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ABSTRACT

One of the most pressing issues for educational researchers is the utilization by courts of social fact evidence. The purpose of this research was to empirically analyze the performance of federal trial courts in a broad sample of representative cases. Using computer screening, a sample of 65 federal cases decided during 1970-77 was identified. Intensive studies were also made of two educational policy litigations, Chance v. Board of Examiners and Otero v. Mesa County School District No. 51. Inquiry into the legitimacy of judicial activism focused on the extent to which decisions were based on fundamental principles as compared with social policy factors, and the extent of representation of all affected interests in court deliberations. Analysis of judicial capacity emphasized the courts' capabilities for assessing complex social fact issues, and the courts' abilities to implement effective remedies. The paper concludes that the courts exhibited a reasonably high level of capability to engage in policy-oriented fact-finding and remedial processes. The legitimacy of the courts' exercise of these capabilities in particular circumstances was strengthened by their tendency to concentrate their activities nearer to the principle pole of the continuum reaching from principle issues to policy issues. (Author)

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# THE ROLE OF THE COURTS IN EDUCATIONAL POLICY MAKING

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This paper is based on portions of a research report prepared for the National Institute of Education of the Department of Health Education & Welfare. The title of the report is "Educational Policy Making and the Courts: An Empirical Study of the Effectiveness and Legitimacy of Judicial Activism."

To obtain copies of the complete report or additional copies of this paper, contact Mr. Ronald Anson, Program Officer, National Institute of Education, Room 714, 1200 19th Street, Washington, D.C. 20208.

Six years ago, in explaining its conclusion that education was not a "fundamental interest" under the United States Constitution, the Supreme Court observed that:

> "Education, perhaps even more than welfare systems, presents a myriad of intractable economic, social and even philosophical problems... In such circumstances, the judiciary is well advised to refrain from imposing on the state inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." (San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 42-43 (1973))

Despite this admonition, the Supreme Court in subsequent years saw fit to issue rulings which directly affected school districts' discretion to handle disciplinary problems among their students,* to establish leave of absence policies for their teachers,** and to determine curriculum offerings for non-English speaking students.*** Even in the area of educational finance reform, where the Rodriquez decision precluded close scrutiny by the federal courts, judicial involvement

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* Goss v. Lopez, 419 U.S. 565 (1975).

** Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

*** Lau v. Nichols, 414 U.S. 563 (1974).

has been vigorously undertaken at the state court level.*

This accelerating pattern of judicial activism in education has parallels in many other social policy areas, such as mental health and prisons. An active debate concerning the significance of these trends has been conducted both in the scholarly literature and in the popular press. Critics of judicial activism say that an "imperial judiciary" has usurped governmental powers entrusted to the executive and legislative branches under the principles of separation of powers. These critics also argue that courts are incapable of comprehending complex social science information relevant to judicially decreed policy changes. It is further argued that courts lack many of the institutional resources that are needed to successfully implement broad-based social reforms.

In response to charges that the courts' new role is illegitimate, proponents of judicial activism portray the courts' intervention as a fulfillment of

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* See e.g., Serrano v. Priest, 135 Cal.Rptr. 345 (Sup. Ct. Calif. 1976); Horton v. Meskill, 376 A. 2d 359 (Sup. Ct. Conn. 1977); Robinson v. Cahill, 303 A. 2d 273 (Sup. Ct. New Jersey, 1973).

the judiciary's constitutional responsibility to enforce basic individual rights and liberties, especially for minority gorups who are not fairly represented in political and administrative forums. These commentators further argue that judges have not arbitrarily seized upon opportunites to increase their influence but, rather, have been propelled into an activist stance by the contemporary realities of substantial legislative and executive intervention into economic and social welfare areas that historically had been considered as being exclusively within the private sector. Regarding the alleged inadequacies of the jduiciary to carry on social factfinding and to institute remedial reforms, these commentators say that courts actually have unsuspected strengths in carrying out these functions, and that if their performance is judged in a comparative framework which takes into account the technical and administrative problems inherent in particular policy areas, courts are as competent as executive and administrative bodies.

For educational researchers, probably the most pressing of the many issues in this debate concerns the utilization by courts of social fact evidence.

The wider the net cast by lawyers and judges into areas of educational policy making, the more often these experts find that their reports, their ideas, and even their presences, are swept into courtrooms. Not surprisingly, scholars and professionals have voiced concerns about the comprehensiveness and integrity of the decision-making processes in which their data and opinions are utilized by the adversary parties in a litigation. In this paper, we will set forth those findings of our report that focus most directly on these issues. But before discussing these issues in detail, we will briefly set the discussion in perspective by summarizing the rationale and methodology of our investigation.

The main objective of our research project, Educational Policy Making and the Courts ("EPAC"), was to test the validity of the competing arguments and allegations in the judicial activism debate in a systematic investigation. In the existing literature many allegations were based on unproven generalizations about court behavior and on descriptions of illustrative cases that had not been selected in an objective fashion. We saw a need for a systematic empirical analysis of the

performance of federal trial courts in a broad sample of representative cases.*

Using computer screening, a representative sample of 65 federal cases decided in the period 1970-1977 was identified. The EPAC research staff compiled the basic pleadings, briefs and other critical court papers from these cases; interviewed participating attorneys; and prepared a standardized analysis of each case, following the format of a survey questionnaire specially designed for that prupose. In order to follow out the implications of the largely quantitative conclusions reached in the systematic empirical survey, we also undertook intensive studies of two significant educational policy litigations: Chance v. Board of Examiners (successful challenge to New York City licensing tests for school supervisors and administrators) and Otero v. Mesa County School District No. 51 (unsuccessful effort to require rural Colorado school district to institute comprehensive bilingual-bicultural curriculum). In addition, a comparative

* Because research into court intervention in the public schools has concentrated largely on desegregation policy problems, we focused our attention on the numerous other important educational policy areas that had received much less attention.

analysis of judicial and legislative approaches and capacities in facing similar social policy disputes was made possible by preparing two detailed legislative case studies: the New York Legislature's deliberations on seniority issues (which paralleled a phase of the Chance litigation) and the Colorado Legislature's deliberations leading to the passage of a bilingual-bicultural education act (which adopted many of the educational policies sought by the plaintiffs in Otero.)

In order to relate the data from the 65 caselets and the four major case studies to the complex questions raised in the judicial activism debate, we created, at the outset, an analytical framework organized around four main issue patters. Our inquiry into the "legitimacy" of judicial activism, focused on (a) the extent to which decisions were based on fundamental "principles" as compared with social "policy" factors, and (b) the extent of representation of all affected interests in court deliberations. Analysis of judicial "capacity" emphasized (c) the courts' capabilities for assessing complex social fact issues, and (d) the courts' abilities to implement effective remedies.

Speaking very generally, we concluded that courts exhibited a reasonably high level of capability to engage in policy oriented factfinding and remedial processes. The legitimacy of the courts' exercise of these capabilities in particular circumstance was strengthened by the courts' tendency to concentrate their activities nearer to the "principle" pole of the continuum reaching from principle issues to policy issues.

In our report, the detailed discussions of our findings are contained in: a) four chapters devoted to analysis of the caselet data in each of the four issue areas; b) four chapters reporting on the four major case studies and containing conclusions related to the analytical framework; and c) a final conclusions chapter integrating all of our findings about legitimacy and capacity and explaining their implications.

It is in the context of the broad study of the role of the courts in educational policy-making that one should consider our analyses and findings on the subject of judicial use of social fact evidence. Specifically, the next section of this paper is the complete text of the

chapter of our report in which we evaluated the caselet survey data on the issue of the courts' factfinding capability.* The final section of this paper is an excerpt from the conclusions chapter of our report; again, the focus of the selection is factfinding issues.

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* The caselets were assigned identifying numbers running from 1-65. Caselets are identified by these numbers in the text and tables of the report. Sometimes an abbreviation of a case name is follwed by a caselet number, e.g."Nicholson (C.49)".

# CHAPTER 4: CASELET ANALYSIS: FACTFINDING CAPABILITY

The issues raised in the literature concerning the judiciary's factfinding capability broke down into two basic questions: First, how well are the courts able to obtain necessary information? Second, how capable are the judges of comprehending the social science data which is presented to them? In order to provide some answers to the first question, we analyzed the workings of the discovery process (the judiciary's main information gathering mechanism), and the social science information submissions of the parties. In regard to the second question, we considered the types of evidentiary issues presented to the courts and the specific analytical devices judges used in deciding (or more often, in avoiding the necessity to decide) social fact issues.

## A. Information Gathering Capacity

### 1. Discovery

"Discovery" is a generic term used to describe a variety of devices the judicial process makes available to litigants to ascertain the amount and the type of information which may be in the possession of an opposing party. Knowledge of the existence of this information allows a party both to be aware of evidence which his adversary intends to introduce at trial and to obtain data in the possession of the adversary which may

be helpful in presenting the party's own case. (This latter function is especially useful in educational policy cases where a plaintiff often can obtain critical data concerning the operations of the school system only by analyzing the school district's files.) Specific discovery rules permit a party to subpoena documents in the possession of an opponent and to pose "interrogatories", or questions which enable the litigant to find out which documents may be available to be subpoenaed. If the parties cooperate with each other in the discovery process, there may be little need for active involvement by the court; however, if a party believes that his adversary is withholding available data, or conversely, if a party believes that his opponent is unreasonably demanding information which is irrelevant, unavailable, or highly confidential, motions may be made to the court either to compel disclosure of available information or to "protect" a party from having to comply with unreasonable discovery demands.

In analyzing discovery in our caselet sample, we concluded that the process operated with impressive efficiency and effectiveness. In 38 of the 65 caselets, formal discovery procedures were utilized.* Roughly speaking, there was extensive

* This finding is based on a search of the docket sheets for entries of interrogatories, depositions and other discovery-related materials, and also on attorney interviews. The main reasons for lack of use of discovery procedures in the remaining 27 cases were the following: a) the parties easily stipulated to the relevant facts (particularly in speech and grooming cases); b) mutually satisfactory information exchanges were worked out informally; and c) evidentiary materials already had been prepared in a related administrative proceeding or court suit.

discovery in 11 cases, moderate discovery in 13 cases, and small amounts of discovery in 14 cases. The breakdown of these findings is presented in Table F-1.

One indicator of the effectiveness of the discovery process as an information gathering technique is the amount of motion practice arising out of discovery disputes. If the parties are able to obtain most of the information they seek without adversarial resistance, it would seem reasonable to assume that the information flow into the judicial process will be maximized. In 15 of the 38 cases involving discovery in our sample, there was at least one discovery motion entered on the docket sheet. In five of these 15 cases more than one motion was filed. Court action was needed to resolve a dispute in nine cases but at least two of the nine instances involved minor, technical disagreements. Therefore, only in seven cases, 11% of the sample, did the court have to determine whether a party was fairly utilizing discovery procedures. In the others, the parties worked out a solution or else the dispute was rendered moot, e.g., by a dismissal of the complaint. The breakdown of these findings is set forth in Table F-2.

Brown (C. 9) is a good example of how utilization of the liberal federal discovery rules can efficiently build a comprehensive factual record and provide a focus for the important areas of agreement and disagreement. This class action suit was brought by Chicago elementary school students in low income neighborhoods who alleged that the Chicago Board

Table F-1

INCIDENCE OF DISCOVERY[1]

| 1<br>None | 2<br>Some | 3<br>Moderate | 4<br>Extensive |
|---|---|---|---|
| 2 | 1 | 10 | 4 |
| 6 | 3 | 11 | 9 |
| 7 | 5 | 19 | 23 |
| 12 | 8 | 22 | 27 |
| 13 | 21 | 25 | 28 |
| 14 | 24 | 29 | 41 |
| 15 | 40 | 31 | 44 |
| 16 | 42 | 32 | 46 |
| 17 | 43 | 37 | 48 |
| 18 | 54 | 38 | 49 |
| 20 | 58[2] | 45 | 52 |
| 26 | 59 | 51 | |
| 30 | 61 | 65 | |
| 33 | 63 | | |
| 34 | | | |
| 35 | | | |
| 36 | | | |
| 39 | | | |
| 47 | | | |
| 50 | | | |
| 53 | | | |
| 55 | | | |
| 56 | | | |
| 57 | | | |
| 60 | | | |
| 62 | | | |
| 64 | | | |
| 27 | 14 | 13 | 11 |
| 42% | 22% | 20% | 17% |

## Footnotes to Table F-1

1. A case is classified as "none" if neither the docket sheet nor attorney interviews indicated that formal discovery procedures were used to attempt to obtain information from an adversary. (Also listed in col. 1 is C. 12, a case in which the court dismissed the complaint before the plaintiffs apparently received any information in response to discovery requests.) Absent specific indications to the contrary, it was presumed that a party which filed copies of discovery requests with the court received at least "some" information in reply.

2. Classification is based solely on attorney recollection. No discovery activity was indicated on the docket sheet.

Table F-2

DISCOVERY MOTIONS

| Motion(s) Docketed (* indicates more than one) | Motions Decided by Court[1] | Motions Settled, Withdrawn, or Mooted Before Decision |
|---|---|---|
| 9 | | 9 |
| 12 | | 12 |
| 23 | | 23 |
| 27 | 27 | |
| 28[2] | 28[2] | |
| 29* | 29 | |
| 31[3] | 31 | |
| 37 | 37[2] | |
| 41* | | 41 |
| 44* | 44 | |
| 45[3] | 45 | |
| 46[4] | | |
| 49[4] | | 49 |
| 52* | 52 | |
| 65 | 65 | |
| 15 | 9 | 5 |

1 Some of these cases involved multiple motions; a case is listed in this column if at least one motion was resolved by the court.

2 No formal motion was docketed, but the court nevertheless resolved objections to interrogatories (C. 28), or objections to answers to interrogatories (C. 37).

3 The motions in these cases were technical, e.g. setting dates for depositions; shortening or lengthening the usual time period for replying to discovery requests.

4 There were at least seven discovery motions in this case, primarily divided between motions to compel answers to interrogatories and motions for protective orders.

of Education provided a lower per pupil funding allocation to them than to residents of wealthier neighborhoods. To prove their case, the plaintiffs needed to obtain massive and detailed records from the board of education concerning expenditure patterns, staffing policies, and other practices. The school district turned over approximately five cartons of documents to the plaintiffs.* The defendants' data became the basis of the plaintiffs' case. The defendants also made use of discovery, but for a different purpose. They obtained the interpretive reports prepared by the plaintiffs' experts, and therefore were able to prepare counter-analyses for presentation at trial.

Throughout the extensive discovery process, only one motion was docketed. The school district asked the court for a protective order against on-site inspections of elementary schools by some of the plaintiffs' representatives. The dispute was resolved by a consent order. Finally, as in many other of the cases studies, mutual discovery led to agreement on a number of previously disputed factual issues.**

Attorney comments confirm our conclusions concerning the efficiency of discovery process in the sample cases. We asked

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* Interview with attorney for school district.

** Discovery appeared to have contributed to important stipulations in Cs. 23, 24, 25, 41, 44 and 52. This list undoubtedly is underinclusive because it is based on explicit attorney statements and on explicit statements in the record.

the litigating attorneys whether discovery procedures had been abused. Only in four cases (Cs. 27, 29*, 46, 49) did lawyers respond that they thought their opponents had acted unreasonably. Even if we assume that these subjective characterizations are fully accurate, it is clear that the information exchange breakdown which often occurs in anti-trust cases and in other private commerical litigation situations rarely occurred in our sample of educational policy cases. School boards and other public defendants apparently felt an obligation to divulge relevant information to their adversaries, who generally were raising issues of general public concern.

Another incentive for a public defendant to cooperate in discovery was that its interests and that of the plaintiffs sometimes were not fully adversary in "multipolar"** cases involving shifting alliances among the various parties. Such alliances are exemplified by two of the cases involving the Philadelphia School District. In Nicholson, (C. 49) after the plaintiffs sued the Pennsylvania Department of Education, the School District of Philadelphia intervened as a defendant.***

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* In C. 29, each attorney stated that the other had acted unfairly and these reports supported other indications that the case, generally, was litigated bitterly.

** See Chapter 3 for a definition and discussion of multipolarity.

*** In the liability stage, the district's intervention motion was granted, but after a few months the court reversed its decision. In the remedial phase, the district intervened again and was given party status. Regardless of party status, however, the district soon came to be seen as the plaintiffs' main adversary.

Frederick L. (C. 23) was the converse situation -- the suit was filed against the city district, and the state department intervened as a defendant. At an early stage in Nicholson, the state apparently decided that the plaintiffs' charges of violations in the use of Title I funds in the Philadelphia School District essentially were correct, and that appropriate relief should be worked out. The state, therefore, gave the plaintiffs full access to its files. By way of contrast, the plaintiffs' attorney reports that the district tried to frustrate his discovery efforts. (The only discovery motion in the record was directed against the district.) There was almost a complete role reversal in the special education situation in Frederick L. There, the plaintiffs and the district had the same programmatic goals. Their positions diverged only on the issue of the extent of the district's obligations in the absence of full state funding. As a result, plaintiffs' extensive discovery requests were substantially accepted by the district (and by the state). There was only one discovery motion and it was settled. As a result of discovery, the plaintiffs and the district were able to stipulate to a number of important facts and conclusions and even submitted to the court a proposed remedial plan which they said the district could implement within two years, if funded by the department.*

* For further description and analysis of shifting party alliances and their effect on judicial process, see the detailed case study of Chance v. Board of Examiners, Chapter 6, infra.

## 2. Adversary System "Distortions"

An additional consideration relevant to the data-gathering process is the contention that the adversary system, by which our legal system functions, tends to distort the information flow to the court. According to this view, since the parties are motivated to present only one side of an issue, the court's decision may be based on a biased, one-sided view of the true facts if, for whatever reason, the adversary does not provide adequate counterveiling information on a particular issue.

In reviewing the caselet data, we tried to determine whether any such imbalance in social fact-finding* occurred with regularity. Our analysis indicated that one-sided data presentation by only a plaintiff or a defendant occurred in 20 cases (11 plaintiffs, 9 defendants) and at least minimally

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* The term "social fact evidence" is used in this report to refer to not only the systematic empirical studies but also to opinion statements by persons recognized by the courts to be "experts", even though these opinions may be based either on sophisticated social science research or on more intuitive analyses based on the "expert's" first hand experiences as a practitioner (e.g., as a school psychologist, a principal, a teacher). In other words, "social facts" are broadly defined to include such diverse materials as: a) a straightforward statistical tabulation of census figures, together with an analysis concluding that voting districts are malapportioned (C. 18); b) complex and detailed studies testing the hypothesis that improved student achievement correlates with increased expenditures for staffing (C. 9); c) the opinion testimony of educational scholars and of psychologists that corporal punishment is educationally counterproductive and psychologically harmful to children (C. 59).

balanced evidentiary presentations occurred in another 21.

At first glance, there would appear to be a substantial problem of imbalance and possible distortion since in half of the cases involving social fact evidence, a one-sided presentation was made. However, a closer analysis of these cases revealed a somewhat surprising phenomenon. In most of the one-sided submission situations, the party which presented the evidence did not prevail in the court decision. Plaintiffs won five out of 11 of the cases in which the only social fact evidence was introduced by them, while defendants won only one out of the nine cases in which they exclusively submitted evidence. These findings are set forth in Table F-3.

The figures in Table F-3 suggest that exclusive submissions did not distort the judicial process and that the courts were able to compensate for one-sided evidentiary presentations. A brief discussion of specific cases indicates how this compensation process operated.

The 11 cases in which the court decided <u>against</u> the sole party introducing social fact evidence presented the following circumstances. In two employment discrimination suits (Cs. 32 and 11) the plaintiffs introduced statistics on employment practices. The court accepted the accuracy of the basic statistics, but, upon analysis, concluded that they demonstrated the <u>absence</u> of race discrimination. Similarly, in C. 38 the court found that the testimony of defendants' expert witness actually supported the plaintiffs' claim. In Cs. 17, 21, 31

## Table F-3

## BALANCE IN SOCIAL FACT[1] PRESENTATIONS

| 1 | | 2 | | 3 | | |
|---|---|---|---|---|---|---|
| Social Fact Evidence Submitted Only By Plaintiffs | | Social Fact Evidence Submitted Only By Defendants | | Social Fact Evidence Submitted by Plaintiffs and Defendants | | |
| 1A Pl. Win | 1B Def. Win | 2A Pl. Win | 2B Def. Win | 3A Pl. Win | 3B Def. Win | |
| 25 | 11 | 5 | 57 | 3 | 8[3] | |
| 27 | 32 | 17 | | 4 | 39 | |
| 33 | 34 | 21 | | 9 | 40 | |
| 37 | 36 | 26 | | 15 | [44][2] | |
| 49 | 46 | 31 | | 16 | 58 | |
| | 47 | 38 | | 18 | 59 | |
| | | 44[2] | | 22 | | |
| | | 62 | | 23 | | |
| | | | | 29 | | |
| | | | | 30 | | |
| | | | | 41 | | |
| | | | | 43 | | |
| | | | | 45 | | |
| | | | | 48 | | |
| | | | | 51 | | |
| | | | | 52 | | TOTAL |
| 5 | 6 | 8 | 1 | 16 | 5 | 41 |

## Footnotes to Table F-3

1 The 41 social fact cases broken down in this table are taken from the 42 cases listed in Table F-4, col. 2. (The omission is C. 2, which cannot be fairly characterized as a "win" either for plaintiff or defendant.)

2 Both sides submitted substantially similar statistics, and the defendant prevailed on the issue of whether there was a system-wide practice of age discrimination. However, only the defendant presented expert testimony regarding the rationality of using remaining years of service as a criterion for promotion decisions and plaintiffs prevailed on this issue. Overall, the most accurate listing of this case was under column 2A, although it also is entered in brackets (but not counted for tabulation purposes) in column 3B.

3 The plaintiff and the local defendant both introduced social fact evidence to show the educational harm suffered by students who did not have textbooks. The state defendant did not concede this point, although it did not introduce opposing evidence. The court considered the social fact evidence to be irrelevant.

and 44 (grooming, speech and age discrimination), the courts rejected the testimony of school administrators because the judges did not accept either the value of the proposed policy objectives or the validity of the means chosen to achieve them. In C. 34 the judge counterposed his own knowledge and views on sexual practices of teenagers to the opinions of plaintiff's psychologist concerning the precociousness of married students. Finally, in Cs. 5, 26, 36, 46 and 47, the court essentially found that the asserted facts -- even if true -- were not legally significant. For example, in C. 26, the court stated that the defendants' evidence about physical and psychological differences between boys and girls was not directly responsive to the question of why it was necessary to exclude a qualified girl runner from competition in inter-scholastic cross-country races.

In three of the six "one-sided" cases in which the party presenting social fact evidence prevailed,* it appeared very unlikely that the opposing party could have presented convincing countervailing evidence. In C. 49 the main defendant essentially conceded liability. In C. 37, a race discrimination case, the court applied a "common sense" analysis to employment statistics, i.e. there were no sophisticated statistical interpretation problems.** The social fact evidence in C. 33 consisted merely

* Table F-3, cols. 1(A) and 2(B).

** For example, it was undisputed that in the year of transition from a segregated to a unitary school system, the proportion of black teachers dropped from 48% to 34%, and 51 new white teachers had been hired as compared to only 2 blacks.

of a census of alien children in the Virgin Islands. It was not crucial to the liability analysis.

Only the remaining group of three cases in which the single party introducing the evidence prevailed, raised realistic possibilities of adversarial distortion. In C. 25 the plaintiffs presented strong testimony by experts from the Educational Testing Service who said that a test they developed (the NTE) was being used for a purpose for which it was not validated, but it is possible that a counterveiling expert might have convinced the court that the district's practices were reasonable and that validation arguments were overly technical and unrealistic. In C. 27 the court accepted the plaintiffs' statistical evidence of discriminatory suspension patterns; a statistical expert for defendants might have drawn different inferences from the data. Finally, in upholding a grooming regulation, the court in C. 57 relied on testimony by defendant school district's witness concerning the cultural value of the rules and the dangers of disruption if they were not enforced, but counterveiling testimony on these issues might have changed the outcome (especially since the same kind of unopposed defendant testimony was rejected by the courts in C. 21 and 31).

In short, then, our analysis indicates that the judicial process provides an effective discovery mechanism through which the parties are able to obtain a substantial amount of relevant information. Although the data available to us cannot fully

determine whether all potentially available information is actually obtained and why in a large number of cases a party did not seek to rebut social fact evidence proferred by its adversary, we have determined that no substantial pattern of adversarial distortions caused by evidentiary imbalance was present; furthermore, the attorneys, in discussing information gathering techniques, did not indicate any substantial problems in this regard.

## B. Information Assessment Capacity

### 1. Nature of Social Fact Disputes Presented

From a perusal of the literature, one would anticipate that judges would be required to grapple with complex social science issues in almost all educational policy cases. Our caselet analysis indicated that this clearly did not happen. Although every case in our sample challenged the system-wide application of an educational policy, in surprisingly few cases was the resolution of conflicting social fact evidence central to the court's decision. We arrived at this conclusion by analyzing the number of cases in which social fact evidence was introduced, the degree to which social fact contentions were contested and the frequency with which courts actually resolved contested issues in order to dispose of the cases.

Social fact evidence was introduced in 42 of the 65 cases in our sample. (In the remaining 23 cases the evidentiary

submissions concerned only "historical" facts.*) For the most part, however, the social fact submissions were relatively straightforward and could reasonably be decided by a generalist judge "on the basis of common experience or the usual modicum of expert testimony."** Specifically, it was determined that only 10 out of the 42 cases involved "complex" evidence which could not be validated on the basis of common sense analysis. These findings are set forth in Table F-4.

Table F-4 indicates that the great majority of the social fact allegations (i.e. those made in connection with evidentiary submissions) were actively disputed by the parties (36/42=86%). The courts, however, actually grounded their decisions on disputed social fact issues in only 20 of these 36 cases -- 56% -- as shown in Table F-5.

If we consider together the factors of disputed issues, complexity and judicial grounds for decision emerging from Tables F-4 and F-5, and set the social fact cases against our entire sample of 65 cases, the following figures emerge. In only 31% of the cases in our sample (20 out of 65) were disputed social facts relied upon by the court in its decision.

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* Historical facts are the subject of traditional forms of judicial inquiry, i.e. answering questions as to whether specific actions actually occurred or specific statements were made. Social facts involve recurrent patterns of behavior relating to general policy issues. These concepts are discussed in more detail in Chapter 1, p. 30 ff.

** D. Horowitz, Courts and Social Policy 47 (1977).

Table F-4

## INTRODUCTION OF HISTORICAL/SOCIAL FACT EVIDENCE[1]

| 1 Only Historical Fact Evidence Introduced | | 2 Social Fact Evidence Introduced | |
|---|---|---|---|
| A Undisputed | B Disputed | A Undisputed | B Disputed |
| 6 | 1 | 26 | 2[3] 34 |
| 7 | 12 | 27 | 3 37 |
| 10 | 13 | 33 | 4* 38 |
| 14 | 19 | 36 | 5 39 |
| 20 | 24 | 46 | 8 40* |
| 42 | 28 | 49 | 9* 41 |
| 56 | 33 | | 11 43 |
| 60 | 35 | | 15 44 |
| 63 | 50 | | 16 45* |
| | 54 | | 17 47 |
| | 55 | | 18 48 |
| | 61 | | 21 51 |
| | 64[2] | | 22 52* |
| | 65[2] | | 23* 57 |
| | | | 25* 58* |
| | | | 29* 59* |
| | | | 30 62 |
| | | | 31 [65][2] |
| | | | 32 |
| N=9 | N=14 | N=6 | N=36 |
| N=23 35% | | N=42 65% | |

## Footnotes to Table F-4

1 An asterisk (*) denotes a case in which "complex" social fact evidence was introduced. "Complex" evidence requires the factfinder to rely on expert opinions which cannot easily be validated by common sense scrutiny. For example, on the basis of a statistician's analysis and testimony, a judge may reach conclusions contrary to his common sense impressions about the implications of quantitative information. Similarly, a party may submit to the court a purported summary of the majority opinions in the literature of a scientific discipline. The concept of "complexity" is more impressionistic than the other classifications used for quantitative analysis in this study. However, because the caselet analysis has employed a very inclusive definition of social fact evidence, it is important to attempt to distinguish between cases with rather straightforward social fact materials, on the one hand, and cases which more closely resemble the model of public law/public policy factfinding described in the literature on judicial capacity, on the other.

2 In C. 65 the court denied plaintiffs' motion for a preliminary injunction. Subsequently, the defendants introduced some social fact evidence (and the plaintiffs sought additional social fact information through discovery but apparently were unsuccessful). There was no subsequent judicial factfinding in the case. Since the social fact evidence was not submitted until after the only liability-related decision in the case, C. 65 is listed for statistical purposes in col. 1 and is entered in brackets in col. 2.

3 Defendant's social fact "evidence" was introduced through a stipulation indicating how defendants' proposed witness "would testify." The court entered a temporary injunction without commenting on the social fact issues, and then abstained from a decision on the merits. There were no subsequent liability decisions in state or federal court.

## Table F-5

### COURT RELIANCE ON DISPUTED SOCIAL FACT EVIDENCE[1]

| [1] Ground for Decision | | [2] Not Ground for Decision | |
|---|---|---|---|
| 4* | 30 | 2 | 41 |
| 8 | 32 | 3 | 47 |
| 9* | 37 | 5 | 51 |
| 11[2] | 38 | 16 | 58* |
| 15 | 43 | 17 | 59* |
| 18 | 44 | 21 | 62 |
| 22 | 45* | 31 | |
| 23* | 48 | 34 | |
| 25* | 52* | 39 | |
| 29* | 57* | 40* | |
| N=20 56% | | N=16 44% | |

1 The cases in this table represent those listed as involving "disputed social fact evidence" in Table F-4. The asterisk is used to denote a "complex" social fact submission (as defined in Table F-4, n. 1). "Grounds for decision" means that the judge referred to the disputed evidence to support a finding of fact that was a basic element of the court's legal holdings even if the court also utilized other independent grounds to justify its disposition of the case. If the court's discussion of evidence clearly was meant to be dictum, then the evidence was not considered a ground for decision.

2 Social fact evidence introduced by the defendants was used by the court to support findings favorable to plaintiffs.

Furthermore, in only eight of these 20 cases were the social fact issues "complex". In other words, in only 12% (3 out of 65) of the sample cases were judges' decisions based on conclusions about complex and disputed social fact issues.

There appears to be a relationship between the subject matter area of the cases and the importance of social fact evidence in the dispute. The 42 cases involving social fact evidence included all of the cases in these categories: special education (four cases); intra-district school finance (four cases) and corporal punishment (two cases). In addition, five of the nine grooming and dress cases, three of the six student discipline situations, and four of the six mandatory leave policy cases were in the social fact category.* By way of contrast, historical fact issues clearly predominated in the eleven first amendment cases (speech, association, religion). In only two of these was social fact evidence presented, and in neither instance did it become a ground for decision. Morecver, of the nine remaining historical fact cases, the facts were undisputed in five.

In the special education cases, social fact issues were important both in the phases of liability and relief. For example, liability questions arose concerning the definition

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* The "complex" social fact cases consisted of all four special education cases, both of the racial discrimination cases involving testing issues, the two corporal punishment cases, one of the intra-district finance situations and the one handicapped teacher case.

of handicaps, the number of children unserved by appropriate services, etc., and remedial questions were posed regarding the reasonableness of timetables for phasing in new programs and the fairness of allocating resources between the plaintiff class and other children. In the testing cases, expert testimony was used to analyze racial impact statistics, and to establish the validation standard appropriate for the given employment criterion or test. In the intra-district finance cases, the social fact evidence consisted of analyses of resource allocations, but by the time of trial there usually was substantial agreement between the parties concerning the basic allocation trends. In a case like Brown (C. 9) however, there remained the additional issue of establishing a link between the demonstrated funding disparities and inequalities in educational opportunities.* As in the finance cases, the main social fact evidence in the non-testing race discrimination cases consisted of statistics. Usually, the defendants did not strongly dispute the accuracy of the plaintiffs' statistical data. The point in issue was whether the objective figures could fairly be interpreted to establish a pattern of race discrimination.

In certain subject areas there appeared to be a direct relationship between novelty of the claim, and the use of social fact evidence.** Corporal punishment, for example, is a policy

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* In Nicholson (C. 49) and Natonabah (C. 48) the funding patterns were shown to be per se violations of statutory guidelines.

** There also was some overall correlation in the sample, between novelty and social fact evidence. Such evidence was introduced in 72% of the "novel" cases, but in only 61% of the "not novel" cases. (Tables P-3 and F-4.) (But this comparison would not pass a formal test of statistical significance. See Appendix B. p. B - 29-30, infra.)

area which raises fundamental disagreement among reputable education experts. Both cases in this area involved complex social fact evidence.* In the maternity cases, by way of contrast, after the U.S. Supreme Court's decision in Cleveland Board of Education v. La Fleur, it became futile for defendants to introduce medical evidence to support the claim that teaching was detrimental to the health of pregnant teachers, and most of the arguments concerning administrative inconvenience also became irrelevant once the principle that mandatory leave must be based on an individualized finding of unfitness, was established by the Supreme Court. Consequently, the use of social fact evidence declined in the later maternity leave cases.**

Unlike the law in maternity leave litigation, the law in grooming cases remained relatively unsettled throughout the period covered by our survey. This uncertainty correlated with a continued reliance on expert testimony. At least one party tried to introduce social fact evidence in six out of nine cases,***including both the earliest and the latest grooming

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* Both decisions antedated the Supreme Court ruling in Ingraham v. Wright, 430 U.S. 651 (1977).

** Compare Cs. 22, 30, 38, and 51 with Cs. 19 and 56. (The social fact evidence was introduced in C. 22 at a hearing that antedated La Fleur; the case was finally decided after La Fleur.

*** In addition to the five cases in which social fact evidence actually was introduced, in C. 13 the plaintiff's request to introduce expert testimony was denied.

litigations in the sample.

### 2. Judicial Methods for Resolving Social Fact Disputes

In the previous section, we identified 42 cases in which social fact issues were introduced and 36 cases (or 55% of the total sample) in which such social fact issues were disputed by the parties. We next attempted to determine how the judges actually dealt with these social fact issues. Our major finding in this regard was that in most instances the judges utilized various "avoidance devices" which allowed them to dispose of the plaintiffs' claims on the merits without having to closely scrutinize the parties' competing social fact arguments. Four categories of such devices were identified: "irrelevance", "burden of proof," "maximizing areas of agreement" and "social fact precedent." A breakdown of the cases falling into each category is set forth in Table F-6.

In the pages which follow we will discuss the cases falling under each of these categories, as well as factfinding methods used by the judges in the minority of cases in which they more directly confronted the social fact issues.

#### a. Avoidance devices

The first basic "avoidance device" listed in Table F-6 is "irrelevance," referring to rulings that social fact evidence offered by a party was not relevant to the legal issue under consideration. Social fact evidence was rejected in these

## Table F-6

### JUDICIAL METHODS FOR RESOLVING DISPUTED SOCIAL FACT ISSUES[1]

| I Avoidance Devices | | | | II Fact Finding |
|---|---|---|---|---|
| A Irrelevancy | B Burden of Proof | C Maximizing Areas of Agreement | D Social Fact "Precedent" | |
| 5 | 3 | 9* | 17 | **A One Party Only Submits Social Fact Evidence** |
| 39 | 16 | (23)* | (23)* | |
| 40* | 18[1] | (41)*[2] | (41)* | 11 |
| 47 | 21 | 43 | 51 | 15 |
| | 58* | (52)*[3] | | 25* |
| | 59* | | | 31[4] |
| | 62 | | | 32 |
| | | | | 34[4] |
| | | | | 37 |
| | | | | 38 |
| | | | | 57 |
| | | | | **B Both Parties Submit Social Fact Evidence** |
| | | | | 4* |
| | | | | 8 |
| | | | | 22 |
| | | | | (23)* |
| | | | | 29* |
| | | | | 30 |
| | | | | 44 |
| | | | | 45*[2] |
| | | | | 48 |
| | | | | (52)*[5] |
| N=4 | N=7 | N=5 | N=4 | N=19 |

## Footnotes to Table F-6

1 This table breaks down 35 of the 36 social fact cases listed in Table F-4, col. 2-B (omitted is C. 2; see Table F-4, n.2). Three cases (indicated by parentheses) are listed in more than one column because separate social fact issues were treated in different ways. These cases are included in the column totals. Thus, the column totals add up to 39, although only 35 separate cases are involved. The breakdown of column II, into subcolumns A and B, is based on the distinction (used previously in Table F-3) between single party and multiple party evidentiary submissions.

2 This method was used in relief proceedings. Note also that in C. 45 the court relied on the expertise of a master it appointed, rather than on a party's witness, for its findings.

3 This method used both in liability and relief proceedings.

4 In Cs. 31 and 34 the court rejected the expert testimony introduced by one party. Out of the 15 cases classified in Table F-5, col. 2, as "disputed/not grounds for decision," only these two are listed in F-6, col. II. The social fact disputes in the other 13 cases were disposed of through avoidance devices. (This calculation omits C. 2 -- see Table F-4, n.2 -- in which factfinding was altogether avoided.)

5 This listing refers to dispute between plaintiffs and settling defendants, on the one side, and intervenor defendants on the other, regarding due process procedures.

instances primarily because it was related to "subsidiary policy arguments."* Four cases fit into this category.

A prime illustration of such "irrelevance" was presented in Banks (C. 5) where the plaintiffs challenged a school rule requiring all students to stand respectfully during flag salute ceremonies. Expert witnesses for the school board testified that this rule promoted student respect for their country and for the rights of others. The court held, however, that the only respect that mattered -- legally -- was respect for the rights of religious minorities who considered it a violation of their faith to participate to any degree in the flag salute ceremony. Similarly, in King (C. 40), the court held that evidence offered concerning the lack of job-relatedness of an employment test was legally irrelevant since the plaintiffs had not shown a prima facie case of race discrimination.

Both in Johnson (C. 39) and in National Indian Youth Council (C. 47) the plaintiffs submitted social fact evidence alleging that the defendants' policies detrimentally affected the students' academic progress. The courts found, however, that the plaintiffs' allegations -- even if true -- did not establish legal grounds for interfering with legislative or administrative requirements which were based on other "rational" policy decisions.

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* See Chapter 2, supra.

b. Burden of Proof

On any given issue, the applicable law places on one party's shoulders a burden of persuasion. In seven cases in our sample, the judges relied on a party's failure to meet such a legal burden of proof as the key aspect of their decision. In the present context, failure to meet a burden of proof meant that when a judge either found or assumed (for argument's sake) that a party's social fact evidence was essentially accurate, he nevertheless concluded that the quantity of evidence was insufficient to decide the issue in that party's favor. For example, in C. 21, the court struck down a school dress code without, however, denying the validity of the school board's expert testimony. The decision was based on the legal premise that the code must be shown to be a "compelling part of the public educational mission." That is, accepting the defendants' experts' claims that permitting long-haired students to play in the marching band or on the basketball team had some negative impact on music and sports competitions, the degree of negative impact alleged was insubstantial.*

Similarly, in Dameron (C. 18) a case in which the defendants essentially admitted plaintiffs' claim concerning malapportionment of voting districts, the court used a burden of proof analysis in determining the remedy. It ruled that any facially reasonable plan put forward by the defendants would be presumptively

* Analogous considerations applied in Cs. 16 and 62.

constitutional and the plaintiffs would have the burden of proving otherwise.

A variation of the burden of proof avoidance device is sometimes used when a holding is based either on the traditional "rational relationship" test of equal protection or on the newer, middle ground equal protection standard that calls for a showing of "substantial rationality." Under the former standard, if public officials set forth any plausible justification for a disputed action, the court will not second-guess their judgment. When, on the other hand, the plaintiffs satisfy the prerequisites for application of the latter test, the officials have the burden of showing that their policies have a substantial factual basis. The burden shifting distinctions between these two tests becomes crucial when social fact evidence is inconclusive -- i.e. when the dispute hinges on a policy issue about which there is no consensus among the experts and in the professional literature. Hence, in the two corporal punishment cases in the sample (Cs. 58 and 59) the courts applied the traditional test, determined that the expert debate about the educational value of corporal punishment was far from settled and therefore, upheld the school board's practices as meeting minimum rationaity under the circumstances.* By way of contrast,

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* In C. 58, the court expressed its holding as follows:

> "The complaint alleges a disagreement among educators as to the value of corporal punishment. There are those who agree that corporal punishment serves no educational purpose but this court cannot say that the regulation of the defendant lacks rationality or is not relevant to the legitimate functions of common school education today." 329 F. Supp. 678, 685.

in C. 3 it was the defendants who failed to meet their burden -- under the substantial rationality test -- because conflicting testimony about the alleged role model impact on students of a teacher who was an unwed parent was found to be inconclusive.

### c. Maximizing areas of agreement

Courts sometimes resolved social fact issues by basing their decisions on areas of agreement in the positions of the parties, thus avoiding any need for independent judicial fact-finding. Five cases fit into this category.

The most explicit example of such reliance is, of course, court approval of a settlement between the parties by entry of a consent order. PARC (C. 52) illustrates a classic consent order situation. It was a class action alleging that state and local school officials were depriving retarded children of public educational services to which they were legally entitled. Plaintiffs' key factual contention was that all retarded children could benefit from educational training. If this social fact premise were upheld, a legal finding of discriminatory exclusion from schooling would clearly follow. At trial, plaintiffs submitted extensive expert testimony supported by detailed exhibits containing social science data and analyses on this issue. Rather than attempting to refute the plaintiffs' presentation, the state defendant negotiated a settlement with the plaintiffs which accepted the premise that retarded children are educable and should be provided appropriate public educational service.

In Frederick L. (C. 23), a special education class action, each side rallied in support of its position one nationally known expert in the field of learning disabilities and a number of lesser known, but indisputably qualified administrative, psychological and pedagogical experts. The court based some of its major social fact findings upon isolated areas of agreement among the parties and their experts. For example, although the experts testified that there were wide differences of opinion among researchers and policymakers concerning the precise definition of "learning disability", and the percentage of children who suffered from that handicap, the parties stipulated for the purposes of the case that there were about 8,000 "LD" children enrolled in Philadelphia public schools.

Another important social fact issue in the case was whether -- as defendants claimed -- LD children who had not been individually identified as such by the district were likely to be receiving appropriate instruction in one of many special district programs not specifically designed for LD's but allegedly employing remedial teaching methods that should benefit them. Starting with the parties' agreement on the number of LD children, the court pieced together a number of facts and figures in the record which had not been systematically organized by any of the parties and reached the conclusion that the defendants' information concerning the services they provided, combined with their admission about the number of LD students, did not support their asserted conclusion that virtually all I

children were receiving appropriate instruction. The court supplemented this analysis with reference to a memorandum, written by an official in the Pennsylvania Department of Education, which stated that services for LD's in Philadelphia did not meet state standards.*

In the remaining three cases in this category, the courts found a basis for concluding that a party had implicitly admitted the accuracy of an important element of its opponent's position. For instance, in Brown (C. 9) the parties' experts disagreed about whether disparities in per pupil expenditures for educational staff would detrimentally affect educational quality. The court accepted the plaintiffs' harm thesis on the grounds that the school board's voluntary decision to take some corrective measures to equalize staffing allocations was "an admission" that the board itself believed these expenditures must have some educational importance.

In Lopez (C. 43) and Kruse (C. 41) the courts appeared to be searching hard for "admissions". A school official in Lopez -- a student discipline case -- had compiled a chart of the named plaintiffs' cumulative academic records and he drew the conclusion that plaintiffs' suspensions had little effect on their educational progress as measured by grade point averages. The court ultimately accepted the plaintiffs' argument that

* Note that the court in this complicated case also employed a social fact precedent avoidance device (see infra at 34) and made an independent factfinding judgment on another issue (see infra at 38).

suspensions were detrimental to students' progress, not by specifically upholding the validity of plaintiff's own expert evidence, but rather by relying on a vague statement by defendants' witness:

> "Mr. Goss [defendants' director of pupil personnel] conceded that any absence from school may have negative educational affects."*

The admission in Kruse was related to the remedial question as to what level of services would have to be provided to learning disabled children during the interim period prior to the effective date of new federal statutory standards. The attorneys drafted a compromise plan, but the state defendant declined to accept it. However, when the plaintiffs proposed the terms of this plan to the court, it was incorporated into a remedial decree over the state's objections. The record reflects that no hearings were held or fact-finding conducted to establish the reasonableness of the decree. The apparent explanation for this procedure is that the court was influenced by the state's attorney's willingness to recommend the terms of the plan to state officials.

d. Social fact "precedent"

On occasion a judge will "follow" the fact-finding conclusions of another governmental body regarding social fact

* 372 F. Supp. 1279, 1292.

questions similar to those presented in the present litigation. The fact-finding precedent may be found in a statute, administrative decision, or in another court's opinion. Four cases in our sample reflected this approach.

A prime example of this category is Paxman (C. 51), a mandatory maternity leave case in which evidence was presented prior to the Supreme Court's decision in La Fleur, but in which the decision was issued subsequent to that major precedent. The trial court opinion did not even refer to the specific testimony of defendants' experts but instead stated that in light of the La Fleur holding, the defendants' purported justifications were insubstantial per se. Somewhat similar reasoning was used in C. 17, a grooming case. Although no Supreme Court precedent was available, the court indicated that other federal courts had rejected arguments similar to those advanced by the defendants, and it was not necessary to review them in detail in the instant case.

The courts ruled in Cs. 23 and 41 that they did not have to consider, de novo, questions as to whether individual screening of all suspected LD children was a necessary element of legally-mandated "appropriate education" or whether regular school programs could provide appropriate education in some instances for LD children. Relying on applicable state statutes, they concluded that the legislature(s) had already decided that individualized identification and use of special programs were mandatory.

### e. Approaches to factfinding

In the 19 cases listed in Table F-6, column II, the courts needed to scrutinize social fact evidence in order to reach their decisions. Nine of these cases involved situations in which only one party submitted social fact evidence; judicial fact-finding methods for these cases were discussed supra at 11-15. Consequently, the present discussion will focus on the remaining 10 cases in which both parties submitted evidence which required judicial resolution. This sub-group of disputed dual evidentiary submissions, constituted only 15% of the overall sample. Of these 10, only 5 involved "complex" issues.* Thus, the cases calling for major judicial scrutiny of strongly contested social fact questions constituted only 8% of the overall sample.

Considering first the cases involving relatively non-complex factual issues, the courts utilized standard judicial techniques of assessing the credibility of the competing expert witnesses and evaluation of the weight and the significance of the documentary evidence. Fabian (C. 22) and Heath (C. 30) were mandatory maternity leave cases in which there was contradictory expert testimony concerning the medical and administrative justifications for the rules. On the medical issues, the judges accepted the testimony that women usually can fully perform their teaching duties during the second trimester of pregnancy and

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* Another five of the complex issue cases were decided through avoidance devices (Cs. 9, 40, 41, 58 and 59) and one involved a single party submission (C. 25).

probably well into the third trimester. (The judges either rejected or considered irrelevant statements that the leave was necessary for the psychological well-being of mother and child.) On the administrative issues, they found that the defendants' asserted interest in continuity of instruction was neither logically nor empirically served by the rigid mandatory leave rules.

In Cs. 44 and 48 both sides submitted substantially similar statistical data, but differed on the inferences to be drawn from the figures. The court in each case found one party's inferences to be "more closely reasoned." In C. 8, the court believed the defendants' experts (an education professor, and school officials) who testified that mandatory student cafeteria service as practiced in Hawaii served a valid educational purpose, and rejected the contradictory opinion of plaintiffs' expert (a high school teacher).

Judicial factfinding in the more complex cases also involved standard judicial techniques of assessing the credibility of witnesses and the weight of the evidence, but such assessments in this context tended to require the judge to learn specialized concepts and technical language in order to comprehend the arguments. The judges apparently did not have major difficulty in obtaining at least a working familiarity with those concepts, and they tended to use this working knowledge to assess the credibility of the key witnesses, and then to rely heavily on credibility factors instead of undertaking a full, independent analysis of the data. This interesting pattern emerges from a

brief review of the "complex" cases.

Armstead (C. 4) was a suit brought to challenge an employment policy enacted by the Starkville School District during the transition period from a segregated to a unitary school system, a period of enrollment decline and faculty retrenchment. The board's new employment policy stated that a teacher would not be re-employed unless he either held a masters degree or took the Graduate Record Examination (GRE) and achieved a minimum cut-off score.

The plaintiffs charged that the application of these criteria resulted in a disproportionate layoff of black teachers. The court, without much difficulty, found that plaintiffs' statistics demonstrated the existence of such a disproportionate impact and ruled that the defendants had the burden of justifying the validity of hiring requirements that resulted in such a disproportionate pattern. After considering testimony by testing experts on behalf of each party, the court concluded not only that the defendants had failed to compellingly prove the job-relatedness of the employment requirements in terms of accepted psychometric practices, but indeed, the expert analysis demonstrated that the board's policy was not even minimally rational. The court's key conclusion was that:

> "Low rankings on the G.R.E. do not mean that a teacher does not have the knowledge or skill requisite for effective classroom performance in elementary and secondary schools." 325 F. Supp. 560, 566.

To reach this conclusion the court relied mainly on the credibility of plaintiffs' expert, who was a representative of the Educational Testing Service, the creators of the G.R.E. (The strong credibility of such a witness, of course, could hardly be denied.) This witness stated that the exam was designed to test a person's ability to pursue graduate studies, not to assess his qualifications for teaching elementary and secondary school children. Furthermore, it was established that most persons taking the test are those who ranked in the upper third of their college class and were seriously interested in graduate school. Hence the defendant's cut-off score was based on a norm derived from the performance of this select population, which was not representative of the population of teacher applicants.*

As discussed above, most of the expert disputes in Frederick L. (C. 23) and PARC (C. 52) were resolved or avoided by maximizing areas of agreement or relying on social fact-finding precedents. On other key issues, however, the courts were required to make a direct finding of fact. In Frederick L., the parties' experts had given conflicting testimony about whether learning-disabled children were currently receiving minimally satisfactory services in Philadelphia. The plaintiffs' lead expert was a university professor and consultant based in Philadelphia. In her testimony she demonstrated considerable knowledge of practices

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* The court treated as an admission a statement by the school superintendent that the standards and the policy "had nothing to do with determining teacher competency."

and policies in the Philadelphia School District. It became apparent during cross-examination of the defendants' lead expert, on the other hand, that he was unfamiliar with many of the practices in the Philadelphia School District. Hence, on this issue, the court gave greater credibility to the views of the plaintiffs' experts.

In PARC, at the hearing on the consent order, educational experts testified jointly for the plaintiffs and for the state defendants. Some local school districts, however, opposed portions of the settlement agreed to by the plaintiffs and the state; they introduced an empirical study and testimony from an educational expert and psychologist alleging that due process procedures contained in the settlement agreement would be unduly disruptive of normal classroom instruction. The court, however, found that the due process procedures agreed upon by the plaintiffs and state defendants were necessary and appropriate, and the problems raised by the objectors were "more imagined than real."*

The plaintiff in Gurmankin (C. 29) was a blind applicant for a teaching position who claimed that her qualifications had not been fairly assessed by the defendants' evaluators. Some of the concerns expressed by the defendants were that a blind

* 343 F. Supp. 279 at 301. During the years following the entry of the PARC consent order, social fact issues arose repeatedly in the remedial phase of the case. As will be described in Chapter 5, the trial judge actively spurred negotiations among the parties so that almost all of the major social fact implementation problems were resolved by agreement and compromise.

teacher could not recognize students, maintain discipline, administer tests, or stay abreast of scholarship in the field of teaching. In response, a representative from an organization serving the blind, and a blind teacher with seven years experience in Detroit, each explained how there were feasible methods for overcoming all of these alleged problems.

The plaintiffs relied heavily on the testimony of an expert witness, Dr. Edward Huntington, who had studied the performance of blind persons who were teaching in a number of locations throughout the country. The court noted that Dr. Huntington's generalizations had to be qualified because they were not based on the study of any large urban school districts, but his credibility still compared favorably with that of the two persons who had actually examined the plaintiff since "both [of them] had no prior contact with blind teachers or blind applicants for teaching positions." Also, before administering the test, "the examiners did not know who they would be interviewing, [and, therefore], they did not undertake any special precautions to become better informed of the problems or capabilities of blind teachers."* After discussing the testimony

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* The court's discounting of the relative importance of knowledge of the urban school district came back to haunt it in the remedial stage of the case. Because of rigors involved in all of the open teaching positions in the Philadephia system, for months the court was in the middle of a bitter dispute between the parties about how desirable a teaching assignment the plaintiff could insist upon, on the basis of her court decreed seniority.

** 411 F. Supp. 982, 987.

of these examiners, the court concluded:

> "The grading of the oral examination is based, at least in part, on misconceptions and stereotypes about the blind, and on assumptions that the blind simply cannot perform, while the facts indicate that blind persons can be successful teachers.*

In Mills (C. 45) the court finally became involved in the close scrutiny of conflicting social fact evidence after a long and fruitless effort to resolve major issues by avoidance techniques. In 1975, the court found the defendants liable for denying educational opportunities to handicapped and "problem" children. There was no trial. Rather, the court granted summary judgment to plaintiffs based on areas of "agreement" -- i.e. admissions, and undisputed social fact exhibits and affidavit testimony.

For the next two and a half years, over the plaintiffs' objections, the court attempted to rely primarily on the defendants to devise and implement a comprehensive plan for educating the plaintiffs, and repeatedly encouraged the parties to negotiate compromise solutions to their disagreements. In 1975, this phase abruptly ended. A hearing was held at which plaintiffs submitted extensive social fact evidence about the inadequacies of the defendants' programs and plans. The defendants submitted statistics and other materials intended to show that they were making reasonable progress in implementation,

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* 411 F. Supp. 982, 987.

considering budgetary constraints. The judge, however, accepted the plaintiffs' proof that the programs were grossly inadequate. Moreover , having explicitly rejected two years earlier the "budgetary constraints" arguments upon which the defendants again relied, the judge now found that the defendants had not been acting in good faith and were in contempt of court.

For the next phase of remediation the court appointed a special master to monitor the defendants' compliance. The master's responsibilities included (among others) investigation of the suitability of educational programs and of the adequacy of screening/placement procedures; review of interagency coordinations efforts, scrutiny of budget procedures to determine means for curing budgetary shortages, and assisting defendants in preparing a comprehensive plan. During the master's tenure, the court twice again found that the defendants' efforts were inadequate (7/75, 8/77). These findings primarily were based on the master's reports. Hence, in a five year period the court made a transition from reliance on avoidance devices; to independent judicial social factfinding (contempt order); to judicial factfinding assisted by a court-appointed expert.

* * * *

In sum, then, although social fact evidence was introduced in the majority of cases in our sample, the assumption in the literature that courts are generally called upon to closely analyze complex social science evidence in deciding cases

involving questions of educational policy was not borne out. Only 36 out of 65 cases raised contested issues of social fact and in about half of these, the courts employed "avoidance devices" that sidestepped any need for judges to directly decide social fact issues. In the balance of the cases, standard judicial techniques of assessing witness credibility and weight of the evidence minimized the need for judges to engage in qualitative analyses of social science issues. Of course, a basic understanding of the social science evidence was necessary to deal with these issues even in this manner; it was our impression that the courts did sufficiently comprehend the data and effectively carried out this task.

Although it is impossible to quantify the degree to which the judges in the sample cases fully understood all of the technical social science evidence introduced, we attempted to validate our impressions in this regard by instructing our researchers to report any indication of a judge's inability to comprehend or deal with specialized social facts. Opinions, briefs and other documents were reviewed to find examples of judicial mistatements of technical concepts. Also, a standard interview question posed to attorneys was whether they believed the judge had gotten involved in specialized social science issues that were beyond his understanding.

Not a single clear judicial error of this nature was reported.

With regard to several cases, attorneys expressed strong disagreement with particular findings of fact. But the

alleged errors were not attributed to the judge's lack of understanding of the concepts or techniques of a specialized field of knowledge.*. Even when one qualifies this finding to reflect the impressionistic nature of the research methodology, the lack of any indication of miscomprehension was striking.**

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* In C. 44 one attorney expressed mild reservations about the judge's understanding of the statistical methodology. The opposing attorney stated that the data was clear and the judge understood it. In C. 15 it appeared from an appellate court opinion that the appellate judges did not understand the technical workings of the proportional representation system of elections, but the district court judge's opinion did reflect an understanding of these details. In C. 48 both attorneys agreed that the judge understood the liability facts, but one attorney thought he got "lost" in the remedial phase.

** In at least a few cases the judges were especially well-qualified to address the disputed social fact issues. For example, in C. 9, both attorneys pointed out that judge, a former anti-trust lawyer, had easily understood the complex statistical data submitted into the record. A judge who had served as a state civil rights commissioner held that a federal anti-discrimination regulation was invalid (C. 56), while another judge, who formerly represented a local school board (in the capacity of city attorney) invalidated a school board policy (C. ). By a trick of fate, in C. 39 the plaintiffs, who were challenging the constitutionality of a state statute, found themselves pleading the case before a judge who had helped to enact that very law when he was the majority leader in the state senate. (Plaintiffs did not move to disqualify him). Our generalizations about judges' competencies are based on the overall survey responses, not on these few illustrations. But these examples serve as useful reminders that federal judges are appointed, not created, and that they often have a background in the social factfinding problems which arise in educational policy cases. Cf. Chayes, "The Role of the Judge in Public Law Litigation," 89 Harv. L. Rev. 1281, 1307-1308 (1976).

C. Summary of Findings

1. Formal discovery procedures were utilized in 38 out of the 65 cases, with extensive discovery taking place in 11 cases. The discovery process appeared to be an effective and efficient information gathering technique since no adversarial resistance occurred in most of these situations and courts were required to decide disputed submission of discovery information in only 7 cases or 11% of the total sample.

2. Of 41 cases that were decided after submission of social science evidence ("social facts"), approximately half (20) involved one-sided data presentations by only the plaintiff or only the defendant. The apparent adversary process information flow distortion was mitigated, however, by the finding that in 70% of the one-sided evidentiary submission cases, the opposing side prevailed in the actual decision.

3. In most education policy litigations, judges are not called upon to actually decide sophisticated social fact issues. Social fact evidence was introduced in only 42 out of the 65 cases in our sample. In about half of these 42 cases, the courts utilized "avoidance devices" which allowed for a final decision to be rendered without actually deciding the disputed issue of fact.

4. In 20 cases (31% of the sample) judges actually engaged in social fact-finding. In half of these instances, evidence was submitted by only one party. Only 5 of the ten remaining

cases -- in which opposing parties submitted social fact evidence -- involved "complex" facts. Thus detailed scrutiny of complex social fact materials submitted by adversaries occurred in only 8% of the sample cases.

5. The judges appeared to have a reasonable working knowledge of social science terminology and concepts in the cases they were called upon to decide; although utilization of traditional judicial techniques such as relying on the credibility of the witnesses avoided the necessity for extending such "working" knowledge into undertaking full, independent qualitative analyses of the social fact disputes.

* * * *

The following pages are excerpted from the final conclusions chapter of our report. In this selection, we analyzed both the caselet data and the facts developed in our four major case studies -- Chance v. Board of Examiners, New York legislative deliberations on seniority; Otero v. Mesa County Valley School District No. 51; and the Colorado legislative deliberations on bilingual-bicultural education. Thus, there are cross

references to materials not contained in this paper. Although these cross-references are, for the most part, self-explanatory, the reader may wish to consult the full project report to better understand the factual basis for some of these comparisons.

The initial fact-finding issue raised in the judicial activism debate concerned the courts' ability to obtain sufficient information on complex social fact issues. Our caselet data indicated that the judicial discovery process was an effective information-gathering technique. Formal discovery mechanisms were utilized in most of the cases and the adversary parties normally cooperated in supplying requested information, since the courts were required to decide disputes about discovery requests in only 11% of the sample cases.

It is impossible to state definitively whether this efficient discovery process actually resulted in submission of a "complete" evidentiary record in any particular case or number of cases, since there is no objective measure of "completeness." However, it does seem reasonable to conclude that in educational policy cases, where most of the

relevant information is in the possession of the school board defendants, efficient discovery procedures would result in the accumulation and submission of most of the available data. Furthermore, the public nature of these disputes seem to incline defendants to more readily accede to requests for information than would corporate defendants in private litigations both because a public defendant tends to be sensitive to its obligation (or the public's perception of its obligation) to cooperate in providing basic facts, and also because non-cooperation in the end would probably prove pointless -- much of the information sought may be obtainable under freedom of information act procedures.*

Our judicial-legislative case studies provided further perspectives on comparative fact-gathering capabilities. For example, in Colorado where identical factual issues were relevant to both the judicial and legislative deliberations, the evidentiary record submitted to the court was clearly more complete than the parallel submissions in the legislature. In New York, where inquiry into the critical question of discriminatory impact required not merely access to raw data in the possession of the defendants, but also substantial analytic compilations to present the data in useful form, the federal court clearly outperformed the state legislature. In Chance, Judge Mansfield induced the parties to cooperate in undertaking a detailed (and costly)

* A possible additional factor is the sheer volume of litigation costs that can result from vigorously contested discovery. City and state attorneys tend to be short-staffed, and boards employing private counsel are usually highly cost conscious.

survey designed to ascertain the precise impact of past examination results on specific ethnic groups, and Judge Tyler was able to require compilation of meaningful layoff estimates from the board of education. In the legislature, where analogous information was needed concerning the impact of past and future layoffs on ethnic minorities, no mechanism for compelling the compilation of usuable data was available and, as a consequence, precise relevant facts and figures were never obtained.

The judiciary's substantial fact-gathering capability may be self-defeating, however, if not properly managed. In Otero, Judge Winner's disinclination to organize discovery, his postponement of the pupil testing issue, and his failure to distinguish at the outset principle-related from subsidiary policy issues, led to a cumbersome trial experience and to the accumulation of a staggeringly voluminous record. In addition to the fact that a passive judicial stance at the discovery stage may be inconsistent with the information-gathering needs of "new model" litigations, such an approach also ignores the opportunity to organize the issues around major, principle-oriented questions and to identify extraneous subsidiary policy issues in advance of trial. In other words, active judicial involvement in discovery and in the organization of the

factual record may, in the long run, help to ensure that courts do not become embroiled in extraneous policy issues. A stitch in time saves nine.

Assuming that substantial information has been obtained, the remaining fact-finding issue concerns the courts' ability to competently assess the social science submissions which are before them. Preliminarily, it should be noted that the assumption that complex social science information is involved in almost all new model litigation cases was not substantiated by our caselet data. Social fact evidence was actually introduced in only 38 of the 65 cases in our sample (most commonly in suits based on novel legal issues). Only ten of these cases were found to involve "complex" social fact issues.

Furthermore, in very few of these complex cases did judges have to resolve conflicts in social science evidence by a direct evaluation of the source materials and of the specific expert reports that were the bases for the differing points of view. Instead, the judges predominantly utilized various "avoidance devices" which permitted their decisions to be made on the basis of such factors as "admissions" by a party or its witnesses or one party's failure to satisfy its legal burden of proof. In the minority of cases where there was no escape from arbitrating between expert social science opinions, the judges tended to

utilize the "traditional" factfinding method of evaluating witness credibility and thereby short-circuited the need to independently review all the relevant data and source materials. These credibility assessments were not fully "traditional," however. After all, the psychologists, statisticians and economists who took the witness stand were not testifying about their memory of events which had occurred or their motivations in pursuing a course of conduct. The judges in these cases were required to assess the comparative professional competence of the expert witnesses and the persuasiveness of their agruments on issues that were central to the basic questions of legal liability. To accomplish this task successfully, the judges had to achieve a basic working understanding of sophisticated social science issues.* Both our impressions of the performance of the judges in Chance and Otero, as well as the general perception of attorneys interviewed in our caselet sample, indicated that by and large the judges did a reasonably good job

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* Although private law litigation (i.e. medical malpractice) sometimes involves fact-finding informed by conflicting scientific opinions, these cases usually are significantly different from public law cases in that the fact-finder is a jury (not a judge); the relevant events have already occurred (unlike the prospective inquiry in many public law cases); the "expert" issues are usually less complex, and the direct impact of the decision is confined to private parties.

educating themselves on the issues in this fashion.*

In the final analysis, both the strength and the weakness of the courts as a fact-finding mechanism depend on the adversary system, which is its motor force. If the opposing adversary parties place before the court a complete factual record which puts in contention the major social science issues, the court seems reasonably well-equipped to undertake competent assessments of the data.** If, however, the attorneys for one of the parties fails to clearly bring to the court's attention potentially significant counterveiling arguments or information (as with the discriminatory impact statistics in Chance and the Glass report on student achievement disparities in Otero), the court, lacking an independent specialized knowledge of the area, naturally will base its decision on the

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* This unique mode of credibility inquiry raises the question of whether appellate judges should defer to credibility judgments reached in social science fact-finding to the same extent that they defer to the trial judge's fact-finding in traditional litigations. It has been argued that appellate judges (who often served as trial judges themselves) working with a paper record, are as capable of assessing the evidence as the judge who presided over the trial; therefore, their review should be more searching than in traditional cases.

** Actually, our caselet data indicated that even when evidentiary submissions are one-sided, the courts often seem capable of compensating for the apparent "adversarial distortion" by ascertaining, on their own motion, weaknesses or contrary implications of evidence offered by one party. Specifically, we found that in the majority of cases involving one-sided evidentiary submissions, the party which presented the evidence actually lost on the merits of the case.

known facts and arguments* and its own "common sense judgments." Furthermore, some of the "avoidance devices" utilized by the courts may reflect deficiencies in the adversary process, rather than an objective appraisal of the facts. For example, the "admissions" upon which courts focus when they base their decisions on "agreements among the parties," may, at times, result from strategic errors in an attorney's presentation or preparation of his witnesses, rather than from an intended acknowledgment by the party that it accepts the implications of a major position articulated by its opponent.**

In assessing the significance of the strengths and weakness of the adversary process, it is, of course, important to place the issue in a comparative perspective. Our legislative case studies indicated that the deficincies

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* Of course, the failure of a party to present effective rebuttal information may stem not only from incompetence or lack of expert resources of the party's attorney, but may also merely reflect the fact that no plausible counterveiling information actually exists.

** Judges may treat party admissions differently in public policy cases than in private suits. For example, acting contrary to the usual tort law rule that a defendant's voluntary post-accident safety measures do not constitute admission of liability, the judge in Brown (C.9) found that the Chicago School District's recent efforts to equalize school spending constituted an admission that resource distribution was casually related to differences in pupil achievement.

of the judicial process in fact-finding competence are paralleled by similar deficiencies in the legislative process, but that the courts' strengths in this area often are not. Specifically, we found that the state legislatures we studied rely on interest group representatives to compile the evidentiary record, just as judges rely on parties to a litigation. Since we also found that on a given issue basically the same interest groups are likely to participate in deliberations, regardless of the forum(s) in which they take place, it follows that any deficiencies in the evidentiary presentation by one of the adversary parties in the court are likely to be repeated in the presentations before the legislature.

Furthermore, it appears that state legislators, like judges, are essentially "generalists" in controversial policy areas in which school reform suits typically are brought. This is due to the rapid turnover of legislative committee memberships, the comparative novelty even for "legislative experts" of contemporary educational issues, and the fact that the comparative expertise of specialized committee members may not be relied upon by the legislature as a whole. Thus, legislators are not likely to have any greater capability than judges for rectifying "adversarial distortions."

Most importantly, whatever flaws may be found in the judiciary's fact-finding abilities, the simple comparative fact is that state legislatures apparently do not even attempt to assume a substantive fact-finding role. Despite their theoretical advantages of open access, staff resources, and investigative hearings, the Colorado and New York legislatures did not purport to base their decisions on detailed factual analyses. Both our research perceptions, and the specific statements of many of the legislators we interviewed, agreed with Lochner's conclusions that decision-making in legislative bodies is basically a political process consisting of "...bargaining, pressure politics, logrolling or appeals to what the people want...rather than the application of reasoned analysis."* The legislature's process of political decision-making (whose validity as a mode for building and maintaining a democratic concenses on public policy issues is not being questioned here) may incorporate factual information in the interest balancing process, but such facts are not systematically explored or related to the final outcome.

* Lochner, "Some limits on the Application of Social Science Research in the Legal Process" Law and Social Order, 815, 843 (1973). "...the whole process is much less rational than the organizational decision making model assumes... In contrast to bureaucratic organizations, the legislature is by its very nature, compelled to be routed in conflict. For just this reason, the criteria used in appraising administrative behavior -- efficiency and effectiveness -- seems out of place." Whalke, et al. The Legislative System, 379 (1962).

In contrast to the "political decision-making" mode of the legislative forum, the judicial pattern might be described in terms of an "analytic decision-making" model which attempts to issue judgments "reached and supported by fact and analysis in the light of explicit standards of judgment."* Courts must justify their decisions with reasoned analysis taking account of all the relevant facts in the record.** The Legislatures, on the other hand, attempt to reconcile competing interest group positions by political bargaining;*** they need not balance the competing group interests on the basis of the evidence presented.**** In short, we

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* H. Laswell quoted in Mayo and Jones "Legal Policy Decision Process" 33 G.W. L. Rev. 318, 338 (1964); See also Dienes, "Judges, Legislators and Social Change" 13 American Behavorial Scientist 511, 514 (1970).

** A striking example of the "enforcement" of this regime was the court of appeals' remand of Judge Winner's Otero decision (on the employment discrimination issues) with the direction that he explains his fact-finding analysis in more detail.

*** See, e.g. R. Dahl, A preface to Democratic Theory (1956), A. Cox, The Role of the Supreme Court in American Government 108 (1976).

**** See Pound, "Theory of Judicial Decision-Making" 36 Har. L. Rev. 1940, 1954 (1923), A. Bickel, The Least Dangerous Branch 24-27 (1962).

believe that the comparative perspective on the capacities of the legislature and the judiciary to digest and comprehend complex social science evidentiary materials, which underlies much of the judicial activism debate, is essentially misplaced, since the legislature, in essence, does not attempt to engage in the type of analytic factfinding that this comparative perspective seems to presume.*

One final point needs to be made in regard to the foregoing discussion. Certain social scientists have set forth strong criticisms of the judicial factfinding capability, based on their professional assessment of judicial performance in particular cases. For example, in a review of the Detroit desegregation trial, Dr. Eleanor Wolf, a sociologist, expressed concern that the adversary parties had accepted as a basic premise the claim that integration results in educational benefits for students;

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* Similarly, the conclusory distinction in the literature between "adjudicative" and "legislative" factfinding is also misleading. The process which is denoted "legislative factfinding" actually is a non-traditional mode of analytic factfinding which includes analysis of complex social science materials. Our research indicates that the courts are, in fact, better positioned to undertake such "legislative" factfinding than are the state legislatures.

similarly, she noted that they had not informed the court that there was important evidence in the literature (e.g., the Coleman report) which might dispute this conclusion.*

We do not challenge Wolf's specific points nor analogous critiques of other social scientists, especially since they are consistent with some of the limitations of the adversary fact-finding process which we discussed above. The critical consideration seemingly overlooked in Wolf's approach to these issues, however, is that neither a court nor any other decision-making body should properly be viewed as as "educational" forum. Leaving aside the fact that many social scientists, even when espousing positions within the halls of academia, often are influenced by political considerations,** the

* E. Wolf, "Social Science and the Courts: The Detroit School Case," 42 Public Interest 102 (Winter, 1976). She also alluded to examples of incomplete and inaccurate factual materials, miscitations, unsubstantiated social science assertions, etc. Compare on this point, Rosen's indications that the complex science presentations in Brown v. Board of Education "were neither misconstrued nor misused." P. Rosen, The Supreme Court and Social Science, 187 (1972).

** In making this point during his interview for the Otero case study, Dr. Glass former President of the American Educational Research Association, also noted that political biases are more easily camouflaged in the education field than in other social sciences such as economics and sociology. As we reported earlier (Chapter 8, supra, p. 88). Dr. Glass said that the Otero trial inspired in him a higher level of preparation than is necessary for many academic presentations.

point is that any decision-making body composed primarily of laymen, whether it be a court, a legislature or an administrative agency, is likely to exhibit the type of deficiencies that Wolf has described. If social science evidence has, indeed, become inextricably involved in the consideration of basic public policy issues, it seems inevitable (barring advocacy of a system which would relegate public policy decision-making to panels of scholars and researchers*) that one or another of the "imperfect" branches of government will have to be entrusted with these responsibilities.**

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* For an interesting discussion of the academic decision-making process, see B. Moore, Reflections on the Causes of Human Misery 95-97 (1973). For a criticism of the "global rationality" model of decision-making models in terms of realities of information availability and environmental pressures, see H. Simon, Models of Man (1957). Note also that trial judges often display considerable skill (no doubt nurtured in part by their experiences in instructing juries) in formulating "common sense" explications of complex social issues, and these explanations can play a valuable role in promoting public understanding and acceptance of authoritative decisions.

** Of course, this is not to say that changes might not be recommended to improve the judicial fact-finding process in complex new model cases. For example, it might be reasonable to relax the normal rules limiting a witnesses' ability to be recalled to "rehabilitate" prior statements after hearing testimony from the other side, in order to permit the most comprehensive presentation of an expert's overall opinion. Similarly, submission of summary social fact reports on critical issues (similar to post-trial legal briefs) prepared by opposing experts, and procedures for encouraging formal admission of basic social science texts (with appropriate opportunity for explanatory comment by attorneys and expert witnesses), might be useful innovations.

And, if this point is accepted, the basic issue to consider concerning fact-finding capability is whether particular instances of public policy decision-making call for the analytic decision-making mode (in which the courts probably have more experience with and commitment to relating relevant social science information in a disciplined fashion to applicable legal principles) or for a political decision-making mode (in which the legislatures are best equipped to related social science information to an interest balancing process that builds a democratic concenses).