THE UTILIZATION OF SOCIOLOGICAL DATA IN JUDICIAL DECISION-MAKING AT THE SUPREME COURT LEVEL

DISSERTATION
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* * * * *

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CHAPTER I

INTRODUCTION

The utilization of sociological data in judicial decision-making at the Supreme Court level has been a controversial topic of discussion among many scholars. This has been true most recently as a result of the decision in Brown v. Board of Education of Topeka, rendered May 17, 1954.\(^1\) In this case, the United States Supreme Court held that racial segregation in the public schools violated the equal protection of the laws clause of the Fourteenth Amendment. An important factor in the opinion in this case was the famous footnote Eleven which referred to studies made by various sociologists and psychologists who had written about the detrimental effects of segregation on the Negro child.\(^2\) The Supreme Court's use of

\(^{1}\) 347 U.S. 483 (1954).

\(^{2}\) Footnote Eleven in the Brown decision was as follows:

"K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Katinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of
this kind of sociological and psychological data became the focal point of heated controversy in the Congressional Record, scholarly journals, law books, classrooms, and at public lectures. Those opposed to the decision or the way in which it was reached alleged that it was based primarily on sociological data and had no legal basis whatsoever. A typical argument representing this viewpoint was presented by Senator James Eastland of Mississippi. He observed:

I think it was an incredible thing that the court in rendering its school-segregation decision, should cite as authorities books on psychology and sociology written by certain persons in this country. Of course, these persons are not legal authorities. They have nothing to do with the law. It is especially bad.... when the authorities cited are persons who are far to the left, who are left wingers of the first order.3

Those favoring the decision pointed out that it was decided within the context of the equal protection clause of the Fourteenth Amendment and thus had a legal basis. They emphasized that before an existing rule of law can be applied, facts have to be presented, and sometimes these facts are those brought forth by social


scientists. Jack Greenberg has pointed out that social science testimony plays an important role in shaping judge-made law in many cases, and aids the Court in ascertaining the relevant facts which have to be proved under existing rules of law.

The primary purpose of this study will be to examine the way in which the Supreme Court has utilized sociological data in the decision-making process in a variety of cases. An attempt will also be made to (1) examine some of the non-sociological factors that are employed in the judicial decision-making process, (2) determine as far as possible, the influence or impact of sociological data on the outcome of the Muller, Brown and Girard cases, and (3) predict from the available data the probable attitude of the Supreme Court and the lower Courts toward the future use of sociological data. My three hypotheses are that (1) the Supreme Court of the United States has accepted and utilized sociological data but also employs a number of non-sociological factors in the decision-making process because of the uncertainty of social science conclusions and the fear that some of these findings may be pseudo-scientific in character (2) the utilization of sociological data in the judicial decision-making process does not mean that such data are the major determinants of the outcome of a particular
case, and (3) the nature of the issue under consideration determines to a large extent the degree of influence that sociological data will have on the outcome of a case.

This topic seems worth of careful examination for three reasons. In the first place, the inclusion of sociological data in the Brown case brought about heated controversy and vehement attacks on the United States Supreme Court. Secondly, a voluminous number of scholarly articles have been written concerning the utilization of such data in the judicial decision-making process. The number of articles in itself indicates the great interest that has been aroused by this practice. Thirdly, the role of social science testimony in the decision-making process is "so unexplored that there is a dire need for careful study by the social scientist himself of the opportunities, the complexities, and the pitfalls in this new and glamorous arena...." 4

Before turning directly to this subject, consideration is first given in Chapter II to various theories of judicial decision-making. An attempt is made here to point out the myths and illusions that have been associated with judicial decision-making as well as to present a more realistic picture of the decision-making process in the United States judicial system.

In Chapter III, emphasis is placed on analyzing the use made by Mr. Justice Brandeis of sociological data at the Supreme Court level since he can be considered a pioneer advocate of the utilization of such data in the judicial decision-making process at the Supreme Court level. An examination of his philosophy of life and views concerning judges, the court, justice and democracy will be made in order to understand why data of a sociological nature were important to him in the cases that he handled at the Supreme Court level and below. This chapter will also concern itself with explaining why scholars have been incorrect in their assertion that the Muller case was actually the first one in which sociological data were introduced in the judicial decision-making process.

In Chapter IV an attempt is made to present a case analysis of the judicial use of sociological data at the Supreme Court level and below in university and public school education cases which culminated in the Brown decision. An analysis will also be made of the Girard College case since sociological data were introduced in this case and became a part of the record. In the fifth chapter an attempt is made to determine the impact or influence of

7 In Re Girard Estate, 386 Pa. 548 (1956).
sociological data on the outcome of the Brown and Girard cases and to show how the Supreme Court as a policy making body decides cases and in the process what weight might seem to be given such factors as the United States Constitution, logic, history, precedent, the spirit of the times, intuition or hunch, and the value system of the Justices who comprise the U. S. Supreme Court. In Chapter VI, an analysis is made of the judicial use of sociological data at the Supreme Court level and below in non-educational cases. It is hoped that this analysis will shed some light on the influence of such data on the decision-making process.

In Chapter VII, the varying views concerning the judicial use of sociological data is presented with particular emphasis on the 1954 decision. A special effort is made here to evaluate the arguments presented by lawyers, congressmen and social scientists on the judicial acceptability of such data. In the final chapter, an estimate is made of the probable future prospects of the judicial use of sociological data from what is already known.
CHAPTER II

AN EXAMINATION OF VARIOUS THEORIES OF JUDICIAL DECISION-MAKING

Judicial decision-making can be divided into three distinct steps after it is clear that there is a case or controversy "because of conflicts of interests among persons in the political society in the name of which the courts act,"¹ and the facts have been ascertained. The first step involves finding the law which fits the factual situation. Nineteenth century theorists believed that this first step involved nothing more than "a mechanical ascertainment of whether the facts fit the rule."²

They had great faith in the syllogistic form of judicial reasoning. According to the mechanical theory, facts would be placed into one end of a machine so to speak, and the applicable principle of law discharged from the other end. The significance of this theory was that regardless of the variety of factual situations, there was always a definite principle of law that could be applied. This theory therefore, brought certainty to the law and prohibited any subsequent judge from altering it according to his private sentiment. Sir William Blackstone observed in his Commentaries that in order to keep the scale of justice from wavering with every new judge's opinion, it was a well established rule to follow precedents where the same points appeared in litigation. This process is illustrative of the doctrine of stare decisis in action. An examination of some of the earlier cases illustrates the degree to which emphasis was placed on following precedent and the element of certainty that was expected from utilizing the mechanistic theory. Thus, in the case


of McDowell v. Oyer\(^4\) the plaintiff proved that he had a contract with Myers to serve as his agent and manage his business until Myers' death. The plaintiff was to receive a certain piece of land from Myers for the services rendered. However, Myers died without making any provisions for fulfilling his part of the contract. The question was whether the right rule had been adopted for assessing damages. The court, speaking through C. J. Black said:

This case is in every word and circumstance precisely like Jack v. McKee (9Barr. 235), in which this Court unanimously decided that one who gives his personal services on a contract to be paid in land, is entitled, if he does not get the land, to get its value. The same thing was held in Bash v. Bash....It had been previously established as the law of New York, in Burlingame v. Burlingame... and a point nearly akin to it was settled here in Rohn v. Kindt....

It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that stare decisis is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law; for law is a fixed and established rule, not depending in the slightest degree on the caprice of those who may happen to administer it.... The uncertainty of the law—an uncertainty inseparable from the nature of the science—is a great evil at best and we would aggravate it terribly if we could be blown by every wind of doctrine, holding for true today what we repudiate as false tomorrow.\(^5\)

\(^4\)21 Pa. St. 417 (1853).

\(^5\)Ibid., pp. 417-20.
This case is just one of many that placed great emphasis on the element of certainty in the law and the importance of adhering to precedents. Men like Benjamin Cardozo, Roscoe Pounds, Oliver Wendell Holmes, Louis Brandeis, Jerome Frank and Edward Levi also realized the importance of adherence to precedents or stare decisis as being the everyday working rule of law, but they were convinced that mere adherence to precedents was not enough. Cardozo expressed this position well when he said:

Their (some judges) notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him.7

These men pointed out that the practice of

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6See also the Sims' Case, 7 Cush. 285 (Mass. 1851). This case is similar to McDowell v. Oyer (1853); Baltimore and Ohio R. R. Company v. Goodman, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 57 A. L. R. 645 (1927); In Re Carrington, 1 Ch. 1 (C. A. 1931); In Re Fish 2 Ch. 83 (C. A. 1893). Depree v. State, 184 Ark. 1120, 44 S. W (2d) 1097 (1932); Geddes v. Brown, 5 Phil. 180 (Pa. Dist. Court, 1863); Doll v. Earle, 59 N. Y. 638 (1874).

depending upon deductions from existing rules for the solution of the problem of the unprovided case in novel situations was insufficient. Their approach was broader than that and took into consideration social ends and interests, values and experience because these factors are relevant in determining socially desirable goals. Cardozo was aware of this when he observed:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.  


Cardozo, The Nature of the Judicial Process, p. 112. It is interesting to note his changing view on the quest for certainty as the years advanced:

"I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience...As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty,"
In Cardozo's view the emotions, likes and dislikes, habits, convictions, instincts, prejudices and predilections that are a part of the judge who makes the decision cannot be separated from the decision-making process itself. Holding this view, it is understandable why he came also to believe that certainty in law is illusory and an objective and impersonal process of justice impossible.10

Finally, in the spirit of a truly great jurist, he recognized that law like the other social sciences, should test the soundness of its conclusions by the logic of probabilities rather than the logic of certainty...The victory is not for the partisan of an inflexible logic nor...all...precedent, but victory is for those who...fuse because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgiving, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born." pp. 166-67.


"'They do things better with logarithms....' The finished product of his work is there before his eyes with all the beauty and simplicity and inevitableness of truth. He is not harrowed by...whether the towers and piers and
these two...together...to an end as yet imperfectly discerned.11

Cardozo could not accept any claim that logic was an end in itself or the exclusive dictator in the decision-making process. Justice Oliver Wendell Holmes long ago advanced a similar view, when he said:

The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories...have had a good deal more to do than the syllogism in determining the rules by which men should be governed.12

cables will stand the stress and strain. His business is to know. If his bridge were to fall, he would go down with it in disgrace and ruin....

"So I cry out at times in rebellion, 'Why cannot I do as much, or at least something measurably as much, to bridge with my rules of law the torrents of life...?' My bridges are experiments."


"The law as experience is desperately aware of its logical insufficiencies...."

"The law is not right reason, nor the means of a good life, nor the framework of society, nor the foundation of the world, nor the harmony of the spheres. It is a technique of administering a complicated social mechanism, so complicated that it reaches at some point almost any sphere of human conduct, but often only rarely reaches it. The technique can dispense with neither logic nor experience."

The second step in judicial decision-making involves developing the ratio decidendi (the reason for the decision) from the material that has been selected. It is at this stage that legal as well as non-legal or sociological data get into the decision-making process because such data may be a part of the material selected as grounds for a given decision. For the purposes of this study, sociological data are the findings of sociologists, psychologists, social psychologists, psychiatrists, economists, political scientists, anthropologists, and scholars from other disciplines who focus their attention on men in interaction.\textsuperscript{13} Thus the concept, sociological data, as used in this study refers to the findings of representatives from any one of the above disciplines. For example, when reference is made to sociological data utilized in the decision-making process in the Brown, Sweatt and anti-trust cases, the findings of several psychologists, a sociologist, and an anthropologist and economists are being referred to. The brief which was presented to the United States Supreme Court in the Brown case also contained testimony from psychiatrists and anthropologists. However, in the famous Footnote Eleven, there was no mention of a psychiatrist or an anthropologist.

\textsuperscript{13}For a statement of the disciplines that make up the social sciences, see Clement S. Michanovich, Robert J. McNamara and William N. Tome, Glossary of Sociological Terms, (Milwaukee: The Bruce Publishing Company, 1957), p. 25.
On May 17, 1954, the United States Supreme Court utilized legal and non-legal materials in the Brown case. The Fourteenth Amendment was the legal basis for the decision. The Court, speaking through Chief Justice Warren said:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs...are...deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.14

The Court then turned to non-legal or sociological materials when it quoted with approval the finding in the Kansas Court which coincided with the opinion of Dr. Kenneth B. Clark, a psychologist. It observed:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law: for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.15

The effective implementation of step two depends to a large degree on the importance attached to non-legal materials being utilized in the judicial decision-making


process by lawyers and judges alike. Judge Charles Wyzanski has observed that data of an economic, political, sociological, and historical nature should be studied in undergraduate and law schools because these data along with information found in legislative hearings, monographs, pamphlets, and in many other places might be relevant to the issue before the court in terms of a choice that would be made from among controversial policy alternatives. Schubert in his discussion of the sociological brief that was filed by Brandeis in the Muller case has observed:

The purpose of such a "sociological" or "scientific" brief was to educate the justices, and to demonstrate that there was a sufficient basis in fact (or rather, in what was accepted at the time as being "facts") to support the legislative policy, so that the Court could not say that the legislative decision was "arbitrary" or unreasonable. Brandeis attached much importance to step two as a lawyer and Supreme Court Justice.

The third and final step in judicial decision-making involves applying the legal grounds for a decision to the facts of a given case. This step may be completely mechanical if a prior decision is unmistakably applicable to the case at hand. However, in many instances, applying the legal principle to the factual situation brings into play the "hunch" or the judge's intuition. This process might seem repugnant to nineteenth century theorists and their


notions of judicial decision-making but it definitely reflects the actuality of the judicial process. When novel and controversial cases arise, economic, political, social, and moral ideas plus fixed images concerning the end of law enter the picture. As Joseph Hutcheson has observed:

...When the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, "when there are many bags on the one side and on the other" and Judge Bridlegoose would have used his "little small dice," I, after canvassing all the available material at my command, and duly cogitating upon it, gives my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.18


"...since...every true decision, as distinct from an inference, involves an element of choice, the constraints imposed by general logic and generalizing mathematics upon decision procedures virtually rule out the study of truly creative decisions and tend to restrict decision science to mechanical and therefore dull repetitive instances of decision-making....How these processes can be remade to deal with the individual event, I of course cannot say. But unless they can, they will not handle the interesting cases of decision." p. 509.

See also Eugen Ehrlich, Fundamental Principles of the Sociology of Law, (Mass.: Harvard University Press, 1936) pp. 474-475. Aware of the many factors that enter into the judicial decision-making process, he observed:

"No serious legal historian believes today that he can present the whole law of a period of time that has been
This non-rational element of the judicial decision-making process makes it difficult to predict from rules alone because law like society must change to meet changed conditions. Edward Levi was referring to this in a way when he said that "the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law.... The rules change as the rules are applied."¹⁹ Judges still move the law, however, within the confines of a system of logically derived rules and precedents according to Levi. "A controversy as to whether the law is certain, unchanging, and expressed in rules, or uncertain, changing and only a technique for deciding specific cases misses the point.

handed down, e.g., that he can present the state of the law of home at the time of the Twelve Tables on the basis of these Twelve Tables even if they had been preserved in their entirety or the... law of the Saxon countries on the basis of the Sachsenspiegel. He is bent upon gaining a first-hand knowledge of the legal institutions on the basis of a study of the legal document. Yet even the legal document will not enable one to get a perfect picture of the law of the past.... Very often the ability to interpret a picture on an ancient vase would be of much greater value to the legal historian."


"Within the law, I say...rules guide but they do not control decision. There is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon. Why should you expect the ethics of the game to be different from the game itself?" p. 150.
It is both."\textsuperscript{20} Jerome Frank, one of the most active and outspoken members of the realist school made a particularly strong attack on nineteenth century legal thinking and pointed out why it is very difficult to predict what the Court will do in fact. In his book, \textit{Law and the Modern Mind},\textsuperscript{21} he suggests that it is impossible to predict court decisions or delimit their uncertainty. The reason for this is the impossibility of being able to predict the relevant facts in a case not yet commenced since they are what a particular judge perceives them to be. Moreover, what this judge thinks they are is dependent upon what he hears and the demeanor of witnesses. Finally, one judge's perception of the facts might be altogether different from that of another judge.

From the foregoing analysis, it should be clear that the judicial decision-making process involves many factors which make it very difficult to predict what the Court will do in fact. They range from a judge's likes, dislikes, intuition, and value system, to logic, history, precedents, the United States Constitution, sociological data, the spirit of the times, and the "accepted standards

\textsuperscript{20}Ibid., p. 3.

of right conduct." Understanding this is to understand the process in practice.
CHAPTER III

AN ANALYSIS OF BRANDEIS' USE OF SOCIOLOGICAL DATA IN JUDICIAL DECISION-MAKING AT THE SUPREME COURT LEVEL

To fully understand why Brandeis became a pioneer advocate of the utilization of sociological data in the decision-making process at the Supreme Court Level, it is necessary to examine his philosophy of life and his views concerning justice, the court, judges, and democracy. When we get a clearer picture of Brandeis as a man and of the ideas that motivated him we can more readily understand why he felt impelled to introduce data of a sociological nature in a number of important cases that he argued before the Court.

Louis Dembitz Brandeis was born in Louisville, Kentucky, on November 13, 1856.¹ His parents, Adolf and

Fredericka Dembitz Brandeis had come to America from Bohemia seeking liberty. After attending the public schools of Louisville, he traveled abroad and attended the Annen Realschule in Dresden for two years. During this period there was some suggestion that he pursue a medical or academic career in Europe, but he held to his desire to return to the United States and study law because nothing else seemed worth while to him. In 1875, at the age of eighteen, and without a college degree, he entered the Harvard Law School and worked his way through this institution by tutoring fellow students. He really had no choice in this matter, for his father's fortune had been lost in the panic of 1873. In two years, after making an outstanding scholastic record, he received his law degree. Since he had not reached his twenty-first birthday, the rule regarding age was suspended in 1877 by special vote of The Harvard Corporation to permit him to receive his degree. After having received the LL.B. degree, Brandeis completed a year of graduate study at Harvard and practiced law for approximately eight months in

St. Louis before returning to Boston where he entered a partnership with his former classmate, Samuel D. Warren, Jr. By 1890, he was one of the prominent members and leaders of the Boston bar and by 1891, had assumed the role of "people's attorney." This role was in line with his social philosophy which was expressed well in 1911.

"I have only one life to live, and it's short enough. Why waste it on things that I don't want most? And I don't want money or property most. I want to be free."  

In acting as an attorney for the people, or in any other cause, the chief characteristic of Brandeis' legal technique was an intense effort to master facts, however

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"Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect also the interests of the people."

intricate. This love for facts was recognized by Charles A. Beard when he observed:

For the copious citation of more or less dubious precedents, which are seldom exactly opposite, he has little affection, preferring, it seems, to substitute for the show of authority a display of stubborn and irreducible facts knit closely together in a pattern of thinking. A minimum of legal legerdemain and a maximum of data and logic—there is his method as revealed in his written words, which are at bottom confessions of the man.4

Brandeis himself states his interest in facts, as follows:

I have no general philosophy. All my life I have thought only in connection with the facts that came before me. It is true, however, in order to work intelligently with the facts, one must see the general direction. I think reason which leaps far ahead does very little in life. We need not so much to reason as to see and understand facts and conditions. Reason which deals with facts that may never be seems rather futile.5

In 1922, Brandeis said of a corporate director that "facts, facts, facts, are the only basis on which he can properly exercise his judgment. It is as necessary that he know


"There is no logic that is properly applicable to any of these laws except the logic of facts. The earlier attitude of judges was due to their theorizing on the subject instead of drawing inferences from the existing facts."

intimately the facts concerning the business...." He also thought that the above rule should apply to lawyers and judges as the truth would come to the light through a critical analysis of facts. Josephine Goldmark, Brandeis' sister-in-law, points up his concern for facts even more directly. He told her that what is needed for a brief is "namely, facts, published by anyone with expert knowledge of industry in its relation to women's hours of labor, such as factory inspectors, physicians, trade unions, economists, social workers."  

Chief Justice Harlan F. Stone also recognized Brandeis' love for facts when he said:

As the first step to decision, he sought complete acquaintance with the facts as the generative source of the law. By exhaustive research to discover the social and economic need and consequences of regulation of wages and hours of labor...he laid the firm foundation of those judicial decisions which for nearly a quarter of a century were to point the way for the development of the law adopted to the industrial civilization of the twentieth century.  

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Many years before his appointment to the United States Supreme Court, he was successful in convincing courts that social and economic data were as important and relevant as precedents in determining the validity of social legislation. He perceived judges as being highly specialized persons who had studied politics, economics and sociology because these disciplines are concerned with facts and pressing social problems. He also emphasized that the judge and court should be willing to protect the interests of the wealthy and poor alike because this leads to social justice. Unlike many lawyers during his era, Brandeis was especially interested in the work of social scientists. He was convinced that "a lawyer who has not studied economics and sociology is very apt to become a public enemy." His insight into certain social values was deepened by his acquaintance with the ideas of such men as Charles Crane, Charles Henderson, Thorstein Veblen and Henry Demarest Lloyd and he fought diligently for a better day by assailing abuses such as low wages, oppression of employees by employers and immoderate hours of labor. All of these evils, in his estimation, were undermining the basic foundations of popular

Although Brandeis has been categorized as a liberal, he differed from fellow liberals during the progressive era in several respects. He was concerned with details and concrete facts rather than with generalities. Secondly, he was concerned with getting needed social legislation passed. His pragmatic perspective was indicative of the era in which he lived. Max Lerner was aware of this when he observed:

The genuinely formative years of Mr. Justice Brandeis' mind fell in the "social justice" period of American history, in the latter part of the nineties and the first decade of the twentieth century. They were years which witnessed on the one hand the rise of powerful vested interests acting under a laissez faire philosophy of government, and on the other hand such movements as populism, muckraking, truck-busting and the new "freedom." The vigor of individual enterprise which had opened a continent had grown barbaric and piratical in the exploiting of it....

Brandeis, like Pound and Frank was a proponent of sociological jurisprudence and greatly opposed to the application of a narrow mechanical jurisprudence which gave first priority to abstract logic and legal precedents. Learned Hand, the distinguished judge of the U. S. Court of Appeals, in his memorial tribute to Justice Brandeis,

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describes this facet of his thinking as follows:

...I mean to choose a single thread from all the rest, which I venture to believe leads to the heart and kernel of his thinking, and— at least at this present— to the best of his teaching. I mean what I shall describe as his hatred of the mechanization of life. This he carried far indeed; as to it he lived at odds with much of the movement of his time.¹³

In Brandeis' view a mechanical application of traditional rules did not give adequate consideration to the principle of growth and the need for adjustment to meet changing conditions. He also had a very strong view concerning democracy in practice. He was convinced that the citizenry should understand industrial, commercial and financial problems because they become political questions in the final analysis. He expressed his position in the following words:

...The end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy. That means that the problems of a trade should be no longer the problems of the employer alone. The problems of his business, and it is not the employer's business alone, are the problems of all in it. The union cannot shift upon the employer the responsibility for conditions, nor can the employer insist upon determining, according to his will, the conditions which shall exist. The problems which exist are the problems of the trade; they are the problems of employer and the employee... There must be a division not only of profits, but a division also of responsibilities.¹⁴

¹⁴Mason, Brandeis: Lawyer and Judge..., p. 55.
After this short sampling of Brandeis' views, attention will now be turned to a case analysis of his use of sociological data in judicial decision-making at the Supreme Court level. Before undertaking this task however, it may be well to briefly discuss the nature of the "Brandeis brief" and the data that was included in it. Marion Doro has compiled a typical "brief" outline which illustrates Brandeis' style. Using hours of labor for women as an example, she has presented an excellent model of the components of the many briefs prepared by him and Josephine Goldmark. Her model is as follows:

Part First

I. Legal Argument
   (Varying from two to forty pages, citing rules from supporting cases.)

Part Second

II. Legislation Restricting Hours of Work for Women

   A. American Legislation
      1. List of states having such legislation

   B. Foreign Legislation
      1. List of countries having such legislation

   C. Summary of combined experience of above legislation

III. The World's Experience upon which the Legislation limiting the Hours of Work for Women is based

   A. The Dangers of Long Hours
      1. Causes
         a. physical difference between men and women
         b. nature of industrial work
B. Bad Effects of Long Hours on Health
   1. General injuries
   2. Problem of fatigue
   3. Specific evil effects on childbirth

C. Bad Effects of Long Hours on Safety

D. Bad Effects of Long Hours on Morals

E. Bad Effects of Long Hours on General Welfare

IV. Shorter Hours the only Possible Protection

V. Benefits of Shorter Hours
   A. Good Effect on Individual
      1. Health
      2. Morals
      3. Home life
   
   B. Good Effect on General Welfare

IV. Economic Aspects of Short Hours
   A. Effect on Output
      1. Increases efficiency
      2. Improves product
   
   B. Aids Regularity of Employment

C. Widens Job Opportunities for Women

VII. Uniformity of Restriction Necessary
   A. Overtime Dangerous to Health

   B. Essential to Enforcement

   C. Necessary for Just Application

VIII. Reasonableness of Short Hours
   A. Opinions of Physicians

   B. Opinions of Employers

   C. Opinions of Employees

IX. Conclusion

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Brandeis presented his first sociological brief to the United States Supreme Court in 1908 in the case of Muller v. Oregon, which involved the constitutionality of an act passed by the Oregon legislature in 1903. The act prohibited the employment of females in factories, laundries and mechanical establishments for more than ten hours during any one day and made a violation of the ten hour day provision a misdemeanor. The Oregon Supreme Court held the 1903 statute constitutional and affirmed the defendant's conviction for violating it. The case reached the United States Supreme Court on a writ of error. Brandeis, who appeared in this case as counsel for the plaintiff presented a brief that contained material which attempted to show how the male and female differed in terms of body structure and in the amount of physical strength. Justice Brewer, speaking for the Court, referred to Brandeis' sociological brief in the following words:

> It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinions from other judicial sources. In the brief filed by Mr. Louis D. Brandeis...is a very copious collection of all these matters....

> ...The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional questions presented to us for determination, yet they are significant of a

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16 208 U. S. 412 (1908).
widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.

...The limitations which this statute places upon her contractual powers, upon her right to agree with her employers as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rests upon her.17

It is interesting to note that two pages of Brandeis' brief contained his legal argument, while approximately one hundred pages contained social science findings concerning the relationship of long hours of work and poor health.18 In these pages he used extracts from over ninety reports of committees, bureaus of statistics, inspectors of factories in the United States and Europe, which pointed out the effects of long hours of work upon women's health. The brief also included similar reports which showed the benefits of short hours of labor.19 In discussing the

17 Ibid., pp. 419-423.
18 Mason, Brandeis: Lawyer and Judge...., p. 108.
19 This brief was prepared by Mr. Brandeis with the assistance of Josephine Goldmark. It has been reprinted by
effects of long hours of labor, Brandeis said "...if strain or labor carried on after fatigue has set in is proved more exhausting than simple work...then the need for the shorter workday rests upon a scientific basis. Science makes out its case for the short day in industry." In this brief Brandeis would seem to be trying to help the court in its decision-making process by introducing materials that he considered to be "scientifically" demonstrable. By implication, the introduction of these materials seems to suggest that he considered it his duty to provide materials to the Court that they would not otherwise be able to get. If this was his view, it would seem that he had the support of other students of the judicial process.

Thus in 1913, Roscoe Pound expresses the view that courts were not nearly as fit as counsel and legislative bodies to investigate complex social and economic conditions because of lack of facilities. On this point he said:

Except as counsel furnish material in their printed arguments, the Court has no facilities for the National Consumers' League under the title, Women In Industry. It has also been reprinted in Josephine Goldmark's Fatigue and Efficiency (New York: William F. Fell Company, 1912), Part II. Part II, which runs to 591 pages and is entitled "The World's Experience Upon Which Legislation Limiting the Hours of Labor for Women is Based," consists of material contained in the first four briefs submitted to the Courts by Brandeis and Josephine Goldmark. Moreover, the first 302 pages of the book deal with fatigue, physical overstrain in industry, regulation of the problem by legislation, and the history as well as the defense of labor laws in Court.

obtaining knowledge of social facts comparable to
hearings before committees, testimony of specialists
who have conducted detailed investigations, and other
means of the sort available to the legislature.\textsuperscript{21}

In order to better understand why Brandeis prepared
sociological briefs supporting restrictive labor legis-
lation, it is necessary to describe the period in which he
lived. During the first years of his law practice (1878-
1890) the economic and social life of America was changing
rapidly. As Mason has pointed out:

Free land had been largely absorbed, the frontier
closed; agriculture had ceased to be the norm of Ameri-
can life. This new era spelled industrialism. The
census of 1890 showed an enormous increase in manu-
factured articles since 1870, though manufacture had
outstripped agriculture even earlier than that; the
product had greatly increased in value, many more
factory workers were employed. The drift from rural
to urban regions was more pronounced; corporate forms
of industrial organization were rapidly displacing co-
partnership....While the whole pattern of American
life was undergoing a fundamental change, promoters,
exploiters, monopolists, and trust magnates pushed
aggressively to places of power in American economic
society.\textsuperscript{22}

The point to be emphasized is that along with the change
from an agricultural to an industrial society came many
abuses and legislation was needed to deal with the problems
that came with the transition. It should not be forgotten,
that although the Muller case was not actually the first

\textsuperscript{21}Roscoe Pound, "Legislation As A Social Function,"

\textsuperscript{22}Mason, Brandeis: Lawyer and Judge...., p. 88.
Also see Richard Hofstadter, The Age of Reform (New York:
time that the Court had used sociological data, it was the first case in which significant and dramatic recognition was given to the inclusion of such data in the decision-making process. Even before 1908, judges of the U. S. Supreme Court and judges at even other levels were eventually required to take into account many factors beyond logic and adherence to precedent. For example, it might be said that the judicial utilization of sociological data has always been implicit if not clearly expressed in the Court's treatment of Negroes.

After the Muller decision, the sociological brief was used on numerous occasions, and Brandeis in case after case compiled data on labor, fatigue, health and economic productivity for the primary purpose of showing the social need for the legislation he was supporting. Thus in 1911, in the case of Ex Parte Anna Hawley, the attorney-general of Ohio invited Brandeis to assist in defending a statute which regulated the working hours for women. Brandeis compiled and successfully presented a brief to the Ohio Supreme Court. This case reached the United States Supreme Court by appeal and again Brandeis filed a brief and participated in the oral argument. In the case of Hawley

the Ohio statute was upheld without an opinion.

In the case of Stettler v. O'Hara, Brandeis utilized approximately three pages to cover the legal points, and three hundred and ninety pages to show that the legislation was reasonable and related to health, safety and welfare. This case involved an Oregon act which established an Industrial Welfare Commission in 1913 with the power to provide for the fixing of minimum wages and maximum hours of labor for women. Brandeis once again filed a brief at the Commission's request which supported the legislation. The statute was upheld by a unanimous vote of the Oregon Supreme Court. However, the United States Supreme Court split four-to-four on its constitutionality. Brandeis who was now on the U. S. Supreme Court by appointment of Woodrow Wilson did not vote because after having taken part in preparing the brief, was unable to sit as a judge.

In Morehead v. New York ex. rel Tipaldo, the U. S. Supreme Court invalidated a New York minimum wage

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24 232 U. S. 719 (1914).
Mason, Brandeis: Lawyer and Judge...., p. 111. This brief was reprinted by the National Consumer's League.
27 298 U. S. 587 (1936). See also Basley v. McLaughlin, 236 U. S. 385 (1915). Brandeis and the National Consumers' League were convinced that sociological data should be considered relevant to the decision-making process.
law for women on the ground that it interfered with the
liberty of contract as guaranteed by the Fourteenth Amend-
ment's due process clause. A Brandeis type brief was pre-
pared and presented to the Court by the National Con-
sumers' League. The nature of the information presented
to the Court on behalf of the petitioner was as follows:

The social and economic circumstances surround-
ing the employment of women, affected as they are by
physiological considerations, have repeatedly been that
women are in a class by themselves, as a special con-
cern of the state. Their health and welfare in the
performance of physical labor so fundamentally affect
the public welfare and are of such public concern that
legislation designed for their special protection has
been sustained even when like legislation for men
might not be. Muller v. Oregon....

This Brandeis type argument failed to impress the Court
which did not distinguish the Tipaldo case in principle
from the Adkins decision. However, Chief Justice Hughes
dissenting, adopted the position taken by the petitioner
which was in line with the data presented in the brief.
He observed:

In the factual brief, statistics are presented
showing the increasing number of wage earning women,
and that women are in industry and in other fields of
employment because they must support themselves and
their dependents. Data are submitted, from reports
of the Women's Bureau of The United States Department
of Labor, showing such discrepancies and variations
in wages paid for identical work as to indicate
that no relationship exists between the value of
the services rendered and the wages paid.

28 Ibid., p. 589.
29 Ibid., pp. 626-627.
The following year, the Tipaldo and Adkins decisions were overruled in the case of *West Coast Hotel v. Parrish*. The majority opinion pointed out that the Constitution does not recognize an absolute liberty. Thus the states were permitted to regulate wages and hours without offending "freedom of contract."

Brandeis also presented sociological data in cases that never reached the Supreme Court. In 1907, in the case of *People v. Williams*, the New York Court of Appeals held invalid a New York statute that prohibited minors under the age of eighteen years, and females, from working in any factory before six o'clock in the morning or for more than ten hours in any one day. There was, however, no social science data presented in support of the legislation which showed the danger of night work to women in factories. Judge Gray in speaking for the Court said:

> I think that the Legislature, in preventing the employment of an adult woman in a factory, and in prohibiting her to work therein before six o'clock in the morning, or after nine o'clock in the evening, has overstepped the limits set by the Constitution of the state to the exercise of the power to interfere with the rights of citizens....Under our laws men and women now stand alike in their constitutional rights, and there is no warrant for making any

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30. 300 U. S. 379 (1937).

31. 189 New York 131, 135, 81 N. E. 778 (1907).
discrimination between them with respect to the liberty of person or of contract. I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful. It might be observed that working in a factory in the night hours is not the only situation of menace to the working woman; but such occupation is arbitrarily debarred her.

The New York legislature, before enacting a second measure, made a detailed survey of the facts on which the new statute was to be based. Brandeis presented sociological data which showed the facts against night work for females when the constitutionality of the act was challenged in 1915. The factual data brought forth by him, covered more than four hundred pages, eighteen of which were used to list the sources along. It is interesting to note that Brandeis presented many facts which were available in 1907, but were not brought forth by counsel in the Williams case. The New York Court of Appeals sustained the act. Speaking for the Court, Judge Hiscock emphasized the importance of factual data which supported certain legislation when he observed:

While theoretically we may (in 1907) have been able to take judicial notice of some of the facts and some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential....

32 Ibid., pp. 779-80.
33 Mason, Brandeis: Lawyer and Judge...., p. 112.
So, as it seems to me, in view of the incomplete manner in which the important question underlying this statute—the danger to women of night work in factories—was presented to us in the Williams case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have developed by study and investigation during the years which have intervened since the Williams decision was made....Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission.34

In 1909, the Illinois legislature passed a statute similar to the one that was involved in the Muller case. It prohibited the employment of females in mechanical establishments for more than ten hours during any one day. The manufacturer argued that a woman who had worked for him for thirty-five years could not earn a living wage unless employed for more than ten hours a day. Brandeis won the case after appearing in defense of the legislation.35 The Supreme Court of Illinois said in referring to the Muller case:

...the general consensus of opinion, not only in this country but in the civilized countries of Europe, is


35 Ritchie v. Wayman, 244 Illinois 509, 91 N. E. 695 (1910). This decision actually overruled Ritchie v. People, 155 Illinois 98, 40 N. E. 454 (1895). It is interesting to note that in the first Ritchie case, the Court held a
that a working day of not more than ten hours for women is justified for the following reasons:

(1) the physical organization of women;
(2) her maternal functions;
(3) the rearing and education of children;
(4) the maintenance of the home;

and these conditions are so far matters of general knowledge that the courts will take judicial cognizance of their existence. We are of the opinion that a statute prohibiting women from working in a mechanical establishment or factory or laundry more than ten hours in any one day is not an arbitrary or unreasonable limitation upon the right of women to contract...We are of the opinion that the act of 1909 is constitutional in all of its particulars and as an entirety.36

It should be noted that Brandeis' effort to generalize concerning the relationship between health and long hours of work does not reflect the scientific method of inquiry in its highest stage of development. In the first place, he did not specify the range of validity of his conclusions. In other words, Brandeis failed to specify the degree to which the hazards of long hours of work in foreign countries were applicable to the working class in the United States. Secondly, his method of collecting data was unscientific because he collected information which supported his position without questioning its validity as limitation of working hours to be arbitrary and unreasonable. However, in the second Ritchie case the Court considered the Muller case and held the limitation of hours not to be arbitrary and unreasonable.

36 Ibid., p. 701. Also see People v. Elerding, 254 Illinois 579, 98 N. E. 982 (1912); Ex Parte Miller, 162 Calif. 687, 124 Pac. 427 (1912); Gainer v. Dohrman, 5 Fed. Number 10, 990 Sup. Court of California (1924).
long as it was found in statutes, reports and labor statistics. He also failed to analyze the data to distinguish facts from opinions. Walter Wilcox recognized the shortcoming of the "Brandeis brief" as early as 1913 when he wrote:

It might be said that the need for statistics is not clear, that the brilliant work of Mr. Brandeis in defending the Oregon ten-hour law for women, which illustrates just what is needed, is far from statistical. Such work was probably the best that could be done under the conditions, but in many fields it could not be duplicated and like any collection of opinions it is open to challenge as mere opinion. Even expert opinion is a poor substitute for an inductive and exhaustive study of the fact.37

Up to this point, an attempt has been made to examine Brandeis' presentation and the Supreme Court's utilization of sociological data in the decision-making process and much has been said of Brandeis' sociological brief in the Muller case. This case is important because (1) it has been stated that sociological data were first utilized in this case and (2) many writers have emphasized that such data had a decisive influence on its outcome. A close analysis however, will show that the impact or influence of sociological data on the outcome of this particular case has been exaggerated. Although the "Brandeis brief" received very favorable comment and praise in the opinion

of the Muller case, it cannot be overlooked that there is language elsewhere which justified a ten hour law for women. There is also language throughout the opinion which suggests that the statute would have been sustained without the presentation and support of sociological data. For example, the Court, speaking through Justice Brewer said:

The legislation and opinions referred to in the margin may not be, technically speaking, authorities and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil....A widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.38

It is reasonable to conclude that this suggests that the decision was based on common knowledge rather than on the sociological data obtained from Brandeis' brief. It can also be argued that the data were important or influential only because they happen to have coincided with the social theory held by the justices during this period. The theory during this time was that certain restraints should be placed on the liberty guaranteed by the due process clause of the Fourteenth Amendment especially when the issue involved protective labor legislation for

38208 U. S. 412, 420-21 (1908).
women. Mason expressed this viewpoint when he said:

[When] facts however stubborn, are confronted by a "stubborn theory," it is the latter that usually wins. When dogmas and doctrines control judges' thought, a formidable barrier is set up against the entrance of facts into the judicial mind. "Facts," as Professor Morris R. Cohen has well said, "are more pliable than stubborn theories. Facts can be ignored, explained away, or denied. But theories are mental habits which cannot be changed at will." 39

It is the author's opinion that the theoretical orientation of judges is a result of their value system. Thus when sociological data support or coincide with their value system they are looked upon with favor in the opinion. However, when sociological data are presented to the Court in a most convincing manner but do not coincide with what the judges believe, the preconceived theory held by the majority of Justices may very well prevail over the data. An excellent example of this can be found in the Adkins case. In this case Felix Frankfurter and Miss Mary Dewson presented the largest brief ever produced by the National Consumers' League. However, the decision was against them. The point to be emphasized is the fact that the data presented did not coincide or support the Justices' theoretical orientation. Thus, its presence proved to be ineffective in terms of influencing a decision favoring its position. Justice Sutherland made this clear

39 Mason, Brandeis: Lawyer and Judge...., p. 114.
in the majority opinion when he said:

We have...been furnished with a large number of printed opinions approving the policy of the minimum wage, and our own reading has disclosed a large number to the contrary. These are all proper enough for the consideration of the law-making bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide. The elucidation of that question cannot be aided by counting heads. It is said that great benefits have resulted from the operation of such statutes, not alone in the District of Columbia but in the several states, where they have been in force. A mass of reports, opinions of special observers and students of the subject, and the like, has been brought before us in support of this statement, all of which we have found interesting but only mildly persuasive.40

It is reasonable to suppose that if sociological data are presented in an impressive and convincing manner by counsel defending legislative, and less convincing data of the same nature presented by opposing counsel to show that the legislation should be declared unconstitutional, the latter would be given favorable comment in the opinion if it supported or coincided with the value system of the majority of Justices. Moreover, this data might even influence the outcome of a particular case. However, this becomes a fact only if the Justices admit it in the opinion of a case or some subsequent communication. The former data might be accepted with favorable comment but to no avail in influencing the outcome of a favorable

40261 U. S. 525, 559-60 (1923).
decision. This interpretation should be kept in mind and applied to the remaining cases that will be analyzed and in which sociological data are presented.

Brandeis was without doubt a mature and realistic jurist. An important part of his methodology was the assembly of a vast body of facts which would presumably demonstrate the need for the particular social legislation which he supported. Mason has described the Brandeis quality well in the following words:

As a member of the Supreme Court, Mr. Justice Brandeis has been and is significant because certain preeminent qualities of mind enable him to bring the law into vital relationship with the social possibilities of industry in our own day. He sees beyond the recorded mass of economic and statistical fact, to the basic social and economic consequences, to philosophic implications for the future.41

41 Mason, Brandeis: Lawyer and Judge..., p. 189.
CHAPTER IV

CASE ANALYSIS OF THE JUDICIAL USE OF SOCIOLOGICAL DATA AT THE SUPREME COURT LEVEL IN PROFESSIONAL AND PUBLIC SCHOOL EDUCATION CASES

Before discussing at length the judicial use of sociological data in the Brown case, it may be well to look at the case of Sweatt v. Painter,¹ which was decided in 1950, and was the very first of the cases having to do with education which contained testimony of a sociological nature. Unlike the Brown case which dealt with segregated public school education, the Sweatt case involved segregated professional education in a state university. A Negro had been denied admission to the University of Texas Law School solely because of race, and was offered, but refused enrollment in a newly established law school for Negroes. A Texas trial court held that the opportunities for the study of law for Negroes were substantially equal to those offered at the University of Texas. The United States Supreme Court disagreed and held that equal educational opportunities

could not be provided in a segregated law school. It pointed out that there were qualities which were incapable of objective measurement, but which made for greatness in a law school. "Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." \(^2\) The Court also emphasized that the University of Texas Law School had a faculty of sixteen full-time and three part-time professors, and a library containing over 65,000 volumes. On the other hand, the law school for Negroes had no independent faculty and the teaching responsibilities were to be performed by members of the University of Texas Law School faculty. The Negro law school lacked accreditation, a full-time librarian and only a few of the 10,000 volumes had arrived which had been ordered for the library. It concluded from the above differences in the two schools that the latter was markedly inferior and that Sweatt had been denied equal protection under the law.

Professor Redfield, a lawyer, Chairman of the Anthropology Department, and former Dean of the Social Sciences at the University of Chicago, presented testimony in the lower court on behalf of the plaintiff. This testimony became a part of the record and centered around the

\(^2\)Ibid., p. 634.
question of whether or not there were differences in the intellectual capacity to learn between Negroes and whites. His opinion was expressed in these words:

The conclusion... to which I come, is differences in intellectual capacity or inability to learn have not been shown to exist as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice.\(^3\)

To the question regarding the effects of segregation on the student, a subject later amplified in the public school cases, Redfield replied:

My opinion is that segregation has effects on the student which are unfavorable to the full realization of the objectives of education. First,—for a number of reasons, perhaps I will try to distinguish.

Speaking first with regard to the student I would say that in the first place it prevents the student from the full, effective and economical coming to understand the nature and capacity of the group from which he is segregated. My comment, therefore, applies to both whites and Negroes, and as one of the objectives of education is the full and sympathetic understanding of the principal groups in the system in which the individual is to function as a citizen, this result which I have just stated is unfortunate.

In the second place, I would say that...segregation has an unfortunate effect on the student,... [and] has an unfortunate effect on the general community, in that it intensifies suspicion and distrust between Negroes and whites, and suspicion and distrust are not favorable conditions either for the acquisition and conduct of an education, or for the discharge of the duties of a citizen.\(^4\)

\(^3\)Record, Sweatt v. Painter, pp. 193-194.

\(^4\)Ibid., p. 194.
Following the Sweatt case, sociological data were next presented in Brown v. Board of Education of Topeka, which was a joinder of four cases arising in Kansas, Virginia, Delaware, and South Carolina. Although these cases arose at the district court level, they are important because the sociological data presented in them are similar and representative of the data presented in the appellants' brief to the United States Supreme Court in the Brown case. The District of Columbia case, which was actually the fifth school case, differed from the other four in that it lacked sociological data. The only argument presented was a legal one which was based on the due process clause of the Fifth Amendment. An analysis of three of these four cases will illustrate the nature of the sociological data presented to the courts.

In the South Carolina case, Negro parents and their children petitioned the Clarendon County board of trustees for educational facilities equal to those provided for whites. In the course of the case, Kenneth Clark, Professor of Psychology at the City College of New York, presented a testimony concerning a doll test which had been


given to Negro children at the segregated Scotts' Branch Elementary School in South Carolina. It proceeded as follows:

Clark: I made these tests on Thursday and Friday of this past week at your request, and I presented it to children in the Scotts' Branch Elementary School, concentrating particularly on the elementary group. I used these methods which I told you about -- the Negro and white dolls--which were identical in every respect save skin color. And, I presented them with a sheet of paper on which there were these drawings of dolls, and I asked them to show me the doll--may I read from these notes?

Judge Waring: You may refresh your recollection.

Clark: Thank you. I presented these dolls to them and I asked them the following questions in the following order: "Show me the doll that you like best or that you'd like to play with," "Show me the doll that is the 'nice' doll," "Show me the doll that looks 'bad','" and then the following questions also: "Give me the doll that looks like a colored child." "Give me the doll that looks like a Negro child," and "Give me the doll that looks like you."

By Mr. Carter:

Question: "Like you?"

Answer: "Like you?" That was the final question, and you can see why. I wanted to get the child's free expression of his opinions and feelings before I had him identified with one of these two dolls. I found that of the children between the ages of six and nine whom I tested, which were a total of sixteen in number, that ten of those children chose the white doll as their preference; the doll which they liked best. Ten of them also considered the white doll a "Nice" doll. And, I think you have to keep in mind that these two dolls are
absolutely identical in every respect except skin color. Eleven of these sixteen children chose the brown doll as the doll which looked "bad." This is consistent with previous results which we have obtained testing over three hundred children, and we interpret it to mean that the Negro child accepts as early as six, seven or eight the negative stereotypes about his own group. And, this result was confirmed in Clarendon County where we found eleven out of sixteen children picking the brown doll as looking "bad," when children, in spite of their own feelings—negative feelings—about the brown doll, were eventually required on the last question to identify themselves with this doll which they considered as being undesirable or negative. It may also interest you to know that only one of these children, between six and nine, dared to choose the white doll as looking bad. The difference between eleven and sixteen was in terms of children who refused to make any choice at all and the children were always free not to make a choice. They were not forced to make a choice. These choices represent the children's spontaneous and free reactions to this experimental situation. Nine of these sixteen children considered the white doll as having the qualities of a nice doll. To show you that that was not due to some artificial or accidental set of circumstances, the following results are important. Every single child, when asked to pick the doll that looked like the white child, made the correct choice. All sixteen of the sixteen picked that doll. Every single child, when asked to pick the doll that was like the colored child, every one of them picked the brown doll. My opinion is that a fundamental effect of segregation is basic confusion in the individuals and their concepts about themselves conflict- ing in their self images. That seemed to be supported by the results of these sixteen children, all of them knowing which of those dolls were white and which one was brown. Seven of them, when asked to pick the doll that was like themselves;
seven of them picked the white doll. This must be seen as a concrete illustration of the degree to which the pleasures which these children sense against being brown forced them to evade reality—to escape the reality which seems too overburdening or too threatening to them. This is clearly illustrated by a number of these youngsters who, when asked to color themselves—For example, I had a young girl, a dark brown child of seven, who was so dark brown that she was almost black. When she was asked to color herself, she was one of the few children who picked a flesh color, pink, to color herself. When asked to color a little boy, the color she liked little boys to be, she looked all around the twenty-four crayons and picked up a white crayon and looked up at me with a shy smile and began to color. She said, "Well, this doesn't show." So, she pressed a little harder and began to color in order to get the white crayon to show. These are the kinds of results which I obtained in Clarendon County.

Question: Well, as a result of your tests, what conclusions have you reached, Mr. Clark, with respect to the infant plaintiffs involved in this case?

Clark: The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

Question: Is that the type of injury which in your opinion would be enduring or lasting?

Clark: I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form.
and in the way it manifests itself.  

In the Virginia trial, the results of the doll test were presented again but the defense was not interested in concentrating on their validity. Instead, defense counsel cross-examined Professor Clark concerning the basic purposes of the NAACP. The Virginia school board also offered the testimony of three expert witnesses who agreed that school segregation had injurious effects on the personality of the Negro child. A typical

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8 Number 2 Briggs v. Elliott, Transcript of Record, pp. 87-90. Card #3669. Also see Kenneth B. Clark, Prejudice and Your Child (Boston: The Beacon Press, 1955), p. 4. In this book, Clark seemed to have been consistent with the testimony presented by him in the South Carolina case. He observed:

"When white American parents demand that a school board maintain separate schools for white and Negro children, and when some of these parents encourage their children to refuse to attend a school to which Negro students have been recently admitted, they do so not only as an expression of their own racial feeling but also in the belief that they are protecting their children. If these parents understood that, far from protecting their children, acts of this type distort and damage the core of their children's personalities, they would not act this way. If they understood that the opportunity for a child to meet and know other children of different races, religions, and cultures is beneficial and not detrimental; that it contributes to social competence and confidence—then they would demand, in the name of their children, non-segregated public education."

9 Number 4, Davis v. County School Board (The Va. Case), Transcript of Record, pp. 285-86, 289.

10 Dr. William Kelly, a psychiatrist; John Buck, a psychologist and K. B. Clark's own former teacher, Dr. Henry Garrett of Columbia University.
example of their testimony was presented by Dr. Buck:

**Question:** ...from your knowledge of conditions, do you believe that in Virginia, today, by Court decree it would be possible for the Negro child to obtain general acceptance in the schools, you were talking about, on the part of the white teachers and the white students.

**Dr. Buck:** I do not. I am sorry to say, I don't.

**Question:** What would be in your opinion, the effect of that on the Negro child as compared to the situation he is in now, where he is in school with his own group.

**Dr. Buck:** I think it would be fair to say, here, that we are probably faced with the choice of the lesser of two evils. I feel that as an abstract idea, segregation is bad.

In the examination of the group in Madison Heights, for example—I present this for what it is worth—we have not been able to analyze the data fully, but from a survey, superficially it would appear that the Negro children in that school are somewhat more maladjusted than white children. Objective evidence in this respect is very difficult to obtain at this point....

**Question:** ...is it your opinion that voluntary segregation would have more serious effects on the personality of the average Negro child than what now exists, that is, segregation under Virginia law?

**Dr. Buck:** ...I should think that voluntary segregation might well have a very definite inferiority feeling involved because the Negro child who is separated by his own parents from the community, as such, would certainly feel that separation more acutely than separation which is a statutory thing. 11

11Number 4, Davis v. County School Board, Transcript of Record, pp. 537-38, 543-44.
In the Delaware case, the plaintiffs produced as
witnesses various scholars in education, sociology, psy-
chology, psychiatry, and anthropology. The opposition did
not present any witnesses. A typical example of the testi-
mony coming from these scholars was presented by Dr. Maur-
ice E. Thomasson, an educational psychologist and acting
President of Delaware State College:

Answer: My opinion is that in a segregated school-
education would not be as good as it can
be in a non-segrated school all other
things being equal.

Question: As to your answer do you wish to state
your reasons for that opinion?

Answer: Yes, I would be glad to. There are cer-
tain things that an educator works toward
in his work, and he judges his school set-
up as being good or not good as it promotes
or does not promote or interfere with or
does not interfere with what he seeks to
accomplish. Now, one is the production
of a good person.

Question: A good what?

Answer: A good person, a good individual. I don't
think that in a segregated situation it is
possible to produce a person who is fully
normal, completely satisfactory. There
are some conditions inherent in the segre-
gated situation that just simply warp a
person's personality. Now, for one thing,
a person who goes to school in a segregated
school goes to that school by virtue of
the fact that the State of which he is a
part has said that he is inferior. That
is, the State has embodied that in the law,
and the law has been sustained by the courts.
He is told as he goes there in the school
segregated by law that he is inferior.
Question: Doctor, do you mean to say that the law expressly states that a school system set apart for the compulsory attendance of persons of a certain color is inferior, or do you mean that that is the implication of such a law?

Answer: It is the implication. I can see no reason for setting up a separate system of schools unless the persons who set the schools up think that for some reason or other the persons designated for that school are not quite fit to go to the regular schools.12

The four trial courts which heard the social science testimony split two-to-two in their acceptance of it. The Virginia and South Carolina courts dismissed the testimony as unproved and irrelevant while the Delaware and Kansas Courts accepted it. The two former courts felt that the opinions of the expert witnesses couldn't override an evaluation of the relationships existing between the races in a given locale and the tensions that could result from desegregating the public schools. They also pointed out that there was "overwhelming authority" which believed that if there are equal educational facilities, segregation by races was not a violation of the Fourteenth Amendment. "We think that this conclusion is supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced

12Ibid., pp. 144a-45a, Card 3704.
by a few educators and sociologists.” The latter courts agreed with the testimony presented by the witnesses. They were convinced that state-imposed segregation resulted in the Negro child receiving inferior educational opportunities and having certain mental health problems.

This testimony was presented by witnesses presumed to be experts or specialists in their chosen field and comprised a major part of the record in the desegregation cases. The lower courts seemed to have accepted the witnesses and their testimony on the basis of several factors. In the first place, witnesses had to be experts. The Model Code of Evidence has defined an expert as follows:

A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know, understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training, and that witness has the requisite special knowledge, skill, experience or training.


Secondly emphasis was placed on the witnesses' education, experience, membership in professional societies and organization, and published articles or books. For example, K. B. Clark, one of the major witnesses for the plaintiffs, was asked the following questions:

**Question:** Mr. Clark, would you kindly state your occupation?

**Answer:** I'm Assistant Professor of Psychology at the New York City College, and Associate Director of the North Side School for Child Development in New York City.

**Question:** How long have you been Assistant Professor of Psychology at the New York City College?

**Answer:** ...I have been Assistant Professor since 1948, I think.

**Question:** Have you held any other than those two?

**Answer:** Yes, I have. I was a reserve consultant for the American Youth Commission in their study of the effect of a minority status on the personalities of the Negro youth. I was reserve associate with the Cornachie-Murdaugh study of the Negro in America....I worked rather recently with the mid-century White House Conference on Children In Youth, preparing for them a manuscript on the effects of prejudice and discrimination on the personalities of children--white and Negro children.

Hansen has defined an expert as follows:

"An expert witness...is one who by dint of superior training, wide experience and demonstrated capacity within an area in which the facts are not disputed can be regarded by a court as a scientific instrument....What counts as an expert varies from discipline to discipline, from time to time...and even from court to court."
Question: Have you published any books or articles on this or any related subjects?

Answer: I have. Within the last ten years, I have published about twenty-five articles on the problem of social psychology with children and the effects of social situations on the personalities of children.

Question: Would you indicate your membership...in professional societies of your profession?

Answer: I am a Fellow in the Division of Personalities and Social Psychology of the American Psychological Association. I am a Fellow in the Society for the Sociological Study of Social Issues, and...a member of the Columbia University chapter of the Honorary Scientific Research Organization.

Question: Well is your major or emphasis on child psychology?

Answer: Child and Social.16

Thirdly, the Courts try to determine if the witnesses are honest and non-partisan because one of the most serious problems of so-called experts participating in the judicial decision-making process is the tendency for some of them to become "active partisan(s),"17 advocates, and quasi-counsels instead of objective and non-partisan witnesses. Professor Edmond Cahn has asserted, for example, that Clark participated in the Brown case as an advocate and "partisan expert." What does a close examination of the facts show on this point? It is clear that the NAACP made the

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16 Number 2, Briggs v. Elliott, Transcript of Record, pp. 82-83.

decision to invite social scientists to participate in the desegregation cases and not Professor Clark. It was also the strategy of the NAACP to resort to sociological and psychological evidence for the purpose of supporting the belief that segregation was psychologically detrimental to the Negro child. Clark informed the NAACP that the available studies had not isolated the variable of public school segregation from the total picture, and that they could not show the damaging effects of school segregation per se. Finally, he pointed out that the conclusions drawn in the appendix to appellants' briefs and presented to the United States Supreme Court were consistent with the existing empirical studies. Presenting only those studies which were requested by the NAACP, he seemed to have been as objective and non-partisan an expert as is possible. Speaking of the role that social science experts will play MacMillan expressed his position regarding experts well when he said:

"Of one thing I am certain, and that is that no scientific man ought ever to become the partisan of a side; he may be the partisan of an opinion in his own science, if he honestly entertains it, but he ought never to accept a retainer to advocate in evidence a particular view merely because it is the view which is in the interest of the party who has retained him to maintain. To do so is to prostitute science and to practice a fraud on the administration of justice."

in the judicial process in the future he said:

It is a fact that the collaboration between psychologists and other social scientists which culminated in the Brown decision will continue in spite of criticisms. Those who question the propriety of this collaboration will probably increase the intensity of their criticisms—particularly as social controversy and conflict increase. Nevertheless, some social scientists will continue to play a role in this aspect of the legal and judicial process because as scientists they cannot do otherwise.\footnote{Ibid., p. 240.}

Following the Brown decision, testimony similar to that presented in this case reached the United States Supreme Court in the Girard College case.\footnote{386 Pa. 548, 127 Atl. (2d) 287 (1956); 353 U. S. 230 (1957).} In this case, Stephen Girard, spelled out in his will before his death in 1831, that the bulk of his estate was to be left in trust to the city of Philadelphia for the purpose of establishing a college for "poor male white orphans." In 1869, a Board of Directors of a City Trust was created by legislative action and consisted of the Mayor, the President of City Council and twelve citizens appointed by judges of the Common Pleas Courts of Philadelphia. The Board's primary function was to administer the Girard Estate and similar trusts. For more than a century, the city of Philadelphia through its Board of Trustees operated the school for "poor male white orphans," and excluded non-whites.
However, in 1954, the racially exclusive admission policy of Girard College was challenged when six Negro orphan boys applied for admission. Their request was rejected, based on provisions of Girard's will. A number of social scientists testified that racial isolation had detrimental effects on the Negro applicants and that there were advantages to interracial relationships. The Board presented several witnesses who refuted the conclusions reached by the social scientists. They argued that although the white male orphans had no Negroes as classmates, there were many instances in which the two groups met each other. For example, the students at Girard College met Negro students in athletics, at community affairs, at interscholastic events, and at speaking engagements. On November 12, 1956, the Pennsylvania Supreme Court affirmed the decision of the Orphans' Court of Philadelphia which had held that the Board's action of carrying out the intentions of the will was within the compass of the Fourteenth Amendment and did not constitute state action.

In 1957, in Pennsylvania v. Board of Directors of [21] The social scientists who testified were: E. Scully Bradley, Chairman of the Graduate Department of American Civilization at the University of Pennsylvania; Isidor Chein, Professor of Psychology at New York University; Alice V. Kelcher, Professor of Education at New York University; George Schermen, Executive Director of the City's Commission on Human Relations; and Ira De A. Reid, Chairman of the Sociology Department at Haverford College.
the City of Philadelphia, the United States Supreme Court held that refusal by the trustees to admit two Negro applicants was discrimination by the state since the Board is an agency of the state. The Court also made it clear that the Brown decision was controlling since the privately endowed college was being administered by a public trustee. In a later proceeding, the Philadelphia Orphan's Court successfully switched private trustees for the City as administrator of Girard's trust, and this change was accepted by the Pennsylvania Supreme Court. The United States Supreme Court refused to review this action.

In discussing the Girard case, Milton Gordon observed that:

...the presence in the case of major sociological and psychological issues and the liberal use of social scientists as expert witnesses add an important second chapter to the story of the participation of the social scientist in major litigation, the first being the School Segregation cases....The role of social-science expert testimony is so recent and so unexplored that there is a great need for careful study by the social scientist himself of the opportunities, the complexities, and the pitfalls in this new and glamorous arena which summons his services....

In short, there is an interactive process between law and the social sciences beginning to take place.


23 It is interesting to note that the United States Supreme Court agreed to rule on a similar case where there had been a substitution of private for public trustees of a park, located in Macon, Georgia. See Peter H. Binzen, "Philadelphia's Negroes Challenge A Will," The Reporter, Volume 33 (1965), p. 44.
which bears careful examination and appraisal by all the parties concerned.  

Testimony similar to that already discussed has also been presented in various related cases which have never reached the United States Supreme Court. Jack Greenberg and Herbert Hill have summed up the judicial utilization of sociological data in the desegregation cases as follows:

Social science, where it is sufficiently reliable, may provide facts that a court needs in order to apply a rule of law. Or, social science may shed light on law to help courts to develop it wisely. This is the use to which the Court put social science in the school cases.

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CHAPTER V

NON-SOCIOLOGICAL FACTORS INFLUENCING
DECISION-MAKING IN EDUCATION

CASES: TWO CASE STUDIES

In this chapter, an attempt will be made to determine as precisely as possible, the influence of sociological data on the outcome of the Brown and Girard cases.

The critics of the Brown decision have forcefully argued that it was based primarily on sociological data and had no legal basis whatsoever. In other words, they have emphasized that such data overwhelmingly influenced the outcome of this case. However, the proponents of the decision have argued that it was not based primarily on sociological data and had a sound legal basis indeed; that legal basis being the equal protection clause of the Fourteenth Amendment.

It is the thesis of this chapter that although the Courts have accepted and utilized sociological data in the decision-making process in the Brown and Girard case, (1) the outcome of these cases would have been the same in the absence of such data and (2) this data happened to
coincide with the Justices' theoretical orientation which is a result of their value system.

It is reasonable to suggest that the groundwork and mood for the Brown decision had been set by the professional educational cases beginning with Missouri ex rel. Gaines v. Canada,¹ where the Court held that Gaines, a Negro, would have to be admitted to the University of Missouri on the same basis as white students. Robert Harris recognized this when he said:

The most important development in the Supreme Court's application of constitutional equality and also one of the major domestic events in the twentieth century was the Court's condemnation of racial segregation and its reversal of the separate but equal formula. Like most constitutional changes, this development did not, in the manner of Minerva, spring full grown from some parent judicial brow. The demise of the separate but equal fiction began in Missouri ex rel. Gaines v. Canada....²

The fight for constitutional equality in higher education continued in the Sipuel³ and Hurst⁴ cases. Sipuel, a Negro girl, was denied admission to the University of Oklahoma Law School solely because of her race. However, the Supreme Court of the United States made it clear that

¹305 U. S. 337 (1938).
this denial was in violation of the equal protection clause of the Fourteenth Amendment. Two years later, in the cases of *Sweatt v. Painter*[^5] and *McLaurin v. Oklahoma State Regents*[^6] segregated graduate education was condemned on an extensive basis. It is important to note that the records of these two cases included not only previous judicial precedents but sociological data as well. These cases spurred huge spending campaigns to equalize all schools in those states which practiced segregation in education. Brand new, well constructed and adequately equipped Negro schools appeared. However, the spirit of the times or the mood for equal educational opportunities had been set, the equal protection clause supported this mood and the *Brown* decision was almost a foregone conclusion. Moreover, in the case of *Bolling v. Sharpe*,[^7] which was actually the fifth school segregation case, the Supreme Court of the United States repudiated segregated education in the District of Columbia, although no sociological data whatsoever were presented in this case. Therefore, it is reasonable to conclude that the outcome of the *Brown* case would have been the same even without such data because the *Bolling* decision

was in line with the 1954 decision. It differed from the other four however, in that the due process clause of the Fifth Amendment was involved rather than the equal protection clause of the Fourteenth Amendment.

A very strong case can be made that the mood or spirit of the times and value system of the Justices in 1896 resulted in the Plessy decision of "separate but equal." The sociological data concerning race during this time were important to the extent that they coincided and supported the value system of the majority of Justices. The idea of Negro inferiority can be traced back to when the colonists decided to fight England for their independence. Charles Silberman has observed:

White men began three and a half centuries ago to treat black men as inferiors, and they haven't stopped yet. A major part of "the Negro problem" in America lies in what these three hundred fifty years have done to...the sense of impotence and inferiority that destroys aspiration and keeps the Negro locked in a prison we have all made.8

John Hope Franklin discussing the idea of Negro inferiority in a somewhat similar vein says:

The generation preceding the outbreak of the Civil War witnessed the development of a set of defenses of slavery that became the basis for much of the racist doctrine to which some Americans have subscribed from then to the present time. The idea of the inferiority of the Negro enjoyed wide acceptance among Southerners of all classes and among many Northerners....It was organized into a body of systematic

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thought by the scientists and social scientists of the South, out of which emerged a doctrine of racial superiority that justified any kind of control over the slave. In 1826 Dr. Thomas Cooper said that he had not the slightest doubt that Negroes were an "inferior variety of the human species; and not capable of the same improvements as the whites."  

As late as 1930-1940, the "separate but equal" doctrine which justified legislation separating the races had overwhelming support from the majority of writers on the subject. The distinctly inferior status attached to Negroes in the scholarly writings facilitated the separation of the races. This separation was a well entrenched 

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"...The memory of the Negro differs from that of the civilized man in one important particular. What the Negro remembers is relatively simple and concrete, whereas what the civilized man remembers is involved and complex. When the latter recalls an idea, he usually drags along with it a host of other ideas....The brain of the civilized man is more complex, in that it has a more intricate system of transverse and radiating channels for the intercommunication of ideas."
value-judgment and the people clung to it tenaciously. The theory of inferiority
not only resulted in the separation of the races, but also led to certain stereotypes
of the Negro and to various discrimination against him. For example, as early as 1860, most Southerners firmly believed that "Sambo" was very real and that his characteristics were a result of his racial inheritance.

This stereotype implied racial inferiority and resulted in the Negro being treated in a disparaging manner. John Griffin, a white man, who darkened his skin by artificial means and then traveled through the South in 1960, experienced at this late date what it is like to be an American

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"The association of master and slave in the South was... close, even if not intimate, and much of the feeling of physical repulsion for a black skin disappeared. This was particularly true of the house servants. White girls and boys kissed their black mammies with real affection, and after marriage returned from other states to the funeral of an old slave. But while color was not repulsive, it was so ineradicably associated with inferiority that it was impossible for a southern white to think the Negro into his own class."

Negro. He observed that the Negro experiences all types of discrimination and is "referred to as nigger, coon, jigaboo....Each new reminder strikes at the raw spot, deepens the wound."¹²

Gunnar Myrdal, a Swedish sociologist, in his book, An American Dilemma,¹³ emphasized the inferiority stigma which had been attached to all Negroes by Caucasians as late as 1944. The stigma in his viewpoint is indicative of a very primitive form of religion, as white is correlated with goodness and Christ while black is associated with evil, sin and that which is bad. Thus the inferiority presumption justified keeping the races separated in the public schools.

Fourthly, to argue that the decision in the Brown case was based primarily on sociological data is to deny the basic effect of the equal protection of the laws clause of the Fourteenth Amendment in determining the outcome of this case. Chief Justice Earl Warren speaking for the Court made this clear when he said that "separate educational facilities are inherently unequal. Therefore,...the

plaintiffs...are...deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."\textsuperscript{14}

Finally, in the \textit{Briggs} and \textit{Davis} cases in South Carolina and Virginia respectively, the district courts held that the sociological testimony was irrelevant and unproved. However, the Supreme Court still held that segregation was unconstitutional.\textsuperscript{15} It is reasonable to suggest then that logic, precedents, the Constitution as interpreted by the United States Supreme Court, history, the spirit of the times, current concepts of justice, and the value system of the Justices were equally important if not determining factors in the outcome of the \textit{Brown} case despite the use of sociological data.

It seems reasonable to suppose that recent research, dating back to the mid-thirties, points to a change in radical attitudes and goes against the theories of inferiority referred to. Moreover, such research findings supported and coincided with the mood and value system of the Justices who rendered the \textit{Brown} decision. In my view, the spirit of the times, the Justices' value system, precedents, and the United States Constitution were the

\textsuperscript{14}347 U. S. 483, 495 (1954).

most important factors in the decision-making process in the Brown case and the sociological data presented were important to the extent that they supported the primary position of all nine justices. It should be noted that the Justices did not say how much weight was given the sociological data and all factors considered support the view that such data did not have a decisive influence on the outcome of this case.

A brief discussion of recent research findings concerning race that did not find their way into the briefs presented in the Brown case is appropriate at this point because they challenge the conclusions of earlier studies. Although it is very difficult to say whether these findings influenced the thinking of the Justices who rendered the Brown decision, it is common knowledge that they are well informed and highly sensitive to authoritative studies which bring forth new knowledge. Thus Gunnar Myrdal has pointed out that recent scientific research concerning the Negro has the task of refuting many erroneous beliefs. A number of studies in the field of sociology, psychology and anthropology during recent decades have been devoted to this task. For example, in a study that appeared as early as 1935, Otto Klineberg pointed out that there was no empirical evidence to support the thesis of fundamental differences in mentality between the races. According

to his analysis, differences which are found are due largely
to environmental differences. In a somewhat less than
scientific exercise involving a poll of public opinion con­
ducted in 1942, a national sample of the white population
was directed to the question of whether Negroes are as
intelligent as Caucasions provided that both groups are
given the same education. In the replies, approximately
one-half of the Northern whites and one out of every five
Southern whites answered positively. However, a study by
Paul Sheatsley which was published in 1966 gives striking
evidence of the changing attitudes of whites toward the
Negro. For example, he found that four-fifths of the
Northern whites and fifty-seven percent of the white
Southern population held the belief that the Negro mental­
ity is equivalent to that of the white population.17 The
implications of these changing attitudes were expressed
in the following words:

The implications of this revolutionary change
in attitudes toward Negro educability are far reach­
ing. It has undermined one of the most stubborn argu­
ments formerly offered by whites for segregated schools
and has made the case for segregation much more diffi­
cult to defend.18

17 Paul B. Sheatsley, "White Attitudes Toward the
18 Ibid.
Repeated surveys found a trend similar to the above one prevailing for the adult population.

Finally, the "scientific racist position" which is associated with Henry Garrett, a psychologist and Professor Emeritus of Columbia University, Professor Frank McGurk, a psychologist of Villanova University, Professor Audrey Shuey, a psychologist of Randolph-Macon Woman's College in Lynchburg, Virginia and others has been strongly challenged. This position holds that the performance of Negroes on intelligence tests is much lower than that of whites. Audrey Shuey in her study drew the following conclusion:

The remarkable consistency in test results, whether they pertain to school or preschool children, to high school or college students, to drafts of World War I or World War II, to the gifted or the mentally deficient, to the delinquent or criminal; the fact that the colored-white differences are present not only in the rural South and urban South, but in the border and northern areas...all point to the presence of some native differences between Negroes and whites as determined by intelligence tests.19

The above position has been challenged by Thomas Pettigrew, Ashley Montagu20 and others who have argued that it lacks scientific proof. They assert that differences


in intelligence are not innate but are due largely to environmental factors and that such differences between Negroes and whites decrease markedly when members of both groups have had comparable educational and cultural opportunities.

Following the Brown decision, an examination shows that sociological data were also presented to the Court in the Girard College case. This data supported the position of the Negro applicants who sought admission to the college, but the decision of the Pennsylvania Supreme Court was still against them. The United States Supreme Court however, upheld the contention of the Negro youths, holding that the public trustees could not run the college on a segregated basis because the Fourteenth Amendment prohibits discriminatory state action. It is reasonable to suggest that the decision would have been the same in the absence of sociological data because the Justices placed great emphasis on prohibited state action in their opinion. They expressed the importance of the legal basis for the decision in the following words:

The Board which operates Girard College is an agency of the state of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education...

The Justices' attitude towards the meaning of the Fourteenth Amendment and their belief in non-discriminatory educational opportunities seemed to have had a decisive influence on the outcome of this case. Sociological data were important to the extent that they coincided with their personal value system.\textsuperscript{22}

\begin{quote}
\textsuperscript{22}The importance of beliefs and system of values in the decision-making process is discussed by Glendon Schubert as follows:

"Issues denominate the questions of policy to which the judge purports to respond in his decision, while values are the internalized beliefs of the judge. The judge, however, can take cognizance of issues in a case only through the intermediation of his own beliefs and expectations concerning the empirical events to which issues of public policy relate, that is, issues can be perceived by a judge only through his own personal system of values. Hence, the issue is the manifest policy question to be decided; the values of the judges are the latent parameters that determine how he will define and respond to the issue."

\end{quote}
CHAPTER VI

Although much attention has been devoted to the judicial utilization of sociological data in educational cases by the scholarly writings, such data have also been presented and utilized by the Courts in a variety of non-educational cases. Therefore, an analysis of some of these cases sheds additional light on how and why the United States Supreme Court has utilized such data in the decision-making process. An analysis will also be made of the judicial use of sociological data in the decision-making process at the lower Court levels because although these cases never reached the United States Supreme Court, such data would have been a part of the record had they reached the high Court by appeal or certiorari.

In anti-trust cases, the Supreme Court has frequently relied on legal periodicals and related sources in which economists have recorded findings based on their knowledge and expertise. As Professor Chester Newland of the University of Kansas has pointed out, "...periodical writing plays a leading part in the shaping of our law in
the anti-trust field.\textsuperscript{1} In \textit{U. S. v. Columbia Steel Company et. al.},\textsuperscript{2} the United States brought a suit under Section Four of the Sherman Act "to enjoin the United States Steel Corporation and its subsidiaries from purchasing the assets on the West Coast on the ground that such acquisition would violate...sections of the Sherman Act." The United States Supreme Court held that such acquisition would not violate sections of the Sherman Act. Justices Douglas, Black, Murphy, and Rutledge dissented. They argued that such acquisition gave the United States Steel Corporation unquestioned domination and pointed to economic data presented in two magazine articles\textsuperscript{3} which gave the reasons why mergers with trust should be made. The economic data in these two articles emphasized that mergers prevent waste, promote efficiency and dilute sales. These articles could have been used by the majority in their opinion since they gave reasons for mergers. The dissenters did not use the economic data presented in these articles to support their opinion, but used them to emphasize that data of this

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\textsuperscript{2}334 U. S. 495 (1948).

\textsuperscript{3}"Effect of War and Shortages," \textit{U. S. News}, May 10, 1946, p. 48. "New Mergers, New Motives," \textit{Business Week}, November 10, 1945, p. 68. The names of the authors of these two articles were not given.
nature which show the advantages of mergers are largely illusory. Thus, the economic data in this case played a negative role.

In another case, United States v. United Shoe Machinery Corporation, Professor Kaysen, a Harvard economist, held the title of law clerk but actually served as an economic advisor to Judge Wyzanski. Speaking for the Court, Wyzanski emphasized that the sort of data necessary to entertain "a petition for dissolution should reflect greater attention to practical problems and should involve supporting economic data and prophesies such as are


(1) "To read the record (including pleadings, testimony and court orders) and to prepare on particular points (a) digests of the relevant testimony and (b) memoranda commenting upon economic significance of the relevant testimony....

(2) "To assist the Court in preparing its findings of fact, conclusions of law, opinion and decree....The object will be to guard the Court from error and to draw to the Court's attention points not treated and points inadequately or wrongly treated."
presented in corporate reorganization and public utility dissolution." Thus the judicial use of the writings and findings of economists has grown steadily in anti-trust cases.

As a result of the inclusion of social science findings presented by economists in anti-trust cases, many

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7 For cases which have utilized economic evidence but never reached the United States Supreme Court see

U.S. v. E.I. Du Pont de Nemours and Company, 118 Federal Supp. 41 (D. Del. 1953);

Kobe Pump Incorporated, et. al. v. Dempsey Pump Company et. al., 97 F. Supp. 342, 198 F. (2d) 416 (10th Cir. 1952);

Hughes v. Cole, 113 Federal Supp. 519 (W.D. Oklahoma 1953);

Hughes v. Fond, 114 F. Supp. 525, 215 F. (2d) 924 (10th Cir. 1954);

U.S. v. Aluminum Company of America, 91 Federal Supp. 333, 148 F. (2d) 416 (2d Cir. 1945);

American Crystal Sugar Company v. The Cuban American Sugar Company, 143 Federal Supp. 100 (S. D. New York, 1956);

Morton Salt Company v. U.S., 235 F. (2d) 573 (10th Cir. 1956);

Nee v. Main Street Bank et. al., 174 F. (2d) 425 (8th Cir. 1949);
favorable arguments have been advanced to sustain this practice. For example, Williard F. Mueller, Director of the Bureau of Economics for the Federal Trade Commission has observed that the courts and the Commission base their decisions in large part on economic evidence and that anti-trust attorneys to be effective, must rely on aid from economic experts. He also pointed out that failing to rely on such experts causes less effective results and a waste of legal talent. Dr. Jesse Markham, Acting Director of the Bureau of Industrial Economics, expressed the same view when he said that lawyers and economists working for anti-trust agencies must unite their disciplines for an effective working of either one. "Economics is concerned largely with fundamental social phenomena and with the laws of human behavior by which man brings order to economic activity. The law on the other hand, is concerned with formal rules enforceable in the courts." He asserted that economics is oriented toward relationships among men, while law comprises the rules of conduct for these relationships. Economists have the job of providing standards

Allied Paper Mills V. Federal Trade Commission, 168 F. (2d) 600 (7th Cir. 1948).


9 Ibid., pp. 145-146.
of proof which may be adapted to legal procedure. John Blair, the chief economist for the sub-committee on anti-trust and monopoly, and George Reycraft, Chief of Section Operations in the Anti-trust Division, agree with Mark-ham. 10

The findings of social scientists have also been utilized by the Supreme Court in criminal cases. In Shepherd v. Florida 11 for example, a Negro was accused of raping a seventeen year old white girl and was sentenced to death. The Florida Supreme Court affirmed the conviction. However, counsel for the defendant made a motion for a change of venue and retained the Roper Organization to find out whether there was adequate local prejudgment to justify such a change. This organization surveyed Negroes and whites in the (1) county that had been chosen for a re-trial (2) the county where the previous trial was held and (3) two northern counties which had been selected because of the possibility that venue would be changed to one of them. 12 The purpose of the survey was to determine

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the degree of prejudgment among the citizenry of the above four counties. The pollsters found greater prejudgment in the county selected for retrial than in the two northern counties. The prosecutor alleged that the evidence was hearsay, objected to its admission, and the objection was sustained. The pollsters then pointed out that as a substitute for their evidence, the state accepted testimony from some of the leading citizens who alleged that the defendant could have a fair trial with the then existing state of opinion in the county. The United States Supreme Court reversed the defendant's conviction and its opinion was similar to the findings brought forth by the pollsters as a result of their survey. Justice Jackson, speaking for the majority said:

> Prejudicial influences outside the court room... were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion.\(^{13}\)

In *Irvin v. Dowd*,\(^ {14}\) the defendant was accused of killing six people in Evansville, Indiana. There had been extensive news coverage of the murders in Evansville and adjoining Gibson County. Counsel was appointed and requested a change of venue which was granted to Gibson

\(^{13}\)341 U. S. 50, 51 (1951).

County. Counsel for the defendant then argued that the trial should be changed to another county because extensive publicity had prejudiced the minds of the inhabitants there. This motion was denied because the court after reviewing a survey, believed that although the majority of jurors felt that the defendant was guilty, they assured the judge that they would be impartial. However, the United States Supreme Court speaking through Justice Clark observed:

Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved... One said that he "could not...give the defendant the benefit of the doubt that he is innocent...." Where so many, so many times, admitted prejudice, such statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion... 15

There have also been many criminal cases in which the lower courts have utilized the findings of social scientists that have resulted from opinion polls. For example, in U. S. ex. rel. Bloeth v. Denno, 16 the appellant was convicted and sentenced to be executed for killing three people in Suffolk County, New York. The press gave


16313 F. (2d) 364 (2d Cir. 1963).
wide and thorough coverage to the killings and scare headlines and to the appellant's confession to the police and District Attorney. The defense attorney made a motion for change of venue because a survey had been taken to show that it was impossible to have a fair trial in Suffolk County because of community prejudices. The trial judge admitted the evidence obtained from the opinion poll, but denied the motion on the ground that a thorough consideration of the evidence convinced the court that a fair trial was possible without change of venue. Answers to four of the questions asked in the survey were as follows:

(1) Have you ever heard of Francis Henry Bloeth who is accused of murdering three people in Suffolk County? YES NO 210 0

(2) Do you think he is guilty? 203 0

(3) Do you know that he had already confessed? 200 10

(4) Do you think he would receive a fair trial in Suffolk County? 17 76 133

The Second Circuit Court of Appeals reversed the defendant's conviction on the ground that the jury was not and could not be impartial in Suffolk County in this particular case.

17 Edward F. Sherman, "The Use of Public Opinion Polls in Continuance and Venue Hearings," American Bar Association Journal, Volume 50, 1964, pp. 358-59. In question number two above, three of the persons interviewed had no opinion, one was "not sure" and three said that the defendant was "insane." In question number four above, one of the two-hundred ten persons interviewed pointed out that he had no opinion.
It is important to note that the court referred to the pollster's finding of community prejudice as an evidentiary source. The case was remanded to the district court for a retrial before an impartial jury.

In *United States v. Estes*, the defendant was convicted for mail fraud. The trial judge allowed the evidence resulting from an opinion poll which proved that there was intense community prejudice against Estes which warranted a change of venue. The Billie Sol Estes trial began about the time that the opinion in the *Bloeth* case was published. This is significant because the interviewers patterned their questions after those that were used in that case. Four-hundred fifty people were interviewed by nine skilled interviewers. The trial judge denied the motion for a change of venue on the ground that the chosen jurors promised that they would be impartial and would base their decision solely on the evidence. The Circuit Court of Appeals affirmed the conviction on the ground that the record did not show prejudice to the appellant's rights as a result of the widespread publicity. In this case, the Court accepted the jurors' word over the findings resulting

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18 *Crim. No. 66283 (W. D. Texas, 1963).*

19 *Billie Sol Estes v. U. S.*, 335 F. (2d) 609, 613 (Fifth Cir. 1964).
from the opinion polls. In other similar cases that have never reached the United States Supreme Court, social science evidence similar to that already discussed has been utilized.

It seems reasonable to suggest, that in criminal cases involving a motion for change of venue, the court should be very hesitant in rejecting such evidence especially if community sentiment is obtained in a systematic and scientific manner. This approach is better that the whim or capriciousness of the judges determining such sentiment. Norman Meier and Harold Saunders have discussed the "rationale for presenting the pollsters' findings to the court as follows:

In tendering the results of a survey of public opinion to the Court for admission in evidence, counsel say in effect: We are offering this evidence as the honest record of a survey conducted in good faith in accordance with approved polling methods. The methods used have been validated time after time. The results are trustworthy—indeed the only trustworthy data available to the court. What the public believes on this issue or how it reacts to these stimuli is pertinent if not determinative of this case. The inherent probability of the accuracy of the data in light of the safeguards employed in their collation, the need of the court for such information, and the total lack of any other satisfactory evidence of the public's opinion or method for obtaining it fully justify the admission of the testimony.21

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There is also a growing trend towards the acceptance and use of the findings resulting from public opinion polls as judicial evidence. Although such findings have not been accepted completely by the courts, the judicial use of evidence resulting from them will increase provided that doubt and disagreement concerning their validity and methodology are removed. This will be possible to the extent that pollsters and counsel are able to submit proof that (1) interviewers are skilled, (2) the sample is adequate in terms of size and representativeness, (3) the questions are carefully worded so as to provide a true picture of the interviewees' opinion and (4) appropriate statistical methodology employed. Moreover, counsel should be able to call as witnesses, the persons responsible for conducting the survey.

In Tudor v. Board of Education, a church-state case, the Board of Education adopted a resolution which permitted an organization known as Gideons International, to furnish copies of the New Testament, Psalms and Proverbs to any student requesting them. Such distribution of the Bible had to be on a strictly voluntary basis. Parents had

22 For cases which have criticized the sample used in surveys see Oneida Ltd. v. National Silver Company, 25 N.Y.S. (2d) 271, 286 (1940); Lerner Store Corp. v. Lerner, 162 Federal (2d) 160, 162 (Ninth Cir. 1947).

23 14 N. J. 31, 100 Atl. (2d) 857 (1953).
to sign a slip which said that it was alright for their child to receive one. The issue in this case was whether Article One, Paragraph Four of the New Jersey Constitution, and the First Amendment of the United States Constitution, forbade distribution of the Bible in the public schools of New Jersey. The school board argued that accepting the Bible was optional and did not interfere with religious freedom. The New Jersey Supreme Court disagreed and treated the question of coerciveness as a factual one. Testimony was presented to the Court by Isidore Chein, a social psychologist, and Dan Dodson, an educational psychologist, which showed that psychological pressures compelled the pupils to accept the Bibles under the distribution system.

Speaking of the psychological pressure Chein said:

...I would expect that a slip of this kind, distributed under the authority of the school, would create a subtle pressure on the child which would leave him with a sense that he is not quite as free as the statement on the slip says; in other words, that he will be something of an outcast and a pariah if he does not go along with this procedure....

I think that they would be in a situation where they have to play along with this or else feel themselves in a public position where they are different, where they are not the same as other people, and the whole pressure would exist on them to conform.24

24Ibid., p. 50
Dodson testified concerning the divisive effect of distributing the Gideon Bible:

I would say that...a document that has the import­ance that this has to certain religious groups, including my own, would be distributed or used as a means of propaganda or indoctrination by official channels, such as the school system, would create tensions among the religious groups; there would be a controversial problem.

I would say that it would raise questions among the children as to who is and who isn't, in terms of receiving the Bible. It would also create problems as to why some accepted it and others didn't. That would be divisive.25

The above testimony might seem to be nothing more than broad generalizations rather than the result of rigorous systematic empiricism. Both social scientists failed to realize the possibility of the majority or at least a sizable minority of the pupils being indifferent to the distribution of the Bible. It also seems likely that some of the students would not experience any psychological pressure whatsoever. Moreover, the question arises as to whether the opinion of a segment of the general public would have been as good as that of the social scientists in answer to the question raised in this case. It is at least possible that a segment of the general public could honestly disagree with the conclusions of the scientists.

25 Ibid.
Another area in which the findings of social scientists have met with some success has been in trademark and unfair competition cases. In *Elgin National Watch Company v. Elgin Clock Company*, the plaintiff sought to introduce an affidavit based on a questionnaire survey and which stated the opinion of an expert witness. The purpose of the survey was to determine whether an average person would confuse the names of two watch companies. Two thousand questionnaires were mailed to retail jewelers rather than to ultimate users. Those which were returned became a part of the exhibit to the affidavit. However, the court excluded the affidavit on the basis of the hearsay rule, stating that it was based solely on the opinions of retail jewelers who were not called as witnesses. The court's rejection of the questionnaire findings can be explained in part by the novelty of the public opinion poll which dates back to the early 1930's, and in part to a lack of means of determining the survey methodology that was used.

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In John B. Stetson Company v. Stephen L. Stetson, the plaintiff had sold hats under the name "Stetson" for a long time and alleged that the defendant used the name, Stephen L. Stetson in his hats and advertising. It was further alleged that this practice infringed the plaintiff's trademark. Neil Border, a distinguished market analyst, was hired by the John Stetson Company to prepare a survey which would determine whether public confusion resulted from having two "Stetson" hats being advertised and sold on the market. He took the stand and explained the survey which was conducted under his surveillance, but his findings were rejected as "solidified heresay" by the court, speaking through Judge Woolsey. However, the conclusions of fact resulting from the survey were reached by the court on the basis of other evidence. It might be pointed out that the polling technique was only six years old when this decision was rendered.

In subsequent trademark cases, the objection made in the above two cases has not been found insurmountable, as the courts seem to be taking a more favorable attitude towards the use of polling techniques. For example, in Sunbeam Corporation v. Sunbeam Lighting Company, an

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27 14 F. Supp. 74 (S. D. N.Y. 1936), aff'd as modified 85 F. (2d) 586 (Second Cir. 1936), certiorari denied 299 U. S. 605 (1936).

action was brought by Sunbeam Corporation against Sunbeam Lighting Company for trademark infringement. A poll was taken to get consumer reaction concerning the word "SUNBEAM." The idea was to determine whether the average buyer associated this word with products manufactured by the plaintiff. The court accepted the findings and pointed out that in cases involving trademark rights, an inkling of consumer thought and belief is badly needed if rights are to be properly adjudicated. Judge Yankwich pointed out that "dealers in electrical equipment, people in every walk of life,...who were subjected to scientific tests and others testified that 'SUNBEAM' spelled to them the products of the plaintiff." 29

Finally, in the case of United States v. 88 Cases of Bireley's Orange Beverage, 30 the United States sought to prove that Bireley's Orange Beverage was adulterated within the meaning of the pure food and drug statute, 31 in that it appeared to the average consumer to be of greater value than was actually true. The United States Government introduced an opinion survey of 3,539 persons which established what they thought the product contained. The

29 Ibid., p. 430.


questionnaires were distributed in hospital by medical personnel. The court admitted this evidence\(^{32}\) by dismissing the hearsay objection. Judge Hastie, speaking for the court said:

...the statements of the persons interviewed were not offered for the truthfulness of their assertions as to the composition of the beverage. They were not offered to prove that Bireley's Orange Beverage is or is not orange juice. They were offered solely to show as a fact the reaction of ordinary householders and others of the public generally when shown a bottle of Bireley's Orange Beverage. Only the credibility of those who took the statements were involved, and they were before the court. The technical adequacy of the surveys was a matter of the weight to be attached to them. And claimant was properly permitted to introduce elaborate testimony on this point.\(^{33}\)

Although the findings resulting from the survey were held admissible, the court after thorough consideration of all the evidence rendered a decision which favored the opposing side.

An analysis of several of the naturalization cases will further illustrate the fact that the findings of social scientists resulting from public opinion polls are likely to gain favor with the courts as has been true in other types of cases. For example, in Repouille v. United

\(^{32}\)A Food and Drug officer who had not conducted the survey testified that a large number of people concluded that "orange juice" was in the bottle.

States, a federal statute stated that for an alien to be admitted to this country he must have been a person of "good moral character" for a period of five years preceding the filing of his petition. Repouille, an immigrant, filed his petition on September 22, 1944. However, on October 12, 1939, he had put his thirteen year old son to death by means of chloroform because he was a physical monstrosity. The district judge found that Repouille had conducted himself in line with the "good moral character" standard, with the exception of this act, for which he served a five year sentence. However, the Circuit Court of Appeals, speaking through Judge Learned Hand, reversed the lower court's decision:

Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion. We can say no more than that, quite independently of what may be the current moral feeling as to legally administered euthanasia, we feel reasonably secure in holding that only a minority of virtuous persons would deem the practise morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance.

Jerome Frank dissented and emphasized that the decision should have been rendered only after consideration had been

34165 F. (2d) 152 (Second Cir. 1947).
35Sec. 707 (a),(3). Title 8 U.S.C.A.
36Repouille v. United States, 165 F. (2d) 152, 153 (Second Cir. 1947).
given to what the public thought on this particular moral issue. This information could have been obtained through a public opinion poll.

In **Johnson v. United States**, it was proven that Johnson had not supported his wife and had been living with a paramour. The District Court held that he had been a person of "good moral character" for the preceding five years within the meaning of the naturalization statute. However, Judge Learned Hand reversed the lower court's decision stating that Johnson had not been a person of "good moral character." In the **Estrin case**, the Circuit Court of Appeals for the second circuit held that one slip from marital fidelity was inconsistent with the statutory requirement of five straight years of "good moral character." Judge Hand, speaking for the court said that it was impossible to use general principles in a case of this nature since each moral situation is unique. Thus, the "best guess" that the judges can possibly make as to what the "common conscience" is on the facts of a given case is all that can be done in his estimation.

These cases illustrate the need for pollsters to

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**37** 186 F. (2d) 588 (Second Cir. 1951).

**38** Estrin v. United States, 80 F. (2d) 105 (Second Cir. 1935).
obtain community sentiment on some moral issues to guide judges. The resulting findings would be better than an intuitive hunch as to what judges feel represents community sentiment and would prevent a man's rights from being adjudicated on the basis of judicial ignorance or judges' obscure notions as to what the public thinks on a given moral issue. Moreover, the findings would serve as models to guide and aid the courts in future cases involving similar factual issues, because if they did not have an accurate poll in the first case and rendered an erroneous decision based upon a surmise, the error would be pyramided in all subsequent cases of a similar nature. To be specific, if we take a case in which the issue involves whether or not a person is to be admitted to this country, it does not seem to be asking too much that the courts of the land avoid guessing, and render decisions only on the basis of factual knowledge.

It would seem that in future naturalization cases, judges would utilize the findings of social scientists resulting from public opinion polls because much of the

doubt concerning their validity has been removed. Robert Sorenson and Theodore Sorenson predicted this as early as 1953 when they wrote:

...present day methods of opinion research are sufficiently developed to make a definite contribution to the judicial process in a variety of litigable areas; that the results and techniques may be admissible and competent evidence, if such evidence, is properly prepared through the collaboration of social scientist and lawyer.40

Walter Blum and Harry Kalven have also expressed their faith in the opinion poll in the following words:

There no longer can be any doubt that opinion surveys have come of age. Social scientists now have a considerable tool for exploring with some refinement and sophistication the state of public opinion. The effectiveness of the tool gives every promise of continued improvement....41

Finally, cases in the censorship field further illustrate the utilization of social science findings by the courts. In State v. Scope,42 the defendant was indicted for showing the movie entitled, "Hollywood Peep Show." Dr. Tarumianz, a psychiatrist, presented testimony for the state which alleged that teen-agers were apt to be


42 46 Del. 519, 86 A. (2d) 154 (1952).
injured psychologically as a result of seeing the film.

The appellate court went on to say that the movie was such that it aroused base emotions in the average adult male.

It expressed its position in the following words:

...the court in the first instance must use its reasonable discretion in determining two things: First, is the subject-matter one that properly falls within the field of expert or special knowledge; and, second, if so, is the witness sufficiently qualified by learning or experience to speak illuminatingly with respect thereto....?

Tested by these standards, we think that there is a reasonable basis for the admission of the expert's opinion that the film in question would tend to have harmful results, at least in the sub-conscious mind, of the average, normal man. The science of psychiatry, while still in its infancy, has made tremendous strides in recent years. Much of it has to do with the workings of the sub-conscious mind about which the average person, obviously knows nothing. If, therefore, it is a fact that the effect of this film might be latent, rather than immediate— that its deleterious effects would linger with probable future undesirable, emotional results not even realized in the conscious mind, then we can see no error in admitting such testimony upon the theory that it would be material and helpful to a jury. However, we doubt if the admission of the evidence as to the effect of the film upon the conscious mind of the normal adult male was correct....

The testimony presented by the psychiatrist might seem to some to be highly conjectural at this stage of development of psychiatry, and to others, it might seem to be stretching science to its limits when one tries to generalize concerning the sub-conscious mind of average people. At this point it might be difficult to demonstrate that the

43 Ibid., p. 526.
opinion of the judges and/or jurors would not have been as sound as that of the psychiatrist after they had seen the film. Chapter VII will present a detailed discussion concerning the difficulty inherent in the presentation of psychiatric testimony.

Another case in this troublesome field is People v. Viking Press. In this case, the New York Society for the Suppression of Vice instituted an action against the Viking Press, which had published Erskine Caldwell's book, God's Little Acre. It claimed that the sale of the book violated Section 1141 of the New York Penal Law. Defendants' counsel presented the testimony of social scientists who argued that the book was not obscene and had literary value. The court dismissed the complaint in the following words:

The Court declines to believe that so large and representative a group of people would rally to the support of a book which they did not genuinely believe to be of importance and literary merit. The Court is of the opinion, moreover, that this group of people, collectively has a better capacity to judge of the value of a literary production than one who is more apt to search for obscene passages in a book than to regard the book as a whole.

In Parmelee v. United States, an action was

44 264 N. Y. S. 534 (1933). Also see Besig v. U. S., 208 F. (2d) 142, 147 (Ninth Cir. 1953); People v. Larsen, 5 N. Y. S. (2d) 55 (1938).


46 113 F. (2d) 729 (D. C. Cir. 1940).
brought to seize and destroy the book entitled *Nudism in Modern Life*. The Circuit Court for the District of Columbia talked about the absence of opinions and findings by social scientists which would have been "helpful if not necessary."

... perhaps the most useful definition of obscene is that presented in...United States v. Kennerley, i.e., that it indicates "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." But when we attempt to locate that critical point in the situation of the present case, we find nothing in the record to guide us except the book itself. The question is a difficult one, as to which the expert opinions of psychologists and sociologists would seem to be helpful if not necessary. Assumptions to the contrary which appear in some of the earlier cases, reveal the profound ignorance of psychology and sociology which prevailed generally, when those opinions were written. More recently, in the cases and textbooks, the desirability and pertinence of such evidence has been suggested. Lacking such assistance in the present case, we can compensate for it in some measure by noticing, judicially, evidence which is thus available to us.47

These cases are illustrative of the way in which the Supreme Court of the United States has utilized the findings of social scientists in the decision-making process in a variety of non-educational cases.

CHAPTER VII

VARYING VIEWS ON THE JUDICIAL USE OF SOCIOLOGICAL DATA
IN THE DESEGREGATION DECISION OF MAY 17, 1954

As noted at the outset, the inclusion of sociological data in the Brown case brought forth varying views as to the appropriateness of such data. Vigorous commentaries on this matter are to be found in the Congressional Record, law reviews, books, and at public lectures. Turning to the views of those who question and disagree with the United States Supreme Court accepting and utilizing such data in the decision-making process, we find Senator Eastland of Mississippi referring to the day that the Brown decision was rendered as "black Monday." He also said that it was completely unjustifiable for the Court to cite sociological and psychological authorities and to depart from legal precedents. Going still further in 1955, he introduced a resolution in the United States Senate which gave the Senate Judiciary Committee the power to investigate those

1 U. S., Congressional Record, 83rd Congress, 2nd Session, 1954, C., Part 9, 11522. Senator Eastland pointed out that the entire basis of American jurisprudence had been destroyed as a result of the Brown decision. Senator Stennis of Mississippi agreed with Eastland.
who were cited by the Court as well as those who assisted in organizing the "modern scientific authority," to see if they could be identified with Communist-front organizations or alien ideologies. This resolution was approved by the Senate on March 12, 1957. Senator Olin Johnson of South Carolina, another critic of the Brown decision, made it clear in his remarks to the Senate that he heartily approved of Senator Eastland's resolution to investigate those who prepared the scientific findings for the Brown case.

Congressman James Davis of Georgia introduced an article in the Congressional Record by Robert Pittman, whom he described as a lawyer of unusual ability. In this article Pittman stated:

The doctrine that all men are created equal is the scrubbrush that is to brainwash the unstable intelligensia of America. The Supreme Court of the United States has been thoroughly brainwashed with that brush....In its decision the court held in effect that it could find no basis for integration in the Constitution or the law and therefore it turned to psychology and sociology. It cited Myrdal's American Dilemma as the "modern authority" for its decision.

He was very much opposed to the Supreme Court turning to social scientists in a decision that was to affect the segregated schools throughout the South. After all, such a

2U. S., Congressional Record, 84th Congress, 1st Session, 1955, Cl, Part 5, 6964.
3Ibid.
schools had become a way of life and the majority of Southerners were not willing to accept a sudden change. Other Congressional critics who agreed with Eastland and Pittman were Senators Richard Russell and Olin Johnson of Georgia and South Carolina, respectively, and Representatives Robert Ashmore and John Flynt of South Carolina and Henderson Lanham of Georgia. A typical expression of the views of these Congressmen was presented by Representative Lanham who stated that the United States Supreme Court had been greatly influenced by Gunnar Myrdal's book, The American Dilemma "and...other dabblers in the field of sociology and psychology to which the Supreme Court turned instead of to legal precedents...."

A more serious criticism of the Supreme Court's utilization of sociological data in the Brown case was presented by the late Edmond Cahn, Professor Law at New


U.S., Congressional Record, 84th Congress, 2nd Session 1956, C11, Part 7, 8757.


York University. In a much publicized law review article, he stated that the impression had arisen that a major factor which influenced the outcome of the Brown case was the data presented to the Court by social scientists who played the role of fact-finders. He also stated the view that the constitutional rights of Negroes or other ethnic groups should not rest on such flimsy scientific foundations as were presented in the records of the desegregation cases. His reasoning was expressed in these words:

Today the social psychologists--at least the leaders of the discipline--are liberal and egalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past, suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?7

Professor Cahn was particularly critical of the testimony presented by Dr. Kenneth B. Clark, Professor of Psychology at The City College of New York, who also presented testimony in Briggs v. Elliott,8 the Clarendon County, South Carolina case. In his view, Clark had spoken more as an advocate for the Negro plaintiffs than as an objective professional witness, and had exaggerated the expert's contribution to the Brown case. Moreover, he felt, therefore,

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that the social science statement had failed to convey any new information.

My Personal, subjective reaction is that the text conveys little or no information beyond what is already known in "literary psychology" (by which I mean such psychological observations and insights as one finds continually in the works of poets, novelists, essayists, journalists, and religious prophets). ⁹

Since Clark had used only sixteen children for the doll test in Clarendon County, Cahn observed that it was highly possible that some of the children tested had "un-typical private experiences," and that the results could easily mislead due to the very small sample. Moreover, he pointed out that several of the interpretations drawn by Clark were predetermined. For example, "...if Negro children say a brown doll is like themselves, he infers that segregation has made them conscious of race; yet if they say a white doll is like themselves, he infers that segregation has forced them to evade reality." ¹⁰ Cahn also found it difficult to understand how Clark had inferred that the Negro children were evading reality because seven out of ten picked the white doll when asked to choose the doll that resembled themselves.

I gather that these seven children were among the ten who had previously chosen the white doll as "Nice." Were they wrong, then, to claim that the white doll was very much "like themselves" because they too were

¹⁰ Ibid., p. 163.
"nice?" No one can state positively what these children were thinking at the time; but if they did have perception enough to insist to themselves that the "niceness" was decisive and not the color, lo and behold! This would be wisdom indeed!\(^\text{11}\)

He also stated that the test did not actually demonstrate the social and psychological effects of school segregation per se because the experiences of the children at school were neither isolated nor differentiated from the general effects of minority group status.\(^\text{12}\) Finally, Cahn discussed the impediments which face social psychology as well as the other social sciences. They are: 1) the youthfulness and uncertainty of social psychology, 2) the lack of agreement among social psychologists on fundamental conclusions or premises and 3) the lack of empirical means to verify results.\(^\text{13}\) "As long as these disadvantages remain, and they are likely to remain in some measure for a long time, social psychology will need, above all things, \(^\text{11}\)Ibid., pp. 165065.


"The unhealthy symptoms revealed by the doll test cannot, however, be traced with certainty to educational segregation."

the use of scrupulous logic in its internal, intermediate processes..."¹⁴

Another criticism of Kenneth Clark's testimony has been presented by Richard Schwartz of the Department of Sociology and Law at Yale University. He pointed out that Clark stated that the testimony presented in the South Carolina case was consistent with previous findings which were obtained in 1947 as a result of testing more than three hundred children. In this earlier study, Negro children in the integrated schools of Springfield, Massachusetts, were compared with Negro children in the segregated schools of Hot Springs, Pinebluff and Little Rock Arkansas. They were given the same doll test that was administered in Clarendon County, South Carolina. Schwartz observed that the test results of 1947 revealed a preference of the white doll by more Northern than Southern Negroes. In other words, more Northern Negroes chose the white doll, concluded that it was nice, was like themselves, and that the Negro doll was bad. "...The children in integrated schools showed a higher incidence of the very reaction which Clark cited in his testimony as evidence of harmful effects on segregated children."¹⁵ He believed that.

¹⁴Ibid., p. 167.

the Court's opinion would have been freer of criticism had it included this observation.

James Gregor, Associate Professor of Social and Political Philosophy at the University of Hawaii, has also given attention to the fact that the studies by Clark which preceded the South Carolina study show that the Negro children in integrated schools preferred their own race less than the Negro children in segregated schools. He writes:

K. B. Clark's studies of Negro pre-school children indicate that in projective tests Negro children in segregated schools tended to prefer their own race. ... 80 per cent of Southern Negro children showed a preference for brown skin color, while Northern Negro children in integrated situations showed a marked preference for white skin color, i.e., only 20 per cent of the Northern Negro children indicated brown as their skin preference. Eleven and twelve year old Negro children attending a non-segregated school were more likely to prefer light skin color than children of the same age attending an all-Negro school. The pattern seems remarkably consistent.\(^{16}\)

Sociological data, he continues, should be pertinent to the issues presented to the Court, scientific and subject to a punctilious interpretation. In his view, the data presented in the \textit{Brown} case met none of the above three requirements.\(^{17}\) Professor Ernest Van Den Haag, of the


\(^{17}\)Ibid., p. 622.
Department of Social Philosophy at New York University, agrees with Gregor's conclusions and believes that Clark's testimony actually misled the Court.  

Disappointed like Gregor with Clark's conclusions in the South Carolina study and criticisms of his book, *The Fabric of Society*, he wrote: "From Professor Clark's experiments, his testimony and, finally, the essay to which I am replying, the best conclusion that can be drawn is that he did not know what he was doing; and the worst that he did."  

Professor Clark has replied to these criticisms, especially the allegation that he was an advocate for the desegregation interests rather than an objective scientist. For example, he made it very clear that it was not his decision but the decision of NAACP lawyers to introduce sociological data in the Brown case.

The social scientists who participated in these cases were invited to do so by the lawyers of the NAACP. It was these lawyers who had the primary and exclusive responsibility for developing the legal rationale and approach upon which these cases would be tried and appealed....It was their decision that the chances of success would be greater if it could be demonstrated that racial segregation, without regard to equality of

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20 Ernest Van Den Haag, "Social Science Testimony....", p. 79.
facilities, damaged Negro children. Furthermore, it was their decision to determine whether they could find acceptable evidence from social psychology and other social sciences which would support their belief that psychological damage resulted from racial segregation. Social scientists were not involved and did not participate in any way in these initial and important policy or legal strategy decisions.21

Clark answered Cahn who alleged that he was a partisan advocate rather than an objective scientist as follows:

The primary research studies were conducted ten years before these cases were heard on the trial court level. Professor Cahn's allegation that the writer served in the role of advocate rather than that of an objective scientist in his participation in these cases seems difficult to sustain in the face of testimony given on the basis of research conducted ten years before these cases were heard. One would have to be gifted with the power of a seer in order to prepare himself for the role of advocate in these specific cases ten years in advance.22

He also pointed out that the studies which were relied upon by the social scientists were not conducted specifically for the desegregation cases. Moreover, the White House Conference Manuscript which was cited by the United States Supreme Court in the famous Footnote Eleven in the Brown case was prepared months before he was aware that the NAACP had plans to challenge segregated public schools in federal courts.23 Finally, Clark wrote:

It must also now be stated that one of the


22Ibid., p. 229.

23Ibid.
responsibilities assigned to this writer in his role of social science consultant to the legal staff of the NAACP was to advise the lawyers not only about those studies and individuals who were scientifically acceptable, but also to advise and warn them away from studies and individuals of questionable scientific repute. At least one well-publicized report on the damaging effects of segregation on the personality of Negroes was not used in these cases because it was the judgment of this writer, that its methodology was scientifically questionable, its selection of subjects and sampling were clearly biased and that its conclusions bordered on the sensational. In short, its flaws and scientific inadequacy were so clear it could not be defended in court.  

Some writers have not been critical of the judicial utilization of sociological data in the Brown case because they hold the view that law and such data are an integral part of the decision-making process and for that the decision was justified exclusively by the words of the Fourteenth Amendment. For example, Mitchell Franklin has said that this decision "was decided exclusively under the text of the Fourteenth Amendment and was justified by it as an historical text formulating American social morality."  

Herbert Hill and Jack Greenberg in their book, Citizen's Guide to Desegregation, have stated that the 1954 decision

24 Ibid., pp. 231-32.  
was made within the realm of the legal tradition because issues that are presented to the courts present questions which involve people, and where social science data provide useful information, they have been used. The findings of social scientists can shed light on the law and aid the judiciary in developing it sagaciously.

Paul A. Freund, Professor of Law at the Harvard Law School, in an article reprinted in the Congressional Record at the request of Representative Heselton of Massachusetts, has answered those who argue that the decision was not justified by the history or language of the Fourteenth Amendment. He pointed out that the silence of the United States Constitution actually proves too much because the doctrine of "separate but equal" would be ruled out from its silence. The Constitution, he adds, failed to mention agriculture, but this does not mean that the United States Congress is powerless to legislate for federal support of agricultural commodities.²⁷ He also argued that the Brown case had not been hastily decided and that every conceivable argument against the decision had already been presented by interested parties. If the Court had held that separate public schooling failed to violate the

Fourteenth Amendment he continued, this would have been equivalent to saying that the American people do not recognize equality of educational opportunity to be a minimum standard for government to observe and enforce.

Arnold Rose, Professor Sociology at the University of Minnesota, and a participant in the preparation of briefs in the Brown case, has had a continuing interest in law and its relationship to the social sciences. He believes that the question of whether segregation involves discrimination is not a question involving law or ethics, but is actually a question of social fact. Thus, he envisions the possibility of social scientists appearing in a variety of court cases on an increasing basis in the future. 28

Finally, Jack Greenberg, assistant counsel for the NAACP legal defense and educational fund, has written that before an existing rule of law can be applied, facts have to be presented and sometimes these facts happen to come from the social scientist. "In a variety of cases social scientists' testimony is playing a role in the shaping of judgment law and in helping find relevant facts which must be proved under existing rules of law." 29 He answered

those who asserted that the Brown decision was based primarily on sociological data by stating that the United States Supreme Court did not discuss the testimony in its opinion and until the Justices tell us the role that this testimony actually played, only speculation remains. Greenberg is aware however, that law and social science evidence can work in combination.

Perhaps, there is something to be said for Professor Cahn's viewpoint that the courts should not rest the constitutional rights of any citizen solely on so-called scientific findings coming from social scientists. Certainly there seems to be a considerable lack of agreement among social scientists on some of the evidence presented in the Brown case. For example, there are conflicting arguments presented by authorities concerning the detrimental effects of segregation on the Negro child.

The personality damage school has argued that segregation causes the Negro child to react with a feeling of inferiority, affects his motivation to learn, reduces his self-esteem, confuses him in such a way that he doubts his own worth and personal dignity, causes him to avoid reality, to reject others in his group, and to hate himself.30 This personality injury continues as long as the

segregation continues according to this school.

On the other side, there are authorities who deny personality injury due to segregated situations. James Coleman in his study of 600,000 children of six ethnic groups in 4,000 schools found that the Negro student had a very high level of motivation, a great sense of self esteem, many interests and aspirations. These qualities were more prevalent among Negroes in the South and Southwest where there is a higher percentage of segregated schools than was true in the North and Northeast. This study also found that Negroes living in the South and Southwest have a higher motivation to remain in school than Negro students living in the North and West. This study also showed that schools failed to bring a great deal of influence to bear on the achievement of children that was independent of their environment and background.

These findings definitely go against those presented by K. B. Clark and other authorities who agreed.

Footnotes:

31 James Coleman, Equality of Educational Opportunity, (Washington: United States Government Printing Office, 1966). It is important to note that this study was done as a result of Section 402 of the 1964 Civil Rights Act. This section called for a survey to be conducted "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions..."  

32 The six ethnic groups studied were Negroes, American Indians, Oriental Americans, Puerto Ricans living in the Continental United States, Mexican Americans, and whites.  

with his personality injury position. Undoubtedly, this uncertainty and disagreement among social scientists is common knowledge to Supreme Court Justices who in any event, were too wise to rely solely on social science findings in a case as important as Brown v. Board of Education of Topeka. 34

A further illustration which points to the uncertainty of the data presented by social sciences can be seen by examining Buck v. Bell. 35 In this case, Carrie Buck, a feeble-minded woman, was ordered sterilized under a Virginia statute which provided for sexual sterilization whenever it was concluded that such operation would be in the interest of the patient as well as society. Justice Holmes speaking for the Court said:

We have seen more than once that the public welfare may call upon the best citizen for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit for continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover

427-39. This brief and the footnotes are also in Appendix One of this dissertation.


cutting the Fallopian tubes....Three generations of imbeciles are enough.\textsuperscript{36}

Following this case, Dr. J. E. Coogan, a Detroit sociologist, decided to review all of the evidence that appeared in the record. He found that Carrie Buck's daughter, the third generation imbecile, was only a month old when the medical personnel decided that she had certain mental defects. He also found that the daughter was reportedly very bright before her death in 1932, after having completed the second grade. Her death was attributed to measles.\textsuperscript{37} Coogan's findings which included the child's entire life span conflict with those of the medical personnel. Carl Auerbach, Lloyd Garrison, Willard Hurst, and Samuel Mermin have observed:

Sometimes a court may be misled by the existing state of knowledge. On the assumption that individuals are likely to transmit tendencies to feeblemindedness to their offspring, the Supreme Court upheld a state law under which the sterilization of a feeble-minded inmate of a state institution was ordered....Yet it is doubtful whether this assumption is supported by current knowledge in the field of eugenics.\textsuperscript{38}

This uncertainty deters the Court from basing its decisions solely on social science findings.

In the field of psychiatry, there is also the problem of uncertainty. Fredric Wertham, a psychiatrist, has

\textsuperscript{36}Ibid., p. 208.


\textsuperscript{38}Carl Auerbach, Lloyd Garrison, Willard Hurst, and
argued that the publications of the authorities in the field are "shaky" and "contain serious errors....".\textsuperscript{39} He continued his viewpoint in the following words:

If we have nothing to offer but psychological speculations and highhanded pronouncements, no progress is possible. Only if we overcome this psychoauthoritarianism will psychiatry find its proper place in the courtroom and play, as it should, a strong but subordinate role.\textsuperscript{40}

Gregory Zilborg, another psychiatrist, has pointed out that forensic psychiatrists have practiced psychological errors for many years and that such errors have been practiced "with an air of unimpeachable respectability," and "wrapped...in a...blanket of correctness which is anything but correct."\textsuperscript{41} Manfred Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, has written that "one must admit,...that our knowledge of sexual pathology is as yet very uncertain."\textsuperscript{42}

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\textsuperscript{40} Ibid., p. 338.


Finally, Michael Hakeem, Associate Professor of Sociology and Social Work at the University of Wisconsin, believes that psychiatrists have tried for many years to extend their influence in the decision-making process. He has anything but praise for the literature that has been used in this campaign.

It is characterized by incautious and immodest effusions, misrepresentation, extraordinary contradictions, flagrant illogicalities, grossly-exaggerated claims, biased selection of data, serious errors of fact and interpretation, ignorance of the distinction between scientific questions and value judgments, lack of sophistication in research methodology, tautological trivialities presented in the guise of technical profundities, and language, subject matter, and procedures not bearing the slightest resemblance to anything medical.43 Psychiatrists in his estimation, have not reached "the level of competence and scientific reliability and validity necessary to make their testimony eligible for serious consideration by the courts."44 He is amazed at judges who picture psychiatrists "as experts on human behaviour" when research is available to show that laymen are superior to them in the judgment of people's motives.

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44Ibid., p. 681.
emotions, abilities, personality traits, and action tendencies."

Turning back to the Brown case, it might be observed that an analysis of the viewpoints by Southern Senators who criticized the judicial use of sociological data in this suggests that they were not so much upset by the judicial use of such data as they were upset by the policy implications of the decision itself. A case which supports this view is Stell v. Savannah-Chatham Board of Education, which involved Negro plaintiffs who brought an action to enjoin the Savannah-Chatham County Board of Education from maintaining a segregated school system which allegedly resulted in irreparable injury to them.

Osborne Garrett, Professor of Psychology at the University of Georgia, and Henry Garrett, Emeritus Professor of Psychology at Columbia University, testified that there are inherent differences between the Negro and white child as far as educability is concerned. Integrated schools, they argue, would create frustration and certain psychological problems for the Negro child because he would not be able to measure up to the existing white standards.

The injunction prayed for was denied because the court speaking through Judge Scarlett felt that segregated schools do not cause injury to either child and that the

classification was reasonable within the meaning of the equal protection clause of the Fourteenth Amendment. This ruling was reversed the same year by the Fifth Circuit Court of Appeals which pointed to the Brown decision as the law of the land. It is noteworthy that the critics did not argue against the judicial use of sociological data in the Stell case at the District Court level because they agreed with this decision and its policy implications and could not afford to rationalize as they had done following the 1954 decision.

Following the Brown decision, many southern states adopted school placement acts as a means of maintaining segregation within the schools. The implementation of these acts called for consideration of certain psychological factors. For example, Negro students who wanted to attend the all white schools because they were closer to their homes, had to take several tests to determine if they were prepared to withstand the academic and psychological pressures. Therefore, since the critics were against mixing law with sociological data in the Brown case, the basic question to be answered is why haven't they raised their voices against such data being considered in the school placement laws? The answer is that they favored

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47 Stell v. Savannah-Chatham County Board of Education, 318 F. (2d) 425 (Fifth Cir. 1963).

48 See Shuttleworth and al. v. Birmingham Board of
the policy implications of these laws. Moreover, they have exaggerated the role that the sociological data played in the outcome of the Brown case.

CHAPTER VIII

CONCLUSION

The judicial utilization of sociological data in the Brown case brought about heated controversy, vehement attacks on the United States Supreme Court and much scholarly writing. The data presented in this paper therefore, have been used to show how the United States Supreme Court and the lower courts have utilized such data in the decision-making process in a variety of cases. Although many authorities have asserted that such data were first used by the Supreme Court in 1908 when the famous "Brandeis brief" was presented in the Muller case, it should be made clear that this was not the first time that the court had used sociological data. This was the case, however, where significant and dramatic recognition was given to its inclusion in the decision-making process.

A close analysis of the Muller opinion has shown that the influence of sociological data on the outcome of this particular case has been exaggerated. Although the "Brandeis brief" received very favorable comment and is praised in the opinion of this case, there is language elsewhere which justified a ten hour law for women working
in industrial establishments. Moreover, there is language in the opinion which suggests that the statute would have been sustained without the presentation and support of sociological data. For example, Justice Brewer referred to the sociological brief by observing that "we take judicial cognizance of all matters of general knowledge." This means or implies that the Muller decision was based on common knowledge rather than the brief which was important or influential only because it happened to have coincided with this knowledge as well as the social theory held by the Justices during this period. The theory was that restraints should be placed on the liberty guaranteed by the due process clause of the Fourteenth Amendment. I take my stand with Alpheus Mason who has argued that "when facts however stubborn, are confronted by a 'stubborn theory,' it is the latter that usually wins..."Facts,' as Professor Morris R. Cohen has well said, 'are more pliable than stubborn theories.'" The theoretical orientation of judges is a result of their value system. Therefore, my view is that when sociological data support or coincide with their value system, they are looked upon with favor in the opinion, but when such data are presented in a convincing manner in a case and do not coincide with their

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1 208 U. S. 412, 421 (1908).

beliefs or system of values, the preconceived theory held by the majority prevails over the data. (See the Adkins Case.) Moreover, if sociological data are presented in a convincing manner by counsel and less convincing data of the same nature are presented by opposing counsel, the latter would be given favorable comment in the opinion and might influence the outcome of a particular case if it supported or coincided with the value system of the majority of Justices. It is noteworthy that the judicial utilization of sociological data has always been explicitly or implicitly associated with the decision-making process. For example, the 1896 Plessy opinion reflected the sociological evidence of that period. Justice Brown speaking for the Court stated that it was impossible for the Constitution to place an inferior race socially speaking, on an identical plane with a superior one.

Following the Muller decision, Brandeis presented sociological briefs to the United States Supreme Court in case after case for the purpose of supporting needed social legislation. He was convinced that lawyers and judges should put forth an intense effort to master facts as the first step towards bringing out the truth in the decision-making process.

The Supreme Court of the United States in addition to utilizing sociological data, also employs a number of
non-sociological factors in the decision-making process because of the uncertainty of social science conclusions and the presence of pseudo-scientific findings. For example, there are conflicting viewpoints concerning the effects of public school segregation on the Negro child. The Justices as a result of the uncertainty, therefore, also take into account precedents, logic, history, the Constitution, the spirit of the times, current concepts of justice, the value system of the Justices, and the Constitution as interpreted by the Supreme Court as a basis for their decision. The writers who assert that the Brown decision was based solely on sociological data, have underestimated the significance of the Fourteenth Amendment which prohibits racial discrimination. Chief Justice Warren, speaking for the Court, made this clear when he said:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs...are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.3

These writers have also overlooked the fact that the 1954 decision did not just come forth "out of the blue," but had its roots extending back to the professional educational cases beginning with Missouri ex rel. Gaines v. Canada

and culminating in *Sweatt v. Painter* (1950). The groundwork and mood had been set and this historic decision was actually a foregone conclusion. It is reasonable to suggest that any keen student of Constitutional law could have predicted the outcome if not the exact date of the *Brown* case. My view is that the United States Supreme Court would have reached the same result if sociological data had never been introduced in this case because in *Briggs v. Elliott*\(^6\) and *Davis v. County Board of Education*,\(^7\) the district courts in South Carolina and Virginia, respectively, held that the sociological testimony was irrelevant and unproved. Moreover, in *Bolling v. Sharpe*,\(^8\) the District of Columbia case, sociological evidence was not presented but the United States Supreme Court still held that segregation was unconstitutional. Therefore, the role that this data played in the outcome of the *Brown* case has been exaggerated by the critics, who were not upset so much by the judicial utilization of sociological data as they were upset by the policy implications of the decision itself. For example, the critics of the *Brown* decision failed

\(^4\) 305 U. S. 337 (1938).


\(^6\) 98 F. Supp. 529 (E. D. South Carolina, 1951).

\(^7\) 103 F. Supp. 337 (E. D. Virginia, 1952).

\(^8\) 347 U. S. 497 (District of Columbia, 1954).
to raise their voices at the District Courts' utilization of the same type of data in the Stell case because they agreed with its policy implications. Thomas Pettigrew, Associate Professor of Social Psychology at Harvard University, speaking on the influences of the psychologists in the Brown case has observed that "our influence on the 1954 ruling was actually of only footnote importance."\(^9\)

The Justices who rendered the 1954 decision have never said how much weight was given the sociological data and until they do, it is reasonable to hypothesize that the data were important to the extent that it supported and coincided with the value system of the nine Justices. Glendon Schubert, who recognizes the importance of Judges' beliefs and system of values explains the matter as follows:

...The judge...can take cognizance of issues in a case only through the intermediation of his own beliefs and expectations concerning the empirical events to which issues of public policy relate; that is, issues can be perceived by a judge only through his own personal system of values....The values of the judge are the latent parameters that determine how he will define and respond to the issue.\(^10\)

The Supreme Court and the lower courts differ in terms of their comments in the opinions concerning the


admissibility and relevance of sociological data in a given case. The evidence presented in this paper has shown that the lower courts have had a tendency to state quite explicitly in the opinion why sociological data were admissible and relevant in the decision-making process, whereas the United States Supreme Court has been much less explicit and more implicit in its statements. A close reading of the opinions supports this conclusion generally speaking. Thus, Chief Justice Warren's opinion in the Brown case did not mention the testimony or the statement which was submitted by the social scientists. Instead, he cited some of the professional publications of sociologists and psychologists in the famous Footnote Eleven, alluding to them as "modern authority." In many instances, the Supreme Court will take judicial notice of sociological data. (See the Muller case.) This failure on the part of the Supreme Court to be more explicit in its opinions, makes it very difficult to determine the influence of sociological data on the outcome of a case. The researcher therefore, has to speculate for an answer and must realize that the judicial utilization of this data does not mean that it will automatically have a decisive influence on the outcome of a justiciable controversy. This is a very important point in view of the allegation that the outcome of the Brown case was due primarily to sociological data.
These data have also been accepted and utilized by the courts in desegregation suits\textsuperscript{11} which followed the Brown case. The available evidence suggests that sociological data will be accepted and utilized by the courts in a variety of cases in the future provided they are deemed relevant to the issues presented in a case and/or coincide or support the value system of the judges. The future, therefore, looks bright for such data in censorship, anti-trust, desegregation, criminal, trade-mark, and naturalization cases.

The judicial acceptance of poll evidence from social scientists in criminal and unfair competition cases has not been completely successful because of the lack of adequate sampling and statistical techniques which reduces validity and reliability. Such evidence will gain judicial acceptance more readily in the future, however, because of the growing confidence in polling techniques. Therefore, in the future, it will be left up to the pollsters to convince the judges on a continuous basis, that their techniques have reached "a judicially recognized point of maturity..."

In future naturalization cases, it would seem that the findings resulting from public opinion polls will be accepted and utilized by the Courts as has been true in other types of cases because doubt concerning their validity has been removed to a great extent, and they will enable judges to determine how the community feels towards certain moral issues. An intuitive hunch from the judges as to what represents community sentiment is thereby eliminated from the decision-making process. After all, when the issue in a case involves whether or not a person is to be admitted to this country, it is not asking too much that the decision be based on more than an unchecked surmise made by judges.

The analysis of the judicial use of public opinion poll evidence indicates that such evidence has had a more decisive influence on the outcome of criminal, trademark and unfair competition cases than was true in the desegregation suits. One hypothesis in this dissertation is that the nature of the issue under consideration determines to a large extent the degree of influence that sociological data will have on the outcome of a case. For example, when the issue in a case involves whether there should be a change of venue because of community prejudice, the answer is primarily a social fact rather than a rule of law or a judicial interpretation of a provision of the Constitution. The findings of social scientists, therefore, should carry
considerable weight. (The Bloeth case.) The same would hold true for trademark and unfair competition cases. (U. S. v. 88 Cases of Bireley's Orange Beverage.)

The utilization of the findings of social scientists in the judicial decision-making process at the Supreme Court level and below is a subject which merits further research because "there is an interactive process between law and the social sciences beginning to take place which bears careful examination and appraisal...." For example, many of the nation's top law schools are beginning to hire social scientists on their faculties and there has also been an increase in the number of socio-legal studies. These are indicative of a trend which is developing in the legal profession and merits serious study.

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APPENDIX I

THE APPELLANTS' BRIEF WHICH WAS PRESENTED TO THE UNITED STATES SUPREME COURT IN THE CASE OF BROWN V. BOARD OF EDUCATION OF TOPEKA (1954).
APPENDIX I

THE EFFECTS OF SEGREGATION AND THE CONSEQUENCES OF DESEGREGATION: A SOCIAL SCIENCE STATEMENT

The problem of the segregation of racial and ethnic groups constitutes one of the major problems facing the American people today. It seems desirable, therefore, to summarize the contributions which contemporary social science can make toward its resolution. There are, of course, moral and legal issues involved with respect to which the signers of the present statement cannot speak with any special authority and which must be taken into account in the solution of the problem. There are, however, also factual issues involved with respect to which certain conclusions seem to be justified on the basis of the available scientific evidence. It is with these issues only that this paper is concerned. Some of the issues have to do with the consequences of segregation, some with the problems of changing from segregated to unsegregated practices. These two groups of issues will be dealt with in separate sections below. It is necessary, first, however, to define and delimit the problem to be discussed.
DEFINITIONS

For purposes of the present statement, segregation refers to that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies, nor with the segregation of criminals or of individuals with communicable diseases which aims at protecting society from those who might harm it.

Where the action takes place in a social milieu in which the groups involved do not enjoy equal social status, the group that is of lesser social status will be referred to as the segregated group.

In dealing with the question of the effects of segregation, it must be recognized that these effects do not take place in a vacuum, but in a social context. The segregation of Negroes and of other groups in the United States takes place in a social milieu in which "race" prejudice and discrimination exist. It is questionable in
the view of some students of the problem whether it is possible to have segregation without substantial discrimination. Myrdal\textsuperscript{1} states: "Segregation...is financially possible and, indeed, a device of economy only as it is combined with substantial discrimination" (p. 629). The imbeddedness of segregation in such a context makes it difficult to disentangle the effects of segregation per se from the effects of the context. Similarly, it is difficult to disentangle the effects of segregation from the effects of a pattern of social disorganization commonly associated with it and reflected in high disease and mortality rates, crime and delinquency, poor housing, disrupted family life and general substandard living conditions. We shall, however, return to this problem after consideration of the observable effects of the total complex in which segregation is a major component.

II

At the recent Mid-century White House Conference on Children and Youth, a fact-finding report on the effects of prejudice, discrimination and segregation on the personality development of children was prepared as a basis for some of the deliberations.\textsuperscript{2} This report brought together the available social science and psychological studies which were related to the problem of how racial
and religious prejudices influenced the development of a healthy personality. It highlighted the fact that segregation, prejudices and discriminations, and their social concomitants potentially damage the personality of all children—the children of the majority group in a somewhat different way than the more obviously damaged children of the minority group.

The report indicates that as minority group children learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation. Many of them become confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others. Under these conditions, the minority group child is thrown into a conflict with regard to his feelings about himself and his group. He wonders whether his group and he himself are worthy of no more respect than they receive. This conflict and confusion leads to self-hatred and rejection of his own group.

The report goes on to point out that these children
must find ways with which to cope with this conflict. Not every child, of course, reacts with the same patterns of behavior. The particular pattern depends upon many interrelated factors, among which are: the stability and quality of his family relations; the social and economic class to which he belongs; the cultural and educational background of his parents; the particular minority group to which he belongs; his personal characteristics, intelligence, special talents, and personality pattern.

Some children, usually of the lower socio-economic classes, may react by overt aggressions and hostility directed toward their own group or members of the dominant group. Anti-social and delinquent behavior may often be interpreted as reactions to these racial frustrations. These reactions are self-destructive in that the larger society not only punishes those who commit them, but often interprets such aggressive and anti-social behavior as justification for continuing prejudice and segregation.

Middle class and upper class minority group children are likely to react to their racial frustrations and conflicts by withdrawal and submissive behavior. Or, they may react with compensatory and rigid conformity to the prevailing middle class values and standards and an aggressive determination to succeed in these terms in spite of the handicap of their minority status.

The report indicates that minority group children
of all social and economic classes often react with a generally defeatist attitude and a lowering of personal ambitions. This, for example, is reflected in a lowering of pupil morale and a depression of the educational aspiration level among minority group children in segregated schools. In producing such effects, segregated schools impair the ability of the child to profit from the educational opportunities provided him.

Many minority group children of all classes also tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist.

The report concludes that, while the range of individual differences among members of a rejected minority group is as wide as among other peoples, the evidence suggests that all of these children are unnecessarily encumbered in some ways by segregation and its concomitants.

With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual
personal ability and achievement. The culture permits and at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups.⁴

The report indicates further that confusion, conflict, moral cynicism, and disrespect for authority may arise in majority group children as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions who, in their support of racial segregation and related practices, seem to be acting in a prejudiced and discriminatory manner. Some individuals may attempt to resolve this conflict by intensifying their hostility toward the minority group. Others may react by guilt feelings which are not necessarily reflected in more humane attitudes toward the minority group. Still others react by developing an unwholesome, rigid, and uncritical idealization of all authority figures—their parents, strong political and economic leaders. As described in The Authoritarian Personality,⁵ they despise the weak, while they obsequiously and
unquestioningly conform to the demands of the strong whom they also, paradoxically, subconsciously hate.

With respect to the setting in which these difficulties develop, the report emphasized the role of the home, the school, and other social institutions. Studies have shown that from the earliest school years children are not only aware of the status differences among different groups in the society but begin to react with the patterns described above.

Conclusions similar to those reached by the Mid-century White House Conference Report have been stated by other social scientists who have concerned themselves with this problem. The following are some examples of these conclusions:

Segregation imposes upon individuals a distorted sense of social reality. Segregation leads to a blockage in the communications and interaction between the two groups. Such blockages tend to increase mutual suspicion, distrust and hostility.

Segregation not only perpetuates rigid stereotypes and reinforces negative attitudes toward members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur.

We return now to the question, deferred earlier, of
what it is about the total society complex of which segregation is one feature that produces the effects described above—or, more precisely, to the question of whether we can justifiably conclude that, as only one feature of a complex social setting, segregation is in fact a significantly contributing factor to these effects.

To answer this question, it is necessary to bring to bear the general fund of psychological and sociological knowledge concerning the role of various environmental influences in producing feelings of inferiority, confusions in personal roles, various types of basic personality structures and the various forms of personal and social disorganization.

On the basis of this general fund of knowledge, it seems likely that feelings of inferiority and doubts about personal worth are attributable to living in an underprivileged environment only insofar as the latter is itself perceived as an indicator of low social status and as a symbol of inferiority. In other words, one of the important determinants in producing such feelings is the awareness of social status difference. While there are many other factors that serve as reminders of the differences in social status, there can be little doubt that the fact of enforced segregation is a major factor.¹⁰

This seems to be true for the following reasons among others: (1) because enforced segregation results from
the decision of the majority group without the consent of the segregated and is commonly so perceived; and (2) because historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.

In addition, enforced segregation gives official recognition and sanction to these other factors of the social complex, and thereby enchanges the effects of the latter in creating the awareness of social status differences and feelings of inferiority. The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter.

Not all of the psychological traits which are commonly observed in the social complex under discussion can be related so directly to the awareness of status differences—which in turn is, as we have already noted, materially contributed to by the practices of segregation. Thus, the low level of aspiration and defeatism so commonly observed in
segregated groups is undoubtedly related to the level of self-evaluation; but it is also, in some measure, related among other things to one's expectations with regard to opportunities for achievement and, having achieved, to the opportunities for making use of these achievements. Similarly, the hypersensitivity and anxiety displayed by many minority group children about their relations with the larger society probably reflects their awareness of status differences; but it may also be influenced by the relative absence of opportunities for equal status contact which would provide correctives for prevailing unrealistic stereotypes.

The preceding view is consistent with the opinion stated by a large majority (90%) of social scientists who replied to a questionnaire concerning the probable effects of enforced segregation under conditions of equal facilities. This opinion was that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group. 12

Similar considerations apply to the question of what features of the social complex of which segregation is a part contribute to the development of the traits which have been observed in majority group members. Some of these are probably quite closely related to the awareness of status differences, to which, as has already been pointed out, segregation makes a material contribution. Others have a
more complicated relationship to the total social setting. Thus, the acquisition of an unrealistic basis for self-evaluation as a consequence of majority group membership probably reflects fairly closely the awareness of status differences. On the other hand, unrealistic fears and hatreds of minority groups, as in the case of the converse phenomenon among minority group members, are probably significantly influenced as well by the lack of opportunities for equal status contact.

With reference to the probable effects of segregation under conditions of equal facilities on majority group members, many of the social scientists who responded to the poll in the survey cited above felt that the evidence is less convincing than with regard to the probable effects of such segregation on minority group members, and the effects are possibly less widespread. Nonetheless, more than 80 per cent stated it as their opinion that the effects of such segregation are psychologically detrimental to the majority group members.¹³

It may be noted that many of these social scientists supported their opinions on the effects of segregation on both majority and minority groups by reference to one or another or to several of the following four lines of published and unpublished evidence.¹⁴ First, studies of children throw light on the relative priority of the awareness of status differentials and related factors as compared to
the awareness of differences in facilities. On this basis, it is possible to infer some of the consequences of segregation as distinct from the influences of inequalities of facilities. Second, clinical studies and depth interviews throw light on the genetic sources and casual sequences of various patterns of psychological reaction; and, again, certain inferences are possible with respect to the effects of segregation per se. Third, there actually are some relevant but relatively rare instances of segregation with equal or even superior facilities, as in the cases of certain Indian reservations. Fourth, since there are inequalities of facilities in racially and ethnically homogeneous groups, it is possible to infer the kinds of effects attributable to such inequalities in the absence of effects of segregation and by a kind of substraction to estimate the effects of segregation per se in situations where one finds both segregation and unequal facilities.

III

Segregation is at present a social reality. Questions may be raised, therefore, as to what are the likely consequences of desegregation.

One such question asks whether the inclusion of an intellectually inferior group may jeopardize the education of the more intelligent group by lowering educational standards or damage the less intelligent group by placing
it in a situation where it is at a marked competitive disadvantage. Behind this question is the assumption, which is examined below, that the presently segregated groups actually are inferior intellectually.

The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences. It has been found, for instance, that the differences between the average intelligence test scores of Negro and white children decrease, and the overlap of the distributions increases, proportionately to the number of years that the Negro children have lived in the North. Related studies have shown that this change cannot be explained by the hypothesis of selective migration. It seems clear, therefore, that fears based on the assumption of innate racial differences in intelligence are not well founded.

It may also be noted in passing that the argument regarding the intellectual inferiority of one group as compared to another is, as applied to schools, essentially an argument for homogeneous groupings of children by intelligence rather than by race. Since even those who believe that there are innate differences between Negroes and whites in America in average intelligence grant that considerable overlap between the two groups exists, it would follow that it may be expedient to group together the
superior whites and Negroes, the average whites and Ne­
groes, and so on. Actually, many educators have come to
doubt the wisdom of class groupings made homogeneous solely
on the basis of intelligence. Those who are opposed to
such homogeneous grouping believe that this type of segre­
gation, too, appears to create generalized feelings of
inferiority in the child who attends a below average class,
leads to undesirable emotional consequences in the education
of the gifted child, and reduces learning opportunities
which result from the interaction of individuals with var­
ied gifts.

A second problem that comes up in an evaluation of
the possible consequences of desegregation involves the
question of whether segregation prevents or stimulates inter­
racial tension and conflict and the corollary question of
whether desegregation has one or the other effect.

The most direct evidence available on this problem
comes from observation and systematic study of instances in
which desegregation has occurred. Comprehensive reviews
of such instances clearly establish the fact that de­
segregation has been carried out successfully in a variety
of situations although outbreaks of violence had been com­
monly predicted. Extensive desegregation has taken place
without major incidents in the armed services, in both
Northern and Southern installations and involving officers
and enlisted men from all parts of the country, including
the South. Similar changes have been noted in housing and industry. During the last war, many factories both in the North and South hired Negroes on a nonsegregated, non-discriminatory basis. While a few strikes occurred, refusal by management and unions to yield quelled all strikes within a few days.

Relevant to this general problem is a comprehensive study of urban race riots which found that race riots occurred in segregated neighborhoods, whereas there was no violence in sections of the city where the two races lived, worked and attended school together.

Under certain circumstances desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races. Relevant studies may be cited with respect to housing, employment, the armed services and merchant marine, recreation agency, and general community life.

Much depends, however, on the circumstances under which members of previously segregated groups first come in contact with others in unsegregated situations. Available evidence suggests, first, that there is less likelihood of unfriendly relations when the change is simultaneously introduced into all units of a social institution to which it is applicable—e.g., all of the schools in a school system or all of the shops in a given factory. When
factories introduced Negroes in only some shops but not in others the prejudiced workers tended to classify the de-segregated shops as inferior, "Negro work." Such objections were not raised when complete integration was introduced. The available evidence also suggests the importance of consistent and firm enforcement of the new policy by those in authority. It indicates also the importance of such factors as: the absence of competition for a limited number of facilities or benefits; the possibility of contacts which permit individuals to learn about one another as individuals; and the possibility of equivalence of positions and functions among all of the participants within the unsegregated situation. These conditions can generally be satisfied in a number of situations, as in the armed services, public housing developments, and public schools.

IV

The problem with which we have here attempted to deal is admittedly on the frontiers of scientific knowledge. Inevitably, there must be some differences of opinion among us concerning the conclusiveness of certain items of evidence, and concerning the particular choice of words and placement of emphasis in the preceding statement. We are nonetheless in agreement that this statement is substantially correct and justified by the evidence, and the differences
among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions.
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APPENDIX II

THE TYPE OF MATERIALS UTILIZED BY JUSTICE BRANDEIS IN HIS BRIEFS. THEY WERE TAKEN FROM JOSEPHINE GOLDMARK, FATIGUE AND EFFICIENCY, NEW YORK: WILLIAM F. FELL COMPANY, 1912.

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APPENDIX II

PART II

THE WORLD'S EXPERIENCE UPON WHICH LEGISLATION LIMITING THE HOURS OF LABOR FOR WOMEN IS BASED

Part II consists of the material contained in four briefs submitted by Louis D. Brandeis and Josephine Goldmark to the Supreme Court of the United States (1908), the Supreme Court of Illinois (1909), the Supreme Court of Ohio (1911), and again to the Supreme Court of Illinois (1912). These briefs were submitted in the following cases, in defense of the ten-hour laws of Oregon and Illinois, of the fifty-four-hour law of Ohio, and of the amended ten-hour law of Illinois:

Muller v. Oregon 208 U. S., 412; Ritchie v. Wayman et al., 244 Ill., 509; Anna Hawley, ex parte, In the Supreme Court of Ohio, December 1911; People v. Elderling, In the Supreme Court of the Senate of Illinois, February term, 1912.
THE WORLD'S EXPERIENCE UPON WHICH LEGISLATION LIMITING THE HOURS OF LABOR FOR WOMEN IS BASED

1. THE DANGERS OF LONG HOURS

A. Causes

(1) PHYSICAL DIFFERENCES BETWEEN MEN AND WOMEN

The dangers of long hours for women arise from their special physical organization taken in connection with the strain incident to factory and similar work.

In structure and function women are differentiated from men. Besides anatomical and physiological differences, physicians are agreed that women are in general weaker than men in muscular strength and in nervous energy. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury.


Samuel Smith, Esq., member of College of Surgeons and practising surgeon in Leeds:

10385. Are not the females still less capable of sustaining this long labour than males would be of a
similar age?—No doubt whatever of it; because in the female neither the bony nor the muscular system is so strongly developed as it is in the male; in fact, the whole body is more delicately formed.

10386. Is the peculiar structure of the female form so well adapted to long continued labour, and especially which is endured standing, as is that of a male?—No, it is not. (Page 503).

10453. You stated that females were not as competent to sustain the labour of the factories as males of the same age; is it not considered that females attain to full maturity and full strength much earlier than males?—They do.

10454. And would they not be so able to do the labour proportioned to their strength as the males of the same age?—No, I think not; the female is altogether a more delicate being than the male. (Page 510).

Thomas Young, Esq., M.D., physician at Bolton:

10600. Will you state whether the female can bear labour as well as the male?—I think females cannot endure labour as well as males. (Page 522.)
IV

SOME SPECIFIC STUDIES OF PHYSICAL OVER-STRAIN IN INDUSTRY

Thus a rapid glance at some actual conditions in diverse occupations such as the telephone service, the great woman-employing needle and textile and shoe trades, and the canneries, throws some light upon the new strain of industry. In all these occupations work has increased its demands upon human energies. We turn next to learn some of the physical effects upon the workers, so far as these have been observed and recorded.

As concerns the past, we have abundant testimony on the fruits of overwork, not only regarding those who have themselves been bound to exacting tasks, but regarding their children and the communities in which their lives were spent. This kind of testimony, to which we shall often have occasion to refer in this study, is found in the accumulated official and unofficial reports of the inspectors and physicians who have had daily to observe the conditions of labor at first hand, and whose unconscious unanimity gives to their evidence, as we have pointed out, a strangely heightened power. The individual observer may exaggerate or minimize or strain the facts. But no one can read without a deep sense of its total truth, the reiterated evidence of generations of such observers, in many countries,
writing independently but agreeing fundamentally in their observations and diagnoses. *

There is a peculiar significance in this kind of testimony. It is the accumulated experience of mankind and has an authority due to its very iterations. This is the power and the moving appeal of history, that it gives us, as fiction rarely can, precisely the cumulative experiences, the persistent realities of our common lot. A truth that has been a hundred years in the forging is, in so far forth, just so much the truer. It is not a mathematical formula, proved once for all and immutable. The truths of history gain in meaning and power under changed guises, coming down to the children of a later age with a fuller and more significant content. This is as true of industrial history as of any other; and hence the industrial experience of the past should enable us more intelligently to estimate our own difficulties and performances.

1. INFANT MORTALITY

According to the testimony of many observers, the industrial overstrain of women has commonly reacted in three visible ways: in a heightened infant mortality, a lowered birth rate, and an impaired second generation.

*See Part II of this volume.
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