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A REVIEW AND APPRAISAL OF THEIR TESTIMONY IN LITIGATION

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"How to inform the judicial mind, as you know, is one of the most complicated problems,"[1] said Justice Frankfurter during argument of the school segregation cases. And as law deals more and more with issues of great public consequence the judiciary's need for knowledge increases. Much of this knowledge is within the realm of what are called the social sciences.

Although jurisprudents and social scientists have long complained of a gulf between law and social science,[2] little notice has been given to the recent, recurrent collaboration between the two at the trial level. In a variety of cases social scientists' testimony is playing a role in the shaping of judge-made law and in helping find relevant facts which must be proved under existing rules of law.

Such evidence is as significant as its precursor, the "Brandeis Brief," for social science information may be relevant in many cases. Social scientists have testified in recent cases on such questions as: What are the psychological effects of racial segregation? Are Negroes inherently intellectually inferior to white people? Is a community's public opinion such that a defendant cannot receive a fair trial there? Is a label on a bottle of orange drink misleading? Are two trademarks likely to be confused? Is a book so

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1 Justice Felix Frankfurter, from the bench, during the first reargument of the school segregation cases [347 U.S. 483, 74 S.Ct. 686 (1954)]. Transcript of Argument, Briggs v. Elliott, No. 102 in the United States Supreme Court, October Term, 1952, p. 59. The arguments were stenographically transcribed and the transcriptions are in the possession of counsel in the cases.

2 Llewellyn, "Law and the Social Sciences—Especially Sociology," 62 HARV. L. REV. 1286 (1949); Simpson and Field, "Social Engineering Through Law," 22 N.Y. UNIV. L.Q. REV. 145 (1947); Cowan, "The Relation of Law to Experimental Social Science," 96 UNIV. PA. L. REV. 484 (1948); Simpson and Field, "Law and the Social Sciences," 32 VA. L. REV. 855 (1946). Social science assistance in legislative rule-making is not uncommon—almost any daily paper will tell of a psychologist, psychiatrist or economist testifying before a legislative committee. See, Sorensen, "Sociology's Potential Contributions to Legislative Policy Determination," 16 AM. SOC. REV. 239 (1951). In a limited related area there has been social science assistance in the appellate courts—the "Brandeis Brief" which marshals social science and other authorities to show the reasonableness and hence the constitutionality of legislation. See, Muller v. Oregon, 208 U.S. 412 at 419, 28 S.Ct. 324 (1908), especially note 1; MASON, BRANDEIS, A FREEMAN'S LIFE 248-251 (1946); WYZANSKI, A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY 18 (1952).

obscene that it is likely to corrupt youth?[3] To help with the answers, social science testimony has been presented or suggested in cases involving issues ranging from segregation to banking—with trademarks, criminal law, religious freedom, censorship, naturalization and antitrust in between.

This testimony has helped courts to make decisions in two ways:

(1) Before an existing rule of law can be applied, relevant facts must be shown. Sometimes they have been established by social scientific experts. For example, there are the trademark cases[4] where the issue is whether two trademarks may be confused with one another. In such cases a psychological or public opinion analysis may help.

(2) Social scientists' testimony was used in a wholly different and new way in the recent school segregation cases. There, by placing before the Court authoritative scientific opinions regarding the effect of racial classification and of "separate but equal" treatment, the plaintiffs helped persuade the Court in the shaping of a judge-made rule of law.

Testimony to Establish Relevant Facts

A recent example of the use of social science testimony for a conventional purpose is found in the church-state case, *Tudor v. Board of Education*,[5] in which Chief Justice Vanderbilt's opinion quotes extensively from the testimony of a social psychologist, an educational sociologist and an educator. The issue was whether the First Amendment to the Federal Constitution (as incorporated into the Fourteenth) and Article I, paragraph 4 of the New Jersey Constitution forbade distribution of the Gideon Bible in New Jersey public schools. The Bibles had been given to the schools free of charge. Each child was asked to sign a card requesting one, much as request for released time was made in *Zorach v. Clauson*.[6] However, in *Zorach* there was no testimony as to whether the choice was free, or whether the children were coerced by psychological or other means. Justice Douglas, for the majority, felt that the issue of the coerciveness of the program was irrelevant; more-

[3] Many other uses—chiefly involving public opinion polls—have been suggested. See Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L.Q. REV. 1213 at 1257-1259 (1953); note, 66 HARV. L. REV. 498 at 508-513 (1952).

[4] Note 22 infra.

[5] 14 N.J. 31, 100 A (2d) 857 (1953).

[6] 343 U.S. 306, 72 S.Ct. 679 (1952).

over, testimony of coercion was inadmissible because the issue had not been properly raised. Justice Frankfurter dissented on the ground, among others, that plaintiffs should have been permitted to make their proof.[7]

But in the *Tudor* case the Supreme Court of New Jersey treated the question of coerciveness as a factual one. The school board urged that accepting a Bible was optional, therefore the program did not interfere with the free exercise of religion. But, the opinion retorted, this argument ignores reality. The testimony of the social scientists was quoted to show that the distribution system tended, by psychological pressures, to compel children to accept Bibles. Quoted testimony also stated that the method of distribution created divisive tensions among children. This finding appears to be irrelevant, but it apparently contributed to the result as somewhat of a policy makeweight at least.

Further illustrations of the need for this type of testimony at the fact level can be found in the censorship field. In *Parmelee v. United States,* an action to confiscate and destroy certain books entitled *Nudism in Modern Life,* the court, noting the lack of social science evidence, wrote:

> " . . . 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 opinion 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."[8]

But there are cases in which such testimony has been admitted. In *State v. Scope* the defendant was indicted for obscene libel for showing the movie, "Hollywood Peep Show." A psychiatrist

[7] Id. at 322.
[8] (D.C. Cir. 1940) 113 F. (2d) 729 at 732.

testified for the state that the film was apt to injure teen-agers psychologically and would tend to rouse base emotions in normal adult males. The court held the testimony admissible:

> ". . . we think that there is a reasonable basis for the admission of the experts' opinion that the film in question would tend to have harmful results, at least in the subconscious 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 subconscious 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 . . . upon the conscious mind of the normal adult was correct. . . ."[9]

In other cases evidence of this kind has been admitted.[10]

But in *Commonwealth v. Isenstadt*[11] the Massachusetts Supreme Court took another view of admissibility. The defendant was tried for violating the obscenity law by selling the book *Strange Fruit*. He attempted to introduce the testimony of a writer and teacher of literature, a child psychiatrist and a professor of theology, to show that the book would "elevate rather than corrupt morals." The testimony was excluded on the ground that it concerned "nothing more than the reaction of normal human beings" and that "there is reason to believe that a jury, being composed of men drawn from the various segments of that public, would be as good a judge of the effect as experts in literature or psychiatry, whose . . . mental reactions . . . are likely to be entirely different from those of the general public." If such evidence were admissible, many cases could not "be adequately tried without an expensive array of experts on both sides. Experience in those fields in which expert testimony is now admittedly necessary does not lead us to look with favor upon such a sweeping extension.

[9] 46 Del. 519 at 526, 86 A. (2d) 154 (1952).

[10] People v. Larsen, 5 N.Y.S. (2d) 55 at 56 (1938); People v. Viking Press, 147 Misc. 813, 264 N.Y.S. 534 (1933); Besig v. United States, (9th Cir. 1953) 208 F. (2d) 142 at 147.

[11] 318 Mass. 543, 62 N.E. 840 (1945).

Without prejudging the indefinite future, we are not convinced that the time has come for it."[12]

Public opinion analysts are the social scientists who have testified, and whose testimony has been suggested, most often.[13] Public opinion may be an issue in many kinds of cases.[14] Recently authority has held such testimony admissible on several occasions. In one case the issue was whether Bireley's Orange Beverage was "economically adulterated" in that it allegedly appeared to the average consumer to better than it was.[15] The Government charged that it appeared to contain a great deal of orange juice, although it contained only 6 percent orange juice and was mostly water. The Government attempted to introduce a public opinion survey of 3,539 persons to establish what people thought the Bireley product contained. There was a hearsay objection. But the court concluded that it was unfounded. Judge Hastie wrote:

> ". . . The statements of the persons interviewed were not offered for the truthfulness of their assertions as to the composition of the beverage. . . . 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 was 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."[16]

The understanding of "savings bank" was an issue in an action by New York State to restrain a national bank from using the words "savings" in its publicity. Section 258 of the New York Banking Law forbade national banks to use the word "savings." Instead they were required to use terms like "thrift account" or "special interest" account. Defendant produced a poll to show the public

12 Id. at 558-559.

13 See, Kennedy, "Law and the Courts," in MEIER AND SAUNDERS, THE POLLS AND PUBLIC OPINION 92 (1949); Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L.Q. REV. 1213 (1953); notes, 66 HARV. L. REV. 498 (1952), 20 GEO. WASH. L. REV. 211 (1951).

14 See note 3 supra. We may add antitrust cases to the types of cases discussed in the text. In the United States' suit against the professional football teams, pollsters' testimony concerning the effect of the television blackout imposed by some teams was admitted subject to motions to strike. United States v. National Football League, (D.C. Pa. 1953) 116 F. Supp. 319. See, N.Y. TIMES, Jan. 28, 1953, p. 34:1; Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L.Q. REV. 1213 at 1218 (1953).

15 United States v. 88 Cases of Bireley's Orange Beverage, (3d Cir. 1951) 187 F. (2d) 967.

16 Id. at 974.

understanding of "savings" which showed that "savings" would attract depositors more readily than the other terms. The court reviewed the polling technique in detail and the testimony concerning it. It concluded:

> "Polls, as evidence, are not controlling, of course. Many are misleading; valueless. . . .
>
> "A party endeavoring to establish the public state of mind on a subject, which state of mind can not be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind. The evidence offered should include calling the planners, supervisors, and workers (or some of them) as witnesses so that the court may see and hear them; they should be ready to give a complete exposition of the poll and even its results; the work sheets, reports, surveys and all documents used in or prepared during the poll taking and those showing its results should be offered in evidence, although the court may desire to draw its own conclusions. In this trial the learned counsel for defendant advanced proof of the kind to which I have just referred. I think that the proof as to the poll should be received in evidence."[17]

When the case reached the United States Supreme Court the poll was not mentioned in Justice Jackson's opinion for the majority, but he assumed that the word "savings" was important to defendant: ". . . they must be deemed to have the right to advertise that fact by using the *commonly understood description* which Congress has specifically selected."[18]

However, in most cases where polls have been introduced, objection apparently was not made,[19] so there are few direct holdings that polls are admissible.

[17] People v. Franklin Nat. Bank of Franklin Square, 200 Misc. 557 at 565-566, 105 N.Y.S. (2d) 81 (1951), revd. 281 App. Div. 757, 118 N.Y.S. (2d) 210 (1953), affd. 305 N.Y. 453, 113 N.E. (2d) 796 (1953), revd. 347 U.S. 373, 74 S.Ct. 550 (1954). Interestingly, the trial judge commented that he believed the pollsters' conclusions and that they coincided with his personal opinion. This comment is suggestive of Judge Waring's dissent in Briggs v. Elliot [(D.C. S.C. 1951) 98 F. Supp. 529 at 538]. He, too, felt that the testimony coincided with what he knew. The North-South split in acceptance of the scientists' testimony in the school segregation cases is in the same vein.

[18] Franklin Nat. Bank of Franklin Square v. New York, 347 U.S. 373 at 378, 74 S.Ct. 550 (1954). Italics added.

[19] The cases are cited in Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L.Q. REV. 1213 (1953), and note, 66 HARV. L. REV. 498 (1952). Polls have been held admissible in Franklin Nat. Bank of Franklin Square v. New York, 347 U.S. 373, 74 S.Ct. 550 (1954); Household Finance Corp. v. Federal Finance Corp., (D.C. Ariz. 1952) 105 F. Supp. 164; S. C. Johnson & Son v. Johnson, (D.C. N.Y.

In some cases the lack of a poll where public opinion is an issue had been noted judicially. In a recent naturalization case, Judge Learned Hand had to decide whether a man who had killed his thirteen-year-old son possessed good moral character. The son was confined to a crib; he was deaf, mute, and deformed by a birth injury which deprived him of bladder and bowel control. The father was convicted of second degree manslaughter, but the jury recommended utmost clemency. He received a light sentence and was placed on probation. His moral character was otherwise unquestionably good. Judge Hand held that the legal test of good moral character was whether it conformed to "the generally accepted moral conventions current at the time," but that in "the absence of some national inquisition, like a Gallup poll, that is indeed a difficult test to apply. . . ." He concluded:

> ". . . 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 practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance."[20]

Judge Jerome Frank dissented.[21] He believed that an issue importantly affecting a man's life should not be decided by resort to "mere unchecked surmises." He recommended remanding to the district judge with directions to give the petitioner and the Government an opportunity to produce reliable information on the subject which the judge might supplement; based upon this, the judge should reconsider his decision. "Then if there is another appeal, we can avoid sheer guessing. . . ." Judge Frank has on other occasions indicated concern over the fact-finding problem presented by legal issues involving public opinion.[22]

1939) 28 F. Supp. 744, mod. (2d Cir. 1940) 116 F (2d) 427; United States v. 88 Cases of Bireley's Orange Beverage, (3d Cir. 1951) 187 F. (2d) 967. One might argue about how strong the "holding" is in some of these cases. See also Rhodes Pharmacal Co. v. FTC, (7th Cir. 1953) 208 F. (2d) 382, which adopts the rule of Bireley; but Rhodes deals with the admissibility of such testimony before an administrative body, the FTC.

[20] Repouille v. United States, (2d Cir. 1947) 165 F. (2d) 152 at 153.

[21] Id. at 154-155.

[22] In a trademark case which involved the issue of whether the word "Seventeen" on a girdle was likely to be confused with the word "Seventeen" on a magazine, he dissented once more, noting the desirability of equipping courts to find such facts. Triangle Publications v. Rohrlich, (2d Cir. 1948) 167 F. (2d) 969 at 974, 976. In so doing he noted (at 976-977) that plaintiff might have employed " 'laboratory' tests, of a sort now familiar, to ascertain whether numerous girls and women, seeing both plaintiff's magazine and de-

There are, of course, problems of admissibility and weight of the evidence. In all cases where an expert testifies, he must first be qualified as especially able to make the judgment he proposes to offer. Therefore, there are the problems of whether his branch of social science is sufficiently certain to warrant an authoritative opinion and whether the expert is sufficiently versed in his field. What standard should be applied? There appears to be no reason why the standard should be any different from that for experts in general. A leading treatise states: "In determining whether a witness is qualified to testify as an expert, the test is whether his knowledge is such that his opinion may aid the jury; but whether it is helpful or not is a question for the court."[23] It does not appear that more has been required in the case of social scientists.[24] Expertise is established by examination and cross-examination prior to the witness' testimony. Each case is decided on its individual merits.[25]

An example of a problem that may arise in qualifying a witness of this type appears in a colloquy which took place in *Briggs v. Elliott*,[26] the South Carolina school segregation case. Plaintiffs attempted to introduce the testimony of a political scientist concerning the effects of segregation "in the development of citizenship."

> Judge Parker: "It seems to me that any lawyer or any man who has any experience in government would be just as well qualified as he would to express an opinion on that. He is not a scientist in the field of education. . . .
>
> "Do you seriously contend he is qualified to testify as an educational expert? What do you say about that Mr. Marshall?"
>
> Mr. Marshall: " . . . we have been trying to . . . present as many experts in the field with as many different reasons why we consider that segregation in and of itself is injurious. . . ."

fendant's advertisements, would believe them to be in some way associated." See also La Touraine Coffee Co. v. Lorraine Coffee Co., (2d Cir. 1946) 157 F. (2d) 115 at 119, 120.

23 ROGERS, EXPERT TESTIMONY, 3d ed., §37 (1941).

24 In Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848 (1950), the following colloquy appears on pp. 192-193 of the Record:

"Q. Dr. Redfield, are there any recognizable differences as between Negro and white students on the question of their intellectual capacity?

"Mr. Daniel: Your Honor, we object to that. . . .

"The Court: I suppose his qualifications he has testified to would qualify him to draw his conclusion."

25 ROGERS, EXPERT TESTIMONY, 3d ed., §39 (1941).

26 (D.C. S.C. 1951) 98 F. Supp. 529.

Judge Parker: "Are you going to offer any more witnesses along this line?"

Mr. Marshall: "No, sir. The other witnesses are REAL (sic) scientists."

Judge Parker: "Well, I'll take it for what it's worth. Go ahead."[27]

In the public opinion poll cases there are problems of admissibility generally related to the hearsay rule. In a recent criminal case in Florida, *Irvin v. State*,[28] the Negro defendant's attorneys engaged the Elmo Roper firm to ascertain what part of the populace in the county of trial believed defendant guilty, and whether the Negro community was so intimidated that a Negro juror would fear to vote for acquittal. The poll was excluded from evidence because the poll supervisors who testified about the polling methods were not present at every interview, and the dozen interviewers who actually asked the questions did not testify concerning each of their 1,500 interviews. The Supreme Court of Florida affirmed, holding poll evidence hearsay and also questioning the competency of evidence, noting pollsters' incorrect predictions in the 1948 presidential election.

These problems have been adequately canvassed elsewhere.[29] Courts are apparently growing more liberal in this area, and the hearsay objection may not remain too formidable. At any rate, if a litigant wants to use the tedious process of putting on every interviewer concerning every interview, he can probably get his poll into evidence. He will either obviate the hearsay objection, or by weight of sheer boredom persuade his opponent to stipulate much of the testimony.

One of the main problems connected with poll testimony is the expense. The poll taken in *Irvin v. State* cost about $8,000; the

[27] Record, Briggs v. Elliott, No. 101 in the Supreme Court of the United States, October Term 1952, p. 103.

[28] 66 Fla. 288 at 290-292, 66 S. (2d) 288 (1953), cert. den. 346 U.S. 927, 74 S.Ct. 316 (1954). This poll is described in detail in Woodward, "A Scientific Attempt to Provide Evidence for a Decision on Change of Venue," 17 AM. SOC. REV. 447 (1952). Noted in 52 MICH. L. REV. 914 (1954).

There are other uses of social science in criminal cases (although it is arguable whether a particular science is "social"). In Arens and Meadows, "Psycholinguistics and the Confession Dilemma," 56 COL. L. REV. 19 (1956), the authors describe a psychological technique for ascertaining the authorship of purported confessions. But for dangers alleged to inhere in carrying psychological investigations too far in ascertaining criminal liability, see Silving, "Testing of the Unconscious in Criminal Cases," 69 HARV. L. REV. 683 (1956).

[29] See note, 66 HARV. L. REV. 498 (1952); Sorensen and Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L.Q. REV. 1213 (1953); note, 20 GEO. WASH. L. REV. 211 (1951).

defense could afford it only because it was paid for by the Legal Defense Fund of the National Association for the Advancement of Colored People. Another problem is that interviewers may not want to testify, especially if the case is controversial.[30] But apart from expense and inconvenience, the relative infrequency of such testimony (and social science testimony in general) has been due to unawareness that it can be useful. This difficulty is beginning to vanish in the case of public opinion testimony, especially in trademark and similar litigation, as the past few years have seen a number of decisions and articles in legal and sociological journals concerning such techniques. But the weight accorded such testimony is still generally not impressive. Courts sometimes question the objectivity of the survey,[31] which may be understandable if they are confronted by two polls with conflicting results.

Testimony To Influence Shaping of Judge-Made Law

In all the cases discussed so far the testimony of social scientists was used in a rather conventional manner. The witnesses testified either as fact-gatherers or as experts whose opinions were themselves relevant facts. It is submitted that the school segregation cases suggest an entirely different way in which the testimony of social scientists can be made useful to the courts.

Before a new court-made rule of law can be formulated it is often necessary to know what is occurring or may occur in society. A variety of information drawn from sociology and elsewhere, although not usually proved, is brought to bear along with the court's concepts of justice and welfare.[32] Such information is generally judicially noticed, sometimes explicitly, sometimes tacitly.[33] Legal analysis or experience may expose these basic assumptions; whether they are well founded may sometimes be proved or disproved with the help of social science. In the school segregation cases, for instance, social science testimony, with other information, was used to help refute the assumptions of "separate but equal." Although literature is often helpful for such purposes, expert testimony, if available, can be more relevant and timely, and can be tested by cross-examination and rebuttal.

30 See Waterbury, "Opinion Surveys in Civil Litigation," 17 PUB. OP. Q. 71 at 86 (1953).
31 Note, 20 GEO. WASH. L. REV. 211 at 227 (1951).
32 CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30, 64-66 (1921).
33 See Davis, "Judicial Notice," 55 COL. L. REV. 945 (1955).

The recently demolished legal keystone of racial segregation in education, *Plessy v. Ferguson,* held in 1896:

> " . . . the underlying fallacy of the plaintiff's argument [is] . . . the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . The argument also assumes that social prejudices may be overcome by legislation. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. . . . "[34]

This argument was, of course, rejected by the Supreme Court on May 17, 1954 in the school cases.[35] And when the Court made its decision it had before it records full of testimony by social scientists relating to the assumptions made by *Plessy.* These witnesses were called by counsel for plaintiffs in the belief that live testimony, subject to cross-examination and rebuttal, could be more pertinent and compelling than quotations from books and articles.

Experts on the segregation issue were first prominently used in cases involving segregated higher education. In *Sweatt v. Painter*[36] social scientists testified that there is no inherent intellectual inferiority determined by race.[37] The testimony was directed at the claim that such alleged differences warranted segregation as a reasonable classification based on learning capacity. There was also testimony on the harmful effects of segregation[38] which were later recognized by the Supreme Court in the school cases.[39]

In those cases at least twenty social scientists from institutions all over the country testified.[40] They exhaustively analyzed school segregation from different scientific points of view, on the basis of their learning and experience, and, in some instances, examination of plaintiff children. The four trial courts which heard this testimony split in their acceptance of it, two-to-two: Delaware[41] and

34 163 U.S. 537 at 551, 16 S.Ct. 1138 (1896).

35 Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954).

36 339 U.S. 629, 70 S.Ct. 848 (1950).

37 Record, Sweatt v. Painter, p. 193.

38 Id. at 194. The testimony was apparently offered for the purpose of showing inequality but accepting its general validity could mean only the end of "separate but equal" and hence a new rule of law. This was recognized by the Delaware chancellor in Belton v. Gebhart, 32 Del. Ch. 343 at 350, 87 A. (2d) 862 (1952).

39 Brown v. Board of Education, 347 U.S. 483 at 493-495, 74 S.Ct. 686 (1954).

40 The extent of social scientists' involvement in the school segregation cases is described in detail in HILL AND GREENBERG, CITIZENS GUIDE TO DESEGREGATION, especially c. 8 (1955). See also Clark, "Desegregation, An Appraisal of the Evidence," 9 J. OF SOC. ISSUES 1 at 4-5 (1953).

41 Belton v. Gebhart, 32 Del. Ch. 343, 87 A. (2d) 862 (1952), affd. 91 A. (2d) 137 (1952).

Kansas[42] finding it true (although legally irrelevant in view of *Plessy),* Virginia[43] and South Carolina,[44] one judge dissenting, dismissing it as unproved and irrelevant. The South Carolina federal district court held:

> "The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators."[45]

However, Judge Waring dissenting, wrote:

> "These witnesses testified from actual study and tests in various parts of the country, including tests in the actual Clarendon School district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably come to the conclusion that racial prejudice is something that is acquired and that that acquiring is in early childhood."[46]

But the Kansas court found that segregation was harmful, a finding which the Supreme Court quoted with approval:

> "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 education and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."[47]

The Delaware chancellor made a similar holding.[48] Following the decision of the school cases in the Supreme Court, similar testimony has been presented in other proceedings involving segregation in schools.[49]

42 Brown v. Board of Education, (D.C. Kan. 1951) 98 F. Supp. 797.
43 Davis v. County School Board, (D.C. Va. 1952) 103 F. Supp. 337.
44 Briggs v. Elliott, (D.C. S.C. 1951) 98 F. Supp. 529.
45 Id. at 536.
46 Id. at 547.
47 Brown v. Board of Education, 347 U.S. 438 at 494, 74 S.Ct. 686 (1954).
48 Belton v. Gebhart, 32 Del. Ch. 343 at 348, 87 A. (2d) 862 (1952).
49 There was such testimony in Walker v. Board of Education of Englewood, 1 Race Relations Law Reporter 255 (1956), a proceeding before the New Jersey State Department

What role did the social science testimony play in the decision of the school cases? Although some have applauded or denounced the decisions as based principally on the testimony,[50] a reading of the decisions reveals that the Supreme Court did not refer to the testimony, nor did it affirm or reverse the findings below on the effects of segregation. Indeed, in the District of Columbia case,[51] it made its decision on a record devoid of testimony. If it had found "inequality" as facts are normally found in litigation, it would have left open the possibility of a future case in which there might be defense testimony that Negroes are psychologically better off in segregated schools.[52] This is obviously impossible; indeed, the Court on May 31, 1955 ruled that "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this [the May 17, 1954[53]] principle." Therefore, if the testimony played any role it was a "legislating" one, in the change from one rule of law to another.

But did it play any role? Of course, since the opinion does not say, we must speculate. Social scientists' research during recent decades deserves much of the credit for the general recognition of segregation's harm. Much of the testimony could only recapitulate what is already known, although in terms of *these* cases. But it is not unfair to assume that the summarizing, emphasizing, and relating of the general to the specific by eminent experts illuminated the issues and perhaps informed for the first time one or more members of the bench whose interests might not have led them earlier to acquire such information.[54] Combined with a

of Education involving a charge of gerrymandering of school district lines. But the opinion does not discuss the testimony. See also Gordon, "The Girard College Case: Desegregation and a Municipal Trust," 304 THE ANNALS 53 at 57, 59 (1956).

50 See S. Res. 104, May 25, 1955, introduced by Senator Eastland: "Whereas this decision was based solely and alone on psychological, sociological and anthropological considerations . . ."; and Dr. Kenneth Clark's speech at the Fisk Race Relations Institute, N.Y. TIMES, July 2, 1955, p. 16:4, commending the decision for resting on the social scientists' testimony.

51 Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954).

52 Indeed, Florida so interpreted the decision and urged on the second reargument of the cases that a Negro applicant to a white school should have to show that he feels he "would be handicapped in his education . . . because of . . . psychological or sociological reasons. . . ." Brief of the State of Florida as Amicus Curiae, p. 63.

53 347 U.S. 483, 74 S.Ct. 686 (1954).

54 Not all judges are aware of or believe to be true what social science accepts in this area. One federal judge, in upholding segregation on a golf course has recently written:

"It seems that segregation is not only recognized in constitutional law and judicial decision, but that it is also supported by general principles of natural law. As nature has produced different species, so it has produced different races of men. Distinguishing racial features have not been produced by man, or man-made laws. They are the result of

number of other factors the testimony undoubtedly contributed to the final result.[55]

This leads one to speculate about what would happen where social science experts might testify to theories and information from an esoteric branch of learning, removed from the knowledge and experience of informed persons unacquainted with that field. Much would depend on the posture of the case. If testifying, for example, in support of the constitutionality of legislation, their testimony might suffice to establish the law's reasonableness and hence its constitutionality. If testifying against the constitutionality, as in the school cases, such an isolated thrust would most probably fail.

Justice Frankfurter has indicated from the bench that social scientists can help appellate courts in formulating rules of law:

> "Can we not take judicial notice of writing by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book without having him called as a witness? . . . How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers."[56]

But how is testimony directed to the problem of formulating law to be introduced? Might not counsel say, "Your Honor, I realize that this testimony may not properly be used in this case to establish a fact at issue in the pleadings. However, the courts must declare a rule of law in this case, and in so doing must consider certain facts about the society in which we live. Materials bearing on these facts are often presented in the briefs, or obtained from other sources, but I would like the courts to have the benefit

processes of evolution and it seems natural and customary for different species and different races to recognize and prefer as intimate associates their own kind. Nature has produced white birds, black birds, blue birds, and red birds, and they do not roost on the same limb or use the same nest. Such recognition and preference of their own kind prevails among other animals. It prevails also among all people, among the yellow, black and red skinned races." Hayes v. Crutcher, (D.C. Tenn. 1952) 108 F. Supp. 582 at 585.

Justice Terrell of the Supreme Court of Florida, in Florida ex rel. Hawkins v. Board of Control, (Fla. 1955) 83 S. (2d) 20, has recently written an opinion in almost identical terms, except that it refers to different animals.

55 See HILL AND GREENBERG, CITIZENS GUIDE TO DESEGREGATION 117-118 (1955), summarizing the forces which contributed to the final result. These include the precedents, the history, the mores, and current concepts of welfare and justice.

56 Justice Frankfurter, from the bench, during the first reargument of the school segregation cases. Transcript of Argument, Briggs v. Elliott, No. 102 in the United States Supreme Court, October term, 1952, pp. 58-59.

of the testimony of experts on these questions, who will be available for questioning by my opponent and the bench." This would not be unlike what happens before a legislative committee prior to the legislative decision upon a rule of law. It should be helpful also when the courts legislate in their unique way. At least one federal judge might be receptive to the idea. Judge Wyzanski has written:

> ". . . Thus the focus of the inquiry becomes not what judgment is permissible, but what judgment is sound. And here it seems to me that the judge, before deriving any conclusions from any such extrajudicial document or information, should lay it before the parties for their criticism.
>
> "How this criticism should be offered is itself a problem not free from difficulty. In some situations, the better course may be to submit the material for examination, cross-examination and rebuttal evidence. In others, where expert criticism has primarily an argumentative character, it can be received better from the counsel table and from briefs than from the witness box. The important point is that before a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent egregious error. As Professor Lon Fuller has observed, the 'moral force of a judgment is at maximum if a judge decides solely on the basis of arguments presented to him. Because if he goes beyond these he will lack guidance and may not understand interests that are affected by a decision outside the framework.' "[57]

There is some indication that other judges may take this view.[58]

Apart from admissibility, there is the problem of weight. Social science often deals with emotional and controversial areas of life. Often it may be difficult for the court, and for the social scientists, to separate uncertain controversy from positive fact finding. Justice Frankfurter indicated judicial concern over the uncertainty of such evidence during oral argument in the school cases. He said, "I do not mean that I disrespect it. I simply know its character. It can be a very different thing from, as I say, things

[57] WYZANSKI, A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY 18-19 (1952). In the school segregation cases the question of admissibility was not clearly raised. But it appears that the parties and the court assumed that the testimony was offered for a conventional purpose.

[58] See, Borden's Farm Products v. Baldwin, 293 U.S. 194 at 209, 55 S.Ct. 187 (1934); People v. Larsen, 5 N.Y.S. (2d) 55 at 56 (1938); Parmelee v. United States, (D.C. Cir. 1940) 113 F. (2d) 729 at 737.

that are weighed and measured and are fungible. We are dealing here with very subtle things, very subtle testimony."[59] This uncertainty is compounded by distrust of experts in general, indicated in the *Isenstadt* case: they are frequently in conflict, often argumentative, and expensive. Besides all this, most judges come from a generation less versed in, and less sympathetic to, the newer scientific disciplines than the younger lawyers. Interestingly, when social scientists' conclusions have been accepted, as we noted, some courts have written that they appeared correct apart from the evidence.

In recent articles, Professor Edmond Cahn has criticized the testimony of the social scientists in the school segregation cases.[60] He notes first that there is an unfortunate impression that the decision was based solely upon their testimony. He writes that counsel for the plaintiffs were wise in using everything available to make their cases, but that the testimony was not necessary because "for at least twenty years, hardly any cultivated person has questioned that segregation is cruel to Negro school children."[61] Beyond this, he severely criticizes some of the testimony itself, holding it non-scientific and self-contradictory. He believes that footnote 11 of the Court's opinion, citing social scientific writings,[62] was in the nature of a consolation prize to the social science witnesses for not having mentioned their testimony. He is concerned that social science will suffer from participation in litigation: "At present, it is still possible for the social psychologist to 'hoodwink a judge who is not overwise' without intending to do so; but successes of this kind are too costly for science to desire them."[63] And he is concerned for the law: "Recognizing as we do how sagacious Mr. Justice Holmes was to insist that the Constitution be not tied to the wheels of any economic system whatsoever, we ought to keep it similarly uncommitted in relation to the other social sciences."[64] But, it may be that he is more cordial than indi-

59 Transcript of Argument, Gebhart v. Belton, No. 448 in the Supreme Court of the United States, October term, 1952, p. 69.

60 Cahn, "Jurisprudence," in 1954 Annual Survey of American Law, 30 N.Y. UNIV. L. REV. 150 (1955); "Jurisprudence" in 1955 Annual Survey of American Law, 31 N.Y. UNIV. L. REV. 182 (1956). See also Frank, "The Lawyer's Role in Modern Society: A Round Table," 4 J. PUB. L. 1 at 8 (1955).

61 30 N.Y. UNIV. L. REV. 150 at 159. What does "cultivated" mean? See the opinion in Hayes v. Crutcher, quoted in note 54 supra, and Florida ex rel. Hawkins v. Board of Control, (Fla. 1955) 83 S. (2d) 20. These examples are not isolated.

62 Brown v. Board of Education, 347 U.S. 483 at 494, 74 S.Ct. 686 (1954).

63 Cahn, "Jurisprudence," 30 N.Y. UNIV. L. REV. 150 at 166 (1955).

64 Id. at 167.

cated above, for he characterizes his attitude as follows: "All in all, the attitude I favored toward social psychology would express receptivity seasoned with critical judgment."[65]

Of course, he is correct, as noted earlier, in concluding that the decisions did not rest upon the testimony of the social scientists. A great many factors contributed to the decision,[66] not the least important of which, as Professor Cahn writes, was the general knowledge "that segregation is cruel to Negro children." But much credit for this general awareness is due to the work of social scientists during recent decades. In the school cases may not the awareness have been fortified, or (there are *nine* justices) in some cases instilled by the testimony of experts in the field? As to trustworthiness, the testimony was subjected to cross-examination and rebuttal by very capable defense counsel who, after the trial of the first school case, could not have been surprised. And even experts for the defense conceded it to be essentially correct. This is not to say that it had the precision of the physical sciences; it did not. Perhaps even, in time, some of the evidence upon which the testimony was based will, as happens in all sciences, be shown to have been wrong or insufficient. But it told us a very great deal about what is known of segregation's harm. True, the Constitution should not be wedded to any social science any more than to a school of economics. On the other hand, constitutional interpretation should consider all relevant knowledge. The Constitution turned on a moral judgment; but moral judgments are generated by awareness of facts. Professor Cahn's objections are, of course, of less force when applied to social science testimony in cases like the trademark cases where no constitutional questions are involved.

Despite all the problems discussed above, there has been an increase in the use of this kind of testimony. Lawyers turn to the sources that are available to support their clients' contentions, and they are beginning to believe that social science can state some conclusions with a good degree of persuasiveness. This confidence has probably been enhanced by the undergraduate training in modern social science of at least the more recent law school graduate. But primarily, the increase has been caused by the growing number of lawsuits involving public law issues. More and more lawyers must produce facts bearing on issues that concern the public: they must establish what the public thinks, or how it will

65 Cahn, "Jurisprudence," 31 N.Y. UNIV. L. REV. 182 at 183 (1956).
66 See HILL AND GREENBERG, CITIZENS GUIDE TO DESEGREGATION *(passim)* (1955).

react, or the effect of social conditions on large groups of people. This has directed attention to a search for new fact-finding techniques.

Lawyers in greater numbers are undoubtedly going to use social scientists where they feel their testimony can help. As a new generation of judges ascends to the bench, and social science achieves greater certainty, more of this evidence will be influential in deciding lawsuits. One court of appeals, perhaps over-optimistically, looks forward to the day "when social scientists can advise not only courts, but the people generally; just as physicians, chemists and other physical scientists do today."[67]

This new development is, of course, of great significance to the social scientists. It will afford them the satisfaction of close participation in the operation of society and the administration of justice. It will probably direct their work more toward immediate social problems which find their way into litigation. It will place upon them the advantage and control of certain external checks of verifiability. It will impose a duty to be objective when the effects of their research will have consequences outside the university, especially where their personal feelings may be involved in the issues of the lawsuit.

Over fifteen years ago, Robert S. Lynd wrote that "Social science is not a scholarly arcanum, but an organized part of the culture which exists to help man in continually understanding and building his culture."[68] A similar statement might be made of law. Fortunately, there is room for the two to work in combination.

67 Parmelee v. United States, (D.C. Cir. 1940) 113 F. (2d) 729 at 737.

68 LYND, KNOWLEDGE FOR WHAT? THE PLACE OF SOCIAL SCIENCE IN AMERICAN CULTURE, p. ix (1939).