Serving Two Masters

Integration Ideals and Client Interests in School Desegregation Litigation

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

> How should the term "client" be defined in school desegregation cases? . . . How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views? Do the political, organizational, and even philosophical complexities of school desegregation litigation justify a higher standard of professional responsibility on the part of civil rights lawyers to their clients, or more diligent oversight of the lawyer-client relationship by the bench and bar?
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> Having achieved so much by courageous persistence, [civil rights lawyers] have not wavered in their determination to implement *Brown* using racial balance measures developed in hard-fought legal battles. This

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stance presents great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. . . . But it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals. The magnitude of the difficulty is more accurately gauged in a much older code that warns: "No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other."[1]

School Litigation: A Behind-the-Scenes View

By the early 1930s, the NAACP, with the support of a foundation grant, had organized a concerted program of legal attacks on racial segregation. . . . The public schools were chosen because they presented a far more compelling symbol of the evils of segregation and a far more vulnerable target than segregated railroad cars, restaurants, or restrooms. . . .

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

By the late 1950s, the realization by black parents and local branches of the NAACP that litigation would be required, together with the snail's pace at which most of the school cases progressed, brought about a steady growth in the size of school desegregation dockets. Because of their limited resources, the NAACP and LDF (Legal Defense Fund) adopted the following general pattern for initiating school suits. A local attorney would respond to the request of an NAACP branch to address its members concerning their rights under the *Brown* decision. Those interested in joining a suit as named plaintiffs would sign retainers authorizing the local attorney and members of the NAACP staff to represent them in a school desegregation class action. . . .

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The civil rights lawyers would not settle for anything less than a desegregated system. While the situation did not arise in the early years, it was generally made clear to potential plaintiffs that the NAACP was not interested in settling the litigation in return for school board promises to

provide better segregated schools. Black parents generally felt that the victory in *Brown* entitled the civil rights lawyers to determine the basis of compliance. Perpetuating segregated schools was unacceptable, and the civil rights lawyers' strong opposition to such schools had the full support of both the named plaintiffs and the class they represented. . . .

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

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Lawyer-Client Conflicts: Sources and Rationale

Having convinced themselves that *Brown* stands for desegregation and not education, the established civil rights organizations steadfastly refuse to recognize reverses in the school desegregation campaign—reverses which, to some extent, result from their rigidity. They seem to be reluctant to evaluate objectively the high risks inherent in a continuation of current policies.

. . . Early in 1975, I was invited by representatives of Boston's black community groups to meet with them and NAACP lawyers over plans for Phase II of Boston's desegregation effort. . . . NAACP lawyers had retained experts whose proposals for the 1975–1976 school year would have required even more busing between black and lower-class white communities. The black representatives were ambivalent about the busing plans. They did not wish to back away after years of effort to desegregate Boston's schools, but they wished to place greater emphasis on upgrading the schools' educational quality, to maintain existing assignments

at schools which were already integrated, and to minimize busing to the poorest and most violent white districts. . . .

. . . The NAACP lawyers assigned to the Boston case listened respectfully to the views of the black community group, but made clear that a long line of court decisions would limit the degree to which those educational priorities could be incorporated into the desegregation plan the lawyers were preparing to file. . . . Acting on the recommendations of appointed masters, Judge Garrity adopted several provisions designed to improve the quality of the notoriously poor Boston schools. But as in the Detroit and Atlanta cases, these provisions were more the product of judicial initiative than of civil rights advocacy.

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

Prior to Detroit, the most open confrontation between NAACP views of school integration and those of local blacks who favored plans oriented toward improving educational quality occurred in Atlanta. There, a group of plaintiffs became discouraged by the difficulty of achieving meaningful desegregation in a district which had gone from 32 percent black in 1952 to 82 percent black in 1974. Lawyers for the local NAACP branch worked out a compromise plan with the Atlanta School Board that called for full faculty and employee desegregation but for only limited pupil desegregation. In exchange, the school board promised to hire a number of blacks in top administrative positions, including a black superintendent of schools.

Apparently influenced by petitions signed by several thousand members of the plaintiffs' class, the federal court approved the plan. Nevertheless the national NAACP office and LDF lawyers were horrified by the compromise. The NAACP ousted the Atlanta branch president who had supported the compromise. Then, acting on behalf of some local blacks who shared their views, LDF lawyers filed an appeal in the Atlanta case.

. . . But finding that the system had achieved unitary status [a] Fifth Circuit panel upheld the plan.

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

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

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

. . . Much more effective remedies for racial subordination in the schools could be obtained if the creative energies of the civil rights litigation groups could be brought into line with the needs and desires of their clients.

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Civil Rights Litigation and the Regulation of Professional Ethics

The questions of legal ethics raised by the lawyer-client relationship in civil rights litigation are not new. The Supreme Court's 1963 treatment of these issues in *NAACP v. Button*,[2] however, needs to be examined in light of the emergence of lawyer-client conflicts which are far more serious than the premature speculations of a segregationist legislature.

As the implementation of *Brown* began, Southern officials looking for every possible means to eliminate the threat of integrated schools soon realized that the NAACP's procedure for obtaining clients for litigation resembled the traditionally unethical practices of barratry and running and capping. Attempting to exploit this resemblance, a majority of Southern states enacted laws defining NAACP litigation practices as unlawful. . . . The Virginia legislature amended its criminal statutes barring running and capping to forbid the solicitation of legal business by "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[3] An attorney accepting employment from such an organization was subject to disbarment. . . . The [Virginia Supreme Court of Appeals] held that the statute's expanded definition of improper solicitation of legal business did not violate the Constitution in proscribing many of the legal activities of civil rights groups such as the NAACP.

The Supreme Court reversed, holding that the state statute as construed and applied abridged the First Amendment rights of NAACP members. . . . Justice Brennan, writing for the majority, placed great weight on the importance of litigation to the NAACP's civil rights program. He noted that blacks rely on the courts to gain objectives which are not available through the ballot box. . . .

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

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

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

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

> it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools

> closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.[4]

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

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

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

The *Code of Professional Responsibility* again and again admonishes the lawyer "to disregard the desires of others that might impair his free

judgment." But the suggestions assume the classical commercial conflict or a third-party intermediary clearly hostile to the client. Even when the *Code* seems to recognize more subtle "economic, political or social pressures," the protection civil rights clients need is not provided, and the suggested remedy, withdrawal from representation of the client, is hardly desirable if the client has no available alternatives.

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

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

Current ABA standards thus appear to conform with *Button* and its progeny in permitting the representation typically provided by civil rights groups. They are a serious attempt to come to grips with and provide specific guidance on the issues of outside influence and client primacy that so concerned Justice Harlan. But they provide little help where, as in school desegregation litigation, the influences of attorney and organization are mutually supportive, and both are so committed to what they perceive as the long-range good of their clients that they do not sense the growing conflict between those goals and the client's current interests. Given the cries of protest and the charges of racially motivated persecution that would probably greet any ABA effort to address this problem more

specifically, it is not surprising that the conflict—which in any event will neither embarrass the profession ethically nor threaten it economically—has not received high priority.

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

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

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The Resolution of Lawyer-Client Conflicts

. . . It is essential that lawyers "lawyer" and not attempt to lead clients and class. Commitment renders restraint more, not less, difficult, and the inability of black clients to pay handsome fees for legal services can cause their lawyers, unconsciously perhaps, to adopt an attitude of "we know what's best" in determining legal strategy. Unfortunately, clients are all too willing to turn everything over to the lawyers. In school cases, perhaps more than in any other civil rights field, the attorney must be more than a litigator. The willingness to innovate, organize, and negotiate—and the ability to perform each with skill and persistence—are of crucial

importance. In this process of overall representation, the apparent—and sometimes real—conflicts of interest between lawyer and client can be resolved.

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

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

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

NOTES

1. Luke 16:13 (King James).
2. 371 U.S. 415 (1963).
3. Id. at 423.
4. 371 U.S. at 462.