disci-

149. 456 F. Supp. 183, 189 (S.D. Ind. 1978).

150. *Id.* at 191. The court relied upon a state statute in providing a remedy. IND. CODE §§ 20-8.1-6.5-1 to 20-8.1-6.5-10 (1971).

151. See *Brunson v. Board of Trustees*, 429 F.2d 820, 824, 827 (4th Cir. 1970) (Sobeloff, J., specially concurring).

152. See, e.g., *Smiley v. Vollert*, 453 F. Supp. 463, 468 (S.D. Tex. 1978); *Morgan v. Kerrigan*, 401 F. Supp. 216, 264 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); see also Maeroff, *Magnet Schools Hailed in Integration Drive*, N.Y. Times, Jan. 21, 1979, § 1, at 26, col. 3.

Senator John Glenn sponsored a magnet school bill in Congress. Emergency School Aid Act of 1976, Pub. L. No. 94-482, § 321(a)-(c), 90 Stat. 2216-17 (codified at 20 U.S.C. §§ 1603, 1606, 1619 (1976)). In introducing the bill, Senator Glenn noted that "magnet schools offer an excellent way to work to eliminate much of ordered busing." 122 CONG. REC. S.5733 (daily ed. Apr. 14, 1976).

153. See, e.g., *Liddell v. Caldwell*, No. 72-100(C)(1) (E.D. Mo. Apr. 12, 1979); *Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1975), *remanded*, 572 F.2d 1010 (5th Cir. 1978).

pline¹⁵⁴) or special enrichment in certain areas of the curriculum (for example, mathematics and science¹⁵⁵ or the arts¹⁵⁶) that will be located so as to attract both white and minority pupils from all over the city.¹⁵⁷ The idea is to make some strategically sited schools "so attractive that students will enroll in those schools for the particular program rather than in the neighborhood school to which they would ordinarily have been assigned."¹⁵⁸ The hope is that a measure of integration will be achieved through the *voluntary* action of children and parents in response to a special educational opportunity. This section of the article examines the extent to which judges, in approving or rejecting plans that include the use of magnet schools, rely on social science research.

A. Courts That Have Rejected the Magnet School Concept

A magnet school plan to achieve voluntary desegregation proposed by the Boston school board was rejected by the federal district court, largely on the recommendation of its panel of special masters.¹⁵⁹ "[A]ny plan that places complete reliance on parental choice to desegregate Boston's schools cannot be constitutionally adopted."¹⁶⁰ The court analogized the Board's magnet

154. For example, the Looscan School in Houston and the Fundamental Academy in Cincinnati stress basic skills as well as good manners, grooming, and proper behavior. Campbell & Brandstetter, *The Magnet School Plan in Houston*, in *THE FUTURE OF BIG-CITY SCHOOLS* 134 (D. Levine & R. Havighurst eds. 1977); Waldrip, *Alternative Programs in Cincinnati*, *id.* at 99.

155. New York City's Bronx High School of Science is a prototype. Another science-oriented magnet school is the Cincinnati Academy of Mathematics and Science, described in Waldrip, *Alternative Programs in Cincinnati*, *supra* note 154, at 97-98.

156. New York City's Fiorello H. LaGuardia High School of Music and Arts is a long-established special academy that draws a citywide enrollment. In Boston, the citywide magnet English High School offers special programs in the performing arts and humanities. Daniels, *A "Magnet" School in Boston Unaffected by Racial Strife*, *The Washington Post*, Nov. 2, 1975, § E, at 2. Cincinnati's School for Creative and Performing Arts was established in 1975.

157. It should be noted in connection with magnet schools that some have expressed the concern that magnet schools may drain off the higher-achieving students in racially isolated schools, or drain off resources, aggravating the educational problems in those schools. *See, e.g.*, Referee's Report No. 13 at 8, 15, 19, *Crawford v. Board of Educ.* (Super. Ct. of Cal., Nov. 28, 1977); testimony of Dr. Kenneth Clark, *Hart v. Community Bd. of Educ.*, 383 F. Supp. 769, 772 (E.D.N.Y. 1974), note 176 *infra* & accompanying text.

158. *Evans v. Buchanan*, 416 F. Supp. 328, 435 (D. Del. 1976), *modified*, 555 F.2d 373 (3d Cir.), *cert. denied*, 434 U.S. 880 (1977).

159. The panel consisted of four members: Jacob J. Spiegel, retired Supreme Judicial Court Justice; Francis Keppel, former United States Commissioner of Education; Edward J. McCormack, Jr., former State Attorney General; and Dr. Charles V. Willie, Professor of Education at Harvard University. It submitted its report opposing the Boston School Committee's plan on March 31, 1975:

The magnet school concept as devised by the Committee is unrealistic and unworkable. Magnet programs could assist desegregation if they satisfied certain conditions. They must be limited in number, and they must be carefully placed, so that the effect of the applications they attract is to promote desegregation.

Master's Report, *quoted in* *Morgan v. Kerrigan*, 530 F.2d 401, 410 n.10 (1st Cir. 1976).

160. *Morgan v. Kerrigan*, 401 F. Supp. 216, 228 (D. Mass. 1975).

schools plan to the "freedom-of-choice" plans discredited in *Green v. New Kent County*.¹⁶¹ In affirming the district court's rejection of the school committee's plan, the court of appeals also relied substantially on the special masters' report.¹⁶²

One of the "Detroit-only" plans that was presented to the federal district judge in *Milliken v. Bradley* was an extension of Detroit's already existing magnet school program. The court rejected this plan because "any hope that it would be effective to desegregate the public schools of the City of Detroit . . . is virtually ruled out by the failure of the current model to achieve any appreciable success."¹⁶³ Obviously, in this case, the judge did not have to turn to social science research. Similarly, the Fifth Circuit court noted that magnet schools had failed to produce any significant desegregation in Austin, despite the best efforts of the school district, and thus cross-town busing was necessary.¹⁶⁴

Two magnet plans were proposed to the three-judge district court in the Wilmington case. The court heard testimony from several educators, including the Superintendent for Instruction of the Houston, Texas, schools but was unconvinced that such plans would work.

Educators who testified in favor of the plan all agreed that they hoped the plan would work but that there was no way that success could be guaranteed. They sought instead, time to try the plan.

.....

The magnet system called to the attention of the Court by the State Board, that beginning operation in Houston, shows relatively little success in actually desegregating schools: it has in fact resulted in some schools receiving an even greater minority enrollment.¹⁶⁵

161. *Id.*

162. 530 F.2d at 410 n.10.

163. *Bradley v. Milliken*, Unpublished Memorandum Decision (E.D. Mich. March 28, 1972), quoted in 484 F.2d 215, 243 (6th Cir. 1973).

164. *United States v. Texas Educ. Agency*, 532 F.2d 380, 394 & n.18 (5th Cir.), vacated and remanded, 429 U.S. 990 (1976).

165. *Evans v. Buchanan*, 416 F. Supp. 328, 345 (D. Del. 1976). The three-judge court noted that the use of magnet schools "as the sole means of system-wide desegregation is decidedly unpromising," *id.* at 346 (citing *Bradley v. Milliken*, 402 F. Supp. 1096, 1147 (E.D. Mich 1975)).

Dr. John E. Codwell, Superintendent for Instruction, Houston Independent School District, testified for the defendants. Transcript, vol. IV at 550-620. On cross examination, Dr. Codwell admitted that since Houston's magnet school went into effect there had actually been an increase in the number of minority elementary schools, *id.* at 584-85, and that projections of the data indicate that the number of all-black schools would increase in the following year. *Id.* at 616. Moreover, the Houston school district had no expectation date for the elimination of one-race schools through its magnet programs. *Id.* at 553-55.

But see the report published by the Office of Program Planning, Research and Evaluation, Houston Independent School District.

In April 1976, under the Magnet School Plan, 109 schools remained racially isolated schools [from October 1974]. The Magnet School Plan had its greatest impact at the elementary school level . . . Significantly, the reduction in racially isolated schools was such

In *Tasby v. Estes*, the district court concluded that the use of magnet schools was a preferable alternative to busing for all but grades four to eight.¹⁶⁶ The Fifth Circuit, however, remanded the case for consideration of *Swann*-type remedies: "The district court is again directed to evaluate the feasibility of adopting the *Swann* desegregation tools for these schools and to reevaluate the effectiveness of the magnet school concept."¹⁶⁷ The court of appeals referred to a statement by Dallas School Superintendent Nolan Estes that magnet schools were not effectively desegregating the system.¹⁶⁸

B. Courts That Have Utilized the Magnet School Concept

In a case involving a single junior high school in New York City,¹⁶⁹ the district judge ordered a magnet schools plan instead of the more extensive pupil reassignment plan sought by plaintiffs. The court's decision was largely based on a report by Special Master Curtis Berger, which did *not* contain substantial social science data on the success of magnet schools.¹⁷⁰ Under the school board's plan, the magnet junior high school was to have a specialized curriculum designed for gifted students, with entrance by application and selection only.¹⁷¹ The master's report recommended a special junior high school modeled after John Dewey High School, a successful magnet school within the district that stressed individualized curricula and instruction.¹⁷²

At the trial, Dr. Kenneth B. Clark, Professor of Psychology Emeritus at The City College of New York,¹⁷³ and Dr. Dan W. Dodson, Professor of Sociology at Southwestern University in Texas,¹⁷⁴ testified in opposition to the magnet school plan.¹⁷⁵ Dr. Clark objected to the idea of separating smarter

that by April 1976, fewer than one-half (47.8%) of the 228 schools in Houston Independent School District had student enrollments which were racially isolated.

1976 First Annual Magnet School Project Evaluation at 10.

This progress was noted by the district court in a case involving a "white breakaway" district from the Houston Independent School District. *Ross v. Coalition to Preserve Houston and HISD*, 457 F. Supp. 18, 22 (S.D. Tex. 1977), *aff'd in part and vacated in part*, 587 F.2d 712 (5th Cir. 1978).

166. *Tasby v. Estes*, 412 F. Supp. 1192 (N.D. Tex. 1975), *remanded*, 572 F.2d 1010 (5th Cir. 1978).

167. 572 F.2d at 1014-15.

168. The court took this statement from the plaintiffs' brief. *Id.* at 1015 n.15.

169. *Hart v. Community School Bd.*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

170. See Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

171. 383 F. Supp. at 771.

172. Berger, *supra* note 170, at 728-29.

173. Professor Clark's research was cited by the Supreme Court in *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

174. Professor Dodson testified in the Indianapolis case with regard to white flight. See note 76 *supra*.

175. 383 F. Supp. at 772-74.

children from their peers, but the judge dismissed this objection as being policy-oriented.¹⁷⁶ In commenting on Dr. Clark's testimony, the district judge quoted extensively from a report prepared for the Senate Education Subcommittee in 1972 by the U.S. Commissioner of Education. In part, the report stated: "There is an enormous individual and social cost when talent among the Nation's children and youth goes undiscovered and undeveloped. These students cannot ordinarily excel without assistance."¹⁷⁷

Professor Dodson argued that a magnet school approach is too slow and uncertain to serve as an exclusive desegregation remedy. To this the court responded that desegregation always takes time and that the master's report presented a convincing position that establishing a magnet school would be the best approach.¹⁷⁸

The Second Circuit affirmed the adoption of the magnet plan, briefly replying to the sociological criticisms of the plan. Responding to Professor Clark, the court of appeals listed the merits of an integrated magnet school:

It gives the non-white as well as the white students so enrolled a chance to widen their horizons through the interplay of ideas and the absorption of diverse sub-cultural attitudes. It can become the training center for leaders of both racial groups who may someday be the leaders, non-white as well as white of our society. Elitism is not obnoxious if it is color blind.¹⁷⁹

Objections that such a plan will not desegregate effectively, the court said, are answered by "substantial evidence" that "integrated special schools have worked in other places." It cited the special master's report, which commended programs in Providence, Rhode Island, and Boston.¹⁸⁰

C. Summary

In several cases, courts were able to draw on their own knowledge or the knowledge of witnesses to find that magnet schools, where they were conceived as the major component of a desegregation plan—that is, a substitute for busing—were not an effective tool for disestablishing a dual school system. When the court opted for a magnet school plan, the decision was not based on the results of social science research but on evidence from other communities that magnet schools had met with some success in drawing white students.

In Boston, magnet schools were included as one component in a broad-scale compulsory desegregation order "so that desegregation may as far as

176. *Id.* at 772, 773.

177. *Id.* at 772, *quoting* U.S. COMMISSIONER OF EDUCATION, EDUCATION OF THE GIFTED AND TALENTED 3-4 (report prepared for the Subcommittee on Education of the Senate Committee on Labor and Public Welfare) (Comm. Print 1972).

178. 383 F. Supp. at 773, 774.

179. 512 F.2d at 54.

180. *Id.* at 55.

possible occur through voluntary choices."¹⁸¹ The court enlisted the aid of colleges and universities as well as the city's business and cultural communities to develop programs for the magnet schools.¹⁸² The hope was that offering white parents a choice of curricula and styles of schools would lessen white flight, but not at the expense of desegregation.¹⁸³ This decision too was not based on any systematic social science research.¹⁸⁴

IV

COMPENSATORY EDUCATION

In *Milliken II*,¹⁸⁵ the Supreme Court was faced with the question of whether it was within the scope of a district court's remedial powers to require compensatory education programs, in-service training programs for teachers, and guidance and counseling programs as part of the desegregation plan.¹⁸⁶ The inclusion of these and similar educational components was challenged on the ground that such remedies exceeded the scope of the constitutional violation.¹⁸⁷ Since the constitutional violation was racially discriminatory pupil assignments, it was argued, the desegregation plan must be limited to reassignment of the pupils.¹⁸⁸

The district court had heard extensive testimony from both academic experts and school officials on each of the four major components. With regard to the first component, remedial reading, the court declared that "[t]here is no educational component more directly associated with the process of desegregation than reading."¹⁸⁹ The remedial reading program was to address the lower reading ability of black students compared to that of white students.¹⁹⁰ In-service training for teachers was also supported by substantial

181. *Morgan v. Kerrigan*, 401 F. Supp. 216, 235 (D. Mass. 1975).

182. *Id.*

183. 401 F. Supp. at 237.

184. Affidavits by social scientists on the subject of white flight were filed *after* the district court delivered its decision. The court of appeals later dismissed the affidavits as "irrelevant." *Morgan v. Kerrigan*, 530 F.2d 401, 420 n.29 (1st Cir. 1976); see notes 62-65 *supra* & accompanying text.

185. *Milliken v. Bradley*, 433 U.S. 267 (1977).

186. *Bradley v. Milliken*, 402 F. Supp. 1096, 1138-39, 1142, 1143 (E.D. Mich. 1975).

187. It should be noted that it was not the Detroit city school board, in *Milliken II*, that challenged the remedial programs ordered by the district court. These programs were under attack from the state defendants. The trial court had ordered the state to pay half the cost of the programs, a sum estimated at \$5.8 million. Brief of Petitioners at 13. The state argued that (1) the district court had no authority to order the ancillary relief, but was restricted to ordering pupil reassignment, *id.* at 21, and (2) even if the special relief was needed, the state could not be compelled to pay for it under the eleventh amendment. Brief of Petitioners at 34. The Court denied both claims. 433 U.S. at 288, 290.

188. 433 U.S. at 281.

189. 402 F. Supp. at 1138.

190. Several expert witnesses testified to the importance of the remedial reading component, including: Dr. Robert Green, Dean of the School of Urban Studies, Michigan State University

testimony, primarily from state and local school officials.¹⁹¹ The third component related to testing. There was evidence that prior testing had been racially and culturally biased,¹⁹² and thus the court ordered bias-free testing programs to be instituted.¹⁹³ The fourth component on which there was extensive testimony with regard to its importance in the desegregation process was a counseling and guidance program.¹⁹⁴

In addition to testimony on specific educational components, there was more general testimony from Detroit school officials on the value of including educational components in a desegregation plan.¹⁹⁵ None of the expert

(Brief of Respondent Board of Education for the School District of the City of Detroit, at 18; Appendix, Petition for Writ of Certiorari, at 61); Dr. Michael J. Stolee, Dean of the School of Education at the University of Wisconsin (Brief of Respondent, *supra*, at 19); and Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami (Brief of Respondent, *supra*, at 19). Dr. Foster noted that desegregation can exacerbate difficulties in educational programs as "teachers are in very dire straits on how to deal with a roomful of children that have very wide achievement ranges." *Id.*

191. Dr. Charles Philip Kearney, Associate Superintendent of Research and Administration of the Michigan Department of Education, and the State's witness, testified that in his opinion a program of in-service training was required to implement effectively a desegregation plan in Detroit. *Milliken v. Bradley*, 433 U.S. at 274 n.9.

Dr. Stuart Rankin, Assistant Superintendent for Research for the Detroit school system, emphasized the need for in-service training in the area of teacher expectations, noting:

It is true that . . . the extent to which the teacher communicates to the student that the teacher expects that the student will learn well is an important variable in how the student feels about how well he is going to learn. And in turn, that is an important factor in how well he does indeed learn.

Brief of Respondent, *supra*, at 21-22 & Appendix at 54.

Professor Margaret C. Ashworth, of Wayne State University School of Education, testified that teachers have to have specific training in terms of how they will relate to those problems that arise when black and white children are brought together in the classroom. Brief for Respondent, *supra*, Appendix at 33.

192. Among those who testified about the discriminatory effect of the previous testing programs were Dr. Kearney, *see* note 191 *supra*; Professor Ashworth, *see* note 191 *supra*; and Dr. Edward Simpkins, Dean of the School of Education, Wayne State University, Brief of Respondent, *supra*, at 23 & Appendix at 31.

193. 402 F. Supp. at 1142.

194. Dr. Kearney testified strongly in favor of "a guidance and counseling effort." 433 U.S. at 274 n.9.

Charles Wells, Assistant Superintendent of the Detroit Public Schools, testified that the counseling and guidance component was needed: "Because we feel that this counseling support is necessary to relate educationally to the adjustments required in desegregation." Brief of Respondent, *supra*, Appendix at 51. Mr. Wells also testified that a revised counseling and guidance component was needed to eradicate previous counseling practices that stereotyped black children. Brief of Respondent at 26 & Appendix at 52.

Professor Ashworth described the need for a guidance and counseling program to eliminate the effects of past segregation:

[W]hat we are saying is that in order to correct the inequalities for the students and right the wrongs of students that the person has to be retrained and that program has to be revamped . . . students have been counseled in or out of certain programs based on their race. If this had not been so the Aero Mechanics would not be 84 per cent white in a school system that is more than 70 per cent black.

Brief of Respondent, *supra*, at 26 & Appendix at 34.

195. Dr. Charles Wolfe, then Superintendent of the Detroit School District, testified: "I feel

witnesses, however, referred to any systematic social science research that showed the extent to which these programs were essential to remedy the consequences of unconstitutional segregation. Although the Detroit School Board included a list of published research studies for each of the challenged educational components in the brief submitted to the Supreme Court,¹⁹⁶ the record

that the education components are certainly a major part and a necessary part of the plan." Brief of Respondent, *supra*, Appendix at 7.

Dr. Cornelius Golightly, President of the Detroit School Board of Education, testified that "if they [educational components] are not included in the plan, you'd have simply an empty form of obeying a Court Order to move the black and white children without bringing anybody into anything." Brief of Respondent, *supra*, at Appendix 12-13. Further testimony was heard from Dr. Louis Monacel, Assistant Superintendent of Curriculum and Staff Development for the Detroit Public Schools, on the need for educational components.

196. Compendium of Writing and Studies Advocating and Supporting the Inclusion of Educational Components as Essential for an Effective Desegregation Plan, Brief for Respondent School Board at 90-98:

A. In-Service Training

1. K. CLARK, *DARK GHETTO* 132 (1965).
2. K. CLARK, *PREJUDICE AND YOUR CHILD* 37-65. (1963).
3. Gordon, *Primary Education in Urban Slums: A Mental Health Orientation*, in *THE URBAN R's* 189 (R. Dentler ed. 1967).
4. H. GERARD & N. MILLER, *SCHOOL DESEGREGATION: A LONG-TERM STUDY* (1975).
5. R. Green & W. Virag, *Integrating the Desegregated School: A Model for the In-Service Education of School Personnel* (1973) (paper presented to the National Council for Social Studies Annual Meeting).
6. M. MUELLER, *THE BRYANT-ANTHONY-RAMSEY (B-A-R) PROJECT: AN EVALUATION* (1974).
7. NATIONAL INSTITUTE OF EDUC., *DESEGREGATION OF THE MINNEAPOLIS PUBLIC SCHOOLS: A CASE STUDY* (1974).
8. U.S. OFFICE OF EDUC., *ACHIEVING EFFECTIVE DESEGREGATION* (1973).
9. South Holland School District 151, Ill., *Winning Public Support of a Desegregated School System* (1975) (Title III ESEA Progress Report, School District 151).
10. W. Virag, *Integrating the Desegregated School: Some Observations and Suggestions* (Nov. 1973) (paper presented to the National Council for Social Studies Annual Meeting).
11. University of Michigan Program for Educational Opportunity Conference Proceedings, *A Look at the Education of Teachers: Pre-Service and In-Service* 17-20, 36-41 (1974).
12. Schuler, *Desegregation and Beyond: The Educational and Legal Issues in University of Michigan Program for Educational Opportunity Proceedings and Forum Series Papers* (1975).

B. Guidance and Counseling

1. K. CLARK, *THE DARK GHETTO* 95-103 (1965).
2. *THE URBAN R's* (R. Dentler ed. 1967).
3. Hayes & Rayburn, *Black-White Dilemmas: Counselors, Busing, Desegregation*, 23 *SCH. COUNSELOR* 92-102 (1975).

C. Testing

1. NATIONAL INSTITUTE OF EDUC. DIV. OF DESEGREGATION STUDIES, *RESEGREGATION: A SECOND GENERATION SCHOOL DESEGREGATION ISSUE* (1975).
2. Miller, *Testing Black Students: Implication for Assessing Inner-City Schools*, 44 *J. NEGRO EDUC.* 406-20 (1975).
3. Mitchell, *Desegregation and Beyond: The Educational and Legal Issues*, in *University of Michigan Program for Educational Opportunity Conference Proceedings and Forum Series Papers* 76-81 (1975).

does not indicate that these studies were submitted to the district court. The State Board of Education was unable to refute the testimony of expert witnesses provided by the plaintiffs or by the Detroit School Board. Indeed, the State's own expert witness confirmed the need for educational components.¹⁹⁷

The Supreme Court's decision in *Milliken II* held that since the purpose of a remedy was to restore the victims of discriminatory conduct to the position they would have occupied in the absence of discrimination,¹⁹⁸ a desegregation plan might have to include programs to undo the inequalities caused by a dual system.¹⁹⁹ The Court concluded that the compensatory programs and other educational components mandated by the district court were "aptly tailored to remedy the consequences of the constitutional violation."²⁰⁰

Children who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream. . . .

Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.²⁰¹

The Court noted that there was "abundant evidence" in the record to support the fact that the specific educational remedies ordered by the district court were essential to correct the unconstitutional condition.²⁰²

The district court in the Wilmington case relied on *Milliken II* in fashioning an extensive program of remedial services to accompany the order for

D. Reading

1. U.S. COMM. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 162 (1967).
2. A. SMITH, A. DOWNS, & L. LACHMAN, ACHIEVING EFFECTIVE DESEGREGATION 131, 234 (1973).
3. H. GERARD & N. MILLER, SCHOOL DESEGREGATION: A LONG-TERM STUDY (1975).
4. Bazeli, *Delivery of Pupil Evaluation in the Segregated High School*, 58 HIGH SCH. J. 295 (1975).

197. Testimony of Dr. Kearney, *see* note 191 *supra*, Brief of Respondents, Appendix at 85-97. The State Board of Education, in its critique of the Detroit Board's plan, conceded that "the in-service training [and] guidance and counseling . . . components appear to deserve special emphasis" in effecting desegregation. Record, vol. 4, doc. 591, at 38-39, *quoted in* *Milliken v. Bradley*, 433 U.S. at 273.

198. 433 U.S. at 282.

199. *Id.* at 283.

200. *Id.* at 287.

201. *Id.* at 287-88.

202. *Id.* at 287.

interdistrict transportation of students.²⁰³ The court rejected the state's argument that such relief could only follow "a showing that each aspect of the necessary remedial relief is presently 'infected' with discriminatory bias."²⁰⁴ The court referred to evidence submitted by superintendents of several of the component school districts that the educational programs were necessary to overcome the effects of segregation.²⁰⁵ There was extensive testimony on the necessity of each of the proposed programs "to overcome the dual school system and the vestige effects of *de jure* segregation and to assure an effective transition to a racially nondiscriminatory unitary school system."²⁰⁶ The testimony was largely that of educators and other practitioners, and thus did not rely significantly on systematic social science research.

The Third Circuit Court of Appeals noted that the value of the educational programs ordered by the district court was not "seriously contested or controverted."²⁰⁷ The court reviewed the record to determine whether there was adequate support for the components ordered by the district court.²⁰⁸ For each of the components, the appellate court found that there was ample testimony from "local administrators and nationally-known desegregation experts."²⁰⁹ "Each area of relief ordered was well-supported in the record, and

203. *Evans v. Buchanan*, 447 F. Supp. 982, 1014 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d Cir. 1978).

The district court also relied on *Milliken II* to justify its order that the state share the costs of desegregating the school systems involved.

It is well settled that a state may be assessed for the costs of ancillary relief. *Milliken II*, *supra*. Despite a direct impact on a state treasury, a state may be ordered to make prospective payments to come into compliance with federal law. See *Edelman v. Jordan*, 415 U.S. 651 (1974). The essence of *Milliken II* is that costs should be allocated between state and local officials in an equitable fashion, without overburdening either source.

447 F. Supp. at 1038.

204. 447 F. Supp. at 1014. The state defendants raised the same objection at the court of appeals level, and the Third Circuit refused to accept it as well.

[W]e are not persuaded that *Milliken II* dictates that there be a finding that each remedial program be "infected with the discriminatory bias of a segregated school system." . . . In fact, this finding was made as to only two of the four challenged programs in *Milliken II*. . . . To read a general prescription into a decision which itself did not follow that purported prescription is a path we cannot follow.

582 F.2d 750, 769.

205. 447 F. Supp. at 1014-15 n.142. The court also noted that the Superintendent of Hillsborough County (Tampa), Florida, had testified regarding the importance of educational programs to desegregation in his district, quoting him as saying: "Well, they saved our life, we said, as far as having staff and people to work with young people." *Id.*

206. 447 F. Supp. at 1015. The programs which the court was persuaded were essential included in-service training of staff, reading and communications skills, curriculum offerings and instructional materials which reflect the cultural pluralism of the students and which are free from racial bias, guidance and counseling programs, human relations programs, and an unbiased discipline code. *Id.* at 1015-17.

207. 582 F.2d 750, 767 (3d Cir. 1978).

208. *Id.* at 770-74.

209. *Id.* at 769 n.15.

the evidence of its value and necessity in the implementation of a successful desegregation plan in Northern New Castle County remains, even at this juncture, uncontroverted by the State appellants."²¹⁰

In yet another phase of the Indianapolis case,²¹¹ the district court ordered the state defendants, as part of an interdistrict remedy, to institute an in-service teacher training program to help the teachers and staff of the transferee schools cope with the effects of desegregation, citing *Milliken II* as authority for that portion of the order.²¹²

Thus in *Milliken II* and in the few lower court cases subsequent to that decision,²¹³ the evidence for including educational components consisted largely of expert opinion testimony. Nevertheless, there may be a role for more systematic social science research on the effects of segregation and the kinds of programs that are likely to ameliorate those effects.

CONCLUSION

This article has reviewed several recent court cases that in ordering busing have taken into account the times and distances involved or the ages of the children being bused, or the potential for white flight, or the degree to which magnet schools offer a viable alternative. Also reviewed in this article are the few cases that have specifically considered the extent to which compensatory education programs and other education components can be ordered as part of a desegregation remedy. Some courts have made these decisions without considering any evidence. When evidence was introduced, however, it was largely opinion evidence of educators and practitioners. Only in the area of "white flight" has there been consideration of sophisticated social science research.

One can speculate on several reasons for this, the first being that there is little sound research on many of these issues. Much academic research has considered questions only tangential to the issues currently before the courts formulating remedies to constitutional violations. This may be an area that should be addressed by the social science community.

The second reason is that the adversary process is not always the most effective way of presenting an issue. Attorneys may not know of existing research or may not be able to obtain the most qualified witnesses. The solution to the problem involves several levels. On one level, merely improving communication between judges, lawyers, and social scientists may be of benefit.

210. *Id.* at 774.

211. See notes 66-78, 138-50 *supra*.

212. *United States v. Board of School Comm'rs*, 456 F. Supp. 183, 192 (S.D. Ind. 1978).

213. A significant number of courts had included compensatory and other education programs as part of a remedial order long before the Supreme Court's decision in *Milliken II* approved such remedies. See cases cited in *Milliken v. Bradley*, 433 U.S. 267, 283-86 (1977).

On another level, the problem may call for some major thinking about the desirability of restructuring the process by which school desegregation remedies are formulated.

Some courts have already articulated the third reason—that it is impermissible to consider certain kinds of evidence in disestablishing a dual school system. This is particularly true in the case of white flight, where some courts have held it inappropriate to allow considerations of white flight to affect the scope of a desegregation order. This is obviously a legal question and not one that can be resolved by social scientists. The question produces different answers in different circuits, since by and large the Supreme Court has yet to squarely confront the issue or to provide adequate guidelines.

Lawyers and social scientists need to know more, strive for more, and cooperate more in this “domain . . . of very subtle things”—where social scientists armed with statistics and control groups to seek objective knowledge assume adversary roles; where the legal imperative to remedy constitutional wrongs, the moral imperative of social justice, and the need for practical change to benefit particular students and particular communities are often perceived as incompatible goals.