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In the years following Brown vs. Board of Education 347 U.S. 483 (1954) a group of "friendly critics" supported the outcome of the opinion but found fault with the reasoning.[1] Today, 26 years after Brown there remains a general sense of unease about the meaning of the school desegregation cases.[2] The opinion often seem disjointed, loosely reasoned, and productive of conclusions which their premises cannot support. Given that Brown settled the question of whether the state could pass laws segregating black and white children, to what degree do later cases go beyond this passive duty to assert a more active duty to work toward integrated schools? Can such a duty be justified under the 14th Amendment? If so why have the courts failed to provide this justification?

The present paper will address these questions in three parts. First we will distinguish between two general approaches to the equal protection clause, which we will call an Individualistic Model and a Structural Model. Second, we will review key cases over the last 25 years in light of these two models. In the process we will attempt to indiciate the sources of the present conceptual difficulties in the desegregation cases. Third, the paper will conclude with a discussion of the reasons why the Supreme Court has not adopted a more coherent line of argument, and attempt to provide a set of justifications for one such analysis.

I. TWO APPROACHES TO THE EQUAL PROTECTION CLAUSE

In the following discussion we will distinguish between two understandings, models if you will, of the Equal Protection Clause. We shall call them an Individualistic Model and a Structural Model. As they are somewhat complex, the next few pages will be devoted to outlining the key differences.

In general the individual model views school segregation as a problem caused in individual actors, and affecting citizens as individuals. The structural model sees the source of the problem in the organization and operation of institutions in our society. And just as the "acting party" is not an individual, neither is the affected party. Rather, the affected party is a group which is kept in a certain position due to these institutional arrangements.

These two ways of viewing the equal protection clause must be understood at three different levels: At the level of attributing responsibility, at the level of determining the nature of the matters in dispute, and at the level of the desired remedy.

Responsibility: In adjudicating equal protection cases, like other disputes, a primary consideration is what it is to be responsible. Responsibility may vary depending upon the extent to which we decide that one's intentions and ones negligence are relevant. Some offences, such as strict liability offences, do not consider either one's intentions or ones negligence in assessing responsicility, e.g., product's liability and workman's compensation. Others may consider negligence or negligence and intention.[3]

A responsibility standard which requires intentional acts must be based at an individualistic level. That is, only individuals can properly be said to have intentions. Organizations cannot have intentions, except through the individuals who staff them. (Coleman 1974).

School systems, like many organizations may be viewed from either an individualistic or an organizational perspective. We can treat the organization as a group of individuals in charge, i.e., the school board; or as an organization, i.e., the school system.

As it relates to school systems, the individualistic understanding of the Equal Protection Clause will look to collectivity of individuals called the school board. It will examine their intention to segregate and determine whether there has been a violation of the 14th Amendment. The structural understanding, on the other hand will look to the system. Using the organization as the unit of analysis it is inappropriate to judge responsibility by assessing intention. Rather one must look at the outcome produced. Responsibility approximates strict liability, as it does in product's liability cases.

The thing in dispute:

In judging any conflict the legal order must decide what it is that is in dispute. This decision is not totally defined by the parties. It is also defined by the legal rules which rework the disagreement so that it fits legal categories. (See generally Buhannan 1967. The law, of course, may define the dispute in various ways.[4]

An individualistic model of the matter in dispute is influenced by the nature of the responsibility rule. It will focus on the school board as a collection of individuals. It looks to the incidents of wrongdoing to assess

the responsibility of the board for those incidents. A structural model, on the other hand, does not define the matter in dispute as an incident, or even a set of discrete incidents. Rather, it look at the relation of the school system to the achievement of equal protection. Owen Fiss, in a recent article, puts the matter well. In his "dispute resolution" model, which here approximates what we have called an individualistic model, a set of norms and rules confers rights and duties on individuals. Adjudications upon the occasion of alleged breach of these duties examines "the incident, or in the language of pleading rules, the 'transaction' or the 'occurence'". From Fiss's structural viewpoint, however, the focus is not upon a particular incident. Rather it is upon "the conditions of social life and the role that large scale organizations play in determining those conditions. . . . These incidents may have triggered the lawsuit. They may also be of evidentiary significance: evidence of a 'pattern or practice' of racism or lawlessness. But the ultimate subject matter of the lawsuit or focus of the judicial inquiry is not these incidents, these particularized and discrete events, but rather a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition." (Fiss, 1979:18)

An individualistic model, moreover, tends to define issues more narrowly. The realm of legal relevance is specifically directed to the purpose and impact of particular decisions within the control of the school board. A Structural model looks to the wider set of social conditions within which the school system operates. This involves such matters as housing patterns, zoning decisions, etc.

Remedy

We must combine the discussion of remedy with some comments on the purpose of the Equal Protection Clause and, therefore, the objectives to be pursued in these cases.

The two models share some common ground in their understanding of the Equal Protection Clause. They would agree that part of the purpose of the Clause is to insure the juridical equality of individuals citizens of the United States. Individuals are entitled to be treated as an equal in terms of their civil and political liberties. Legislation discriminating between individuals must be justified on the basis of real differences in their circumstances.[5]

When we move beyond these basics, however, the two perspectives begin to differ. The individual model interprets Equal Protection Clause as speaking solely to individuals and is to that extent ahistorical. A structural model is concerned with the historical position of groups. Historical, structural inequality is at the heart of this understanding. This point of view is expressed in the Slaughter House Cases 16 Wall 36, 21 L. Ed. 394 (1873).

> "We repeat then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one prevading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formally exercised unlimited dominion over him".

Only ten years later, however, in the Civil Rights Cases, 109 U.S. 3, 27L. Ed. 835 (1883) a much more ahistorical and individual interpretation was made. The structural position of blacks was discounted by Mr. Justice Bradley, who concluded that open housing statutes passed by Congress under the 14th Amendment were unconstitutional. His opinion reads in part:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseperable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, the ceases to be the special favorite of the laws, and when his rights, as a citizen or a men are to be protected in the ordinary modes by which other men's rights are protected."

It follows from this that the individualistic model is solely concerned with the rights of the individual, while the structural model is also concerned with the status of a group, most especially black Americans and others who find themselves in a similar position, a position of "walled-off inferiority".[6]

Within the individual model the purpose of the Equal Protection Clause is the creation of equal opportunity between citizens. At the level of public education this involves equal educational opportunity, both academically and psychologically. A structural understanding, however, focuses upon a second virtue, that of community. The objective is not solely to provide juridical equality between individual citizens, but to bring black Americans into the mainstream of the society. Put boldly, it asserts structural integration (Luhman & Gilman, 1980, 137) as one of the constitutional values embodied in the Equal Protection Clause.[7]

A sense of true community is a difficult thing to achieve in an advanced industrial society. Nevertheless, it is clear that today, as in the past, there is a deep sense of estrangment among both black and white americans. There is a gulf of seperatism and inequality constructed from prejudice, social distance, and residential, school and occupational segregation. The structural approach is aimed at closing this gulf. The remedy should be designed to create greater community between groups. At the level of school desegregation "community" must mean two things. First it must mean desegregation in the traditional sense that seperate education of white and black children ceases. Second it must mean greater equality in educational attainment and achievement. Note that the equality implied by the structural model is more than equality of opportunity for individuals. It is equality in outcome between groups. (See Fiss, 1976).

The structural model is fundamentally concerned with questions of "macro justice" (See Brickman, et al. 1980). The appropriateness of a remedy is to be measured by its ability to produce certain distributional properties. (e.g., racial balance, greater equality of academic success). Such a view is deindividuating. It does not rest upon a fit between the attributes of individuals and their rewards. Rather it places a priori constraints upon the allowable form or distribution of resources. (Id at 6.)

The individual model on the other hand is more concerned with questions of "micro justice". The adequacy of remedy is to be measured by the existence of formally neutral principles which allow individuals to choose and to achieve according to merit. There are no restrictions on the shape of the outcome distribution. (Id.)

The following table summarizes the two models.

		Individual	Structural
1.	Responsibility	a) Concerned with individual or collective acts	a) Concerned with the institutional behavior
		b) Concerned with the intentions and purposes of these individuals or collections of individuals	b) Less concerned with intentions, more with institutional arrangements and outcomes
2.	Matters in Dispute	a) Looks to specific incidents.	a) Looks to social conditions produced by insitutional arrangements
		b) Adopts a narrow focus on legally relevant issues: the purpose and impact of decisions of school boards	b) Adopts a wider frame or relevance: considering the conditions within which the school system operates.
3.	Remedy	a) Adopts an ahistorical perspective, treating people as juridical equals	a) adopts an historical structural perspective: considering the substantive inequalities between blacks and white Americans
		b) Focuses upon the treatment of individuals as equals. (micro justice)	b) Focuses upon building equality and community between groups (macro justice)

The two models are, of course, ideal types. In real cases it is possible to adopt intermediate positions. For example, the adoption of a "negligence" standard for school board actions, i.e. whether they could forsee the outcome of their decision, is an intermediate step with respect to responsibility (See, Oliver v. Michigan State Bd. of Edu. 508 F.2d 178 (6th Cir. 1974). Or again, it is possible to use a series of discrete incidents to construct a "pattern or practice" of school system behavior, which stands in between an adjudication of individual incidents, and a direct analysis of the social relationships produced or perpetuated by the school system (See Penick v. Columbus Board of Education, 583 F.2d 787,814 (6th Cir. 1978).

The difficulty with the school cases is not, however, that they sometimes adopt middle positions. It is, we will argue, that the cases have consistently adopted contradictory positions. They have clung to an individualistic model of responsibility, maintained a uncertain position concerning the matter in dispute, and yet with few exceptions produced remedies which can only be understood through a structural model. Even at the remedy level, however, the courts have never fully appreciated the implications of a structural understanding, and, therefore, the remedy has never pursued the logic of a structural model to its conclusion.

The two key cases from last summer, Columbus Vd. of Edu v. Penick, 99 S. Ct. 2941 (1979) and Dayton Bd. of Edu. v. Brinkman II 99 S.Ct. 2971 (1979) suggest some movement toward a fully structural approach, but also bring into bold relief the continuing contradiction in the school cases. But it is a long way from Topeka to Columbus, so let us begin.

II. The Cases

A. From Brown through Swann: Toward a Structural Model of Rational Remedy

In Brown and in the Southern cases to follow the issue of intentional violation was so obvious that there was little occasion to come to grips with the standard of responsibility. There was no reason to examine whether intent was a necessary element in providing a school violation, nor whether the accused school board could successfully plead an alternative "neutral" purpose for its action sufficient to justify a given practice, (e.g. a "racially neutral" neighborhood school policy as a reason for segregated schools). Speaking generally, there was no occasion to see what excuses might persuade the court to say that regardless of consequences, the school board action was justifiable. These issues had to await later cases where the purpose of school board actions is not so obvious, and where alternatives interpretation of behavior are at least plausible.

The question which did arise was that of remedy. After Brown I the court gave the parties an opportunity to go home and think about this problem. In 1955, in Brown II, 349 U.S. 294 (1955) the court took its first tentative steps toward fixing remedies in these cases. Believing that the lower court would best be able to assess each local situation the Supreme Court remanded the Brown cases to the District courts with the directive that they should "take such proceeding and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed."

The language of gradualism, and the implicit willingness of the court to consider the sensibilities of white southerners in the process of constructing a remedy has been one of the most discussed aspects of the decision, (see Carter, 1969). With respect to the two models, however,

two other parts of the opinion are more important. First, what did the court have in mind as an adequate remedy which would be consistant with Brown I? While the opinion is vague on this point, one passage suggests an answer. In describing considerations which the District Courts might entertain the court noted they might consider "problems related to administration, arising from the physical conditions of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis....(id)" These passages suggest what was almost certainly the dominant expectation at the time; that the court would require a policy which was racially blind. The lower courts should consider the adequacy of any plans the defendents may purpose to meet these problems and to effectuate a transition to a "racially nondiscriminatory school system."

And the way to that remedy is equally obvious; operate a school system which revises "school districts and attendance areas into compact units to achieve a system of determining admission to the public schools." In short the court had a neighborhood school system in mind.[3]

This language of the court suggests an interpretation which called for an end to desegregation as a state policy, but did not require any actual desegregation as a consequence. Nor would it look at what the school was doing to overcome the consequences of years of seperatism on the intellectual or moral psychological development of children. Affirmative duties to reorganize the school system are nowhere suggested.

Had most southern school boards actively pursued a neighboorhood policy it might well be that the constitutional law of school desegregation would now be relegated to the realm of legal historians. Had school boards

uniformally adopted a neighborhood assignment policy, even at the very deliberate speed of one grade a year, that might have sufficed.

But such a solution was never considered in many communities, perhaps because in many communities it would have worked. Instead most communities adopted a strategy of outright defiance, and finally, when pushed, adopted what came to be called freedom of choice plans. These plans kept the old dual system intact but gave school children the right to opt out of the system by asking for a transfer to a school predominately of another race. Such a remedy expresses an individualistic understanding, disregarding all structural barriers to desegregation.

From an individualistic point of view these plans were racially neutral. The freedom of choice applied to both white and black children, and each child could go to the school of his or her choice. But in any (structural) sense one would have to count the effort both a subterfuge and a failure. Some place in the south there may have been some white children who chose a formally black school. If so, the cases in point have not come to my attention. Any desegregation that did occur rested on the shoulders of black children going to formally white schools. And for a variety of reasons they did so in relatively few numbers.[9]

In 1964 ten years after Brown, only one per cent of black children in the old south attended integrated schools (see U.S. Commission on Civil Rights, 1964). Had freedom of choice remained a valid method of desegregation one should expect that desegregation would to this day be a rare event.

There was, however, a second element to the Brown decision which boded ill for the individualistic model. In remanding the cases to the lower federal courts the Supreme Court said they should be guided by equitable

principles. At the time, this might have appeared to be a further retreat from a strong desegregation stance, for the equity language was used so that the lower courts could take into consideration various practical problems and could adjust and reconcile public and private needs in the case. Equity, however, has always been the bastion of a more substantive type of justice in Anglo-American law. In giving the district courts wide discretion to determine remedy it provided them with substantial powers to require that the remedies suggested by defendents would in fact have the consequence of desegregating the schools.

The Supreme Court gave the District Courts time to see how things would work out and power to act on the experience that gained during that time. It has been argued that by allowing southern districts time to impose desegregation plans, and by using the equity langauge to allow districts to consider the practicalities of the situation, (i.e. white resistance) the court made a serious error, (see, Carter, 1969). And for ten years it looked as if this assessment was correct. But from the longer view one might hazzard the opinion that by providing southern districts the leeway of "deliberate speed" the Court gave itself, and the lower courts time to come to a more structural understanding of remedy. And it gave southern boards time to hang themselves.

One of the surest ways to drive a court away from a formally neutral interpretation of rules is for obstructionist parties to hide behind every legal nook and crany formalism provides. Southern whites had already attempted this technique in the voting rights struggle. For years they hid behind the white primary as a devise to disenfranchise blacks. And ultimately the court had swept away all formalisms about the primary being something other than state action to come to one central structural concern;

were black citizens able to vote in such a way that they truly participated in the electoral process, (Nixon v. Herndon 273 U.S. 536 (1924); Nixon v. Condon 286 U.S. 73 (1932); Grovey v. Townsend 295 U.S. 45 (1935); Terry v. Adams 345 U.S. 461 (1953)).

Here too, by at first resisting and then hiding behind the formally nondiscriminatory freedom of choice plans, the southern school boards pushed the courts (both the Fifth Circuit and the Supreme Court) to an orientation which demanded that whatever else a plan might do, it must in fact desegregate schools. Slowly, in the middle and late sixties the courts began to sweep aside remaining attempts at obstructionism, and demand that schools be desegregated. And at the same time they were expanding what was required by way of desegregation.[10]

An important element in the court's increasing concern with results was the passage of the 1964 Civil Rights Act and the 1965 Elementary and Secondary Education Act; the latter providing millions of dollars in federal money to local school districts. Title VI of the Civil Rights Act gave the Department of Health, Education and Welfare the power to withhold the ESEA money if schools remained segregated. The HEW guidelines looked to results, and many of these were given great weight by the courts in determining whether school boards had made progress towards compliance with Brown, (see United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir 1966)).[11]

In 1968 the movement toward a structural model of remedy reached the Supreme Court in Green v. County School Board of New Kent County, 391 U.S. (1968). The question was whether a freedom of choice plan adopted in a sparsely populated eastern Virginia county could pass muster. And the key issue was not whether it evidenced a neutrality toward black and white

children, but whether it worked. The school district had a total of 1300 children. It operated two schools, one white combined elementary and high school (550 students) and one black combined elementary and high school (740 students). There were no attendance zones, thus no neighborhood schools. In 1965 the board adopted a freedom of choice plan whereby each fall a student entering the 1st or 8th grade must choose a school, and the remainder could choose if they wished. Absent a choice of the student would be assigned to the school he or she had attended the previous year. Between the time the plan was instituted and the time the court heard the case a total of 115 black children had enrolled in the white school, and no white children had enrolled in the black school. Eighty five per cent of the black children in the district still attended the all black school.

In its opinion the Court said that the adoption of a freedom of choice plan (eleven years after Brown) does not end the inquiry, but merely begins it. The court then provided a 1968 interpretation of what Brown II meant. "School boards such as the respondent then operating state-compelled dual systems were...clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discimination would be eliminated root and branch...The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."[12]

The Green Case was a key statement of structural approach. It supported HEW guideline standards, and thus asserted that Brown did not simply stand for a cessation of discrimination, but rather the immediate adoption of a plan which could disestablish the dual school system. The key principle upon which school districts had relied, that the Constitution required an end to segregation, but did not require any affirmative acts toward integration, was swept aside.[13]

And during the next term, after the Nixon administration had taken hold, the court refused a delay in plans in 33 Mississippi School districts, reaffirming that it was the "obligation of every school district to terminate dual school systems at once and to operate now and hereafter only unitary schools" Alexander v. Holmes County Board of Education, 396 U.S. 19 at 20 (1969).

Remaining after Green and Alexander is the question of the scope of permissible remedies. In the Green Case, the court suggested the simple expedient of zoning the county so that the eastern half went to one school and the western half went to the other. Since there was little residential segregation in New Kent County, this plan would desegregate the schools. Of course most school districts operate on some type of zoning assignment system, usually under the rubric of a neighborhood school policy. Is this permissible in situations where a neighborhood plan will not desegregate? To put the question another way, should the alleged virtues of a neighborhood school policy work as a defense to continued segregation outcomes? How far can the federal courts go beyond a neighborhood policy in constructing plans which promise to work to desegregate schools? Can a school system ignore the demographic structure of a community in adopting a plan? These are the issues in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1972).[14]

In the Swann case, the court defined four issues related to remedy: a) the extent to which racial balance or racial quotas might be used as part of a remedial order, b) whether every black and all white schools must be eliminated, c) the limits on the rearrangement of school districts and attendance zones as a remedial measure, and d) the limits on the use of transportation to remedy de jure school desegregation. As to these points:

1. The court rejected the idea that desegregation required exact mathematical ratios be achieved in each school. It did say, however, that such ratios could be used as a starting point in the process of constructing a remedy. Thus while the court did not define a unitary district as one where every school had very similar racial ratios, it did blunt the individualistic argument that the courts could not consider race (the Constitution is color blind) in constructing a remedy, see McDaniel v. Barrosi, 492 U.S. 39 (1971).

2. On the issue of one race schools, the court held "the existence of some small number of one race, or virtually one race schools within a district" is not be itself proof of a state segregated system. Thus is it might possible for an adequate remedy to contain such schools. However, where a board's plan does contemplate such schools "they have the burden of showing that such school assignment are genuinely nondiscriminatory." The court ordered optional majority to minority transfer plans with free transportation for students wishing to leave such schools.

3. As to the third issue the court held "The objective is to dismantle the dual school system. 'Racially neutral' assignment plans proposed school authorities to district court may be inadequate;" if they fail to counteract the effects of past school desegregation. "In short, an assignment plan is not acceptable simply because it appears to be neutral."

4. Finally, the court allowed transportation as part of a remedy until time or distance of travel is so great as to risk the health of children or impinge on the educational process.

In summary, the court rejected geographic proximity as a criterion for assignments where the policy fails to lead to a desegregated system; validated the use of race in student assignments; and required school boards to take all feasible steps to eliminate segregation, (see Fiss,

1971). Finally, by arguing that the duty of formally dual school systems was to "eliminate all vestiages of state-imposed segregation," (402 U.S. at 15), and by providing for comprehensive remedial orders, the court created an evidentiary presumption that racial imbalance in formerly dual systems constitute a prima facie showing that the dual system has not been dismantled.

All of these positions move the law of school desegregation toward a more structural model of remedy. Perhaps the key word is "dismantle." It implies an organizational structure which must be altered. "Neutral" solutions will not suffice when the demographics of school assignment policies and residential location fail to produce desegregation. Most fundamentally, the court sees the racial balance part of desegregation as a question of "macro justice." The primary criterion for adequacy in a desegregation plan is not individual opportunity to desegregate, or presumed individual advantage from desegregation. It is the distribution of white and black students per se.[15]

Swann is the last key southern case. While may southern cases remained to be litigated, and while many continue in litigation, the development of school law was about to move north.

The northern cases were to present two new challenges to the court. First the court would have to come to grips with the question of violation in a way that was unnecessary in the south. In deciding the question of violation new choices between an individualistic and a structural model would emerge. Second, the northern cases would present the court with new remedy questions which would test its commitment to a structural model of remedy. And both of these legal challenges would present still a larger issue to the court. That is, if a structural approach is appropriate,

exactly what is it we are trying to achieve in the school cases, and how can the courts move us toward those goals?

B. The Northern Prelude

If Brown v. Board of Education was ambigious as to the remedy required of school districts found in violation of the 14th Amendment, it was equally ambigious as to exactly what it was about a dual school system which constituted a violation of the Constitution. Why was it improper to run a dual school system?

In the cases leading up to Brown[16] the court had slowly retreated from an equal facilities argument toward an argument based upon the "intangibles" of education, such as the ability to engage in discussions and exchange views with fellow students. In addition the Brown opinion speaks of scars to personality caused by the fact that segregation "generates a feeling of inferiority as to their (black students') status in the community that may affect their hearts and minds in a way unlikely every to be undone," 347 U.S. at

Finally, this sense of inferiority was said to affect the child's motivation to learn. The court quoted with approval the conclusion of the Kansas Court where it said, "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system," Id. at _____. The court, in the famous footnote eleven cited a long list of social science works said to support this last statement. And in conclusion the court stated: "in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal," Id. at _____.

It would seem that a fair reading of Brown would conclude that the court believed segregation, even in "equal" facilities was unequal because of the real if intangible harm it caused black children, both psychologically and educationally. Many writers soon argued that the case could not possibly hinge upon the question of whether black children were in fact harmed; or, if they were, whether desegregated education would overcome this harm.[17] The language in Brown leads some support to such a view, for the court speaks of segregation as being "inherently unequal" and inherent would be an unusual choice of words if what was at stake was some empirical observation.

In 1963, the 5th Circuit Court made a ruling which supported the idea that educational harm was not at the heart of Brown. In Stell v. Savannah-Chatham County Board of Education, 318 F 2d. 425 (th Cir. 1963) the Circuit Court granted an injunction where a district court judge had refused to order desegregation because of evidence presented by white intervenors that children of each race have "distinguishable capabilities" and that therefore desegregation would have adverse effects on the educational standards of the school system and would psychologically harm children of both races. Such arguments were rejected. It was clear the 5th Circuit would not allow its cases to turn on empirical evidence concerning the educational harms of segregation or desegregation.[18]

Nevertheless, the educational "harm" theory of Brown was attractive to Plaintiffs because it seemed to sweep away the de jure - de facto distinction in these cases. If there were harms of an educational and psychological nature in segregated schools, they would exist regardless of the source of segregation. Such an argument was especially appealing in northern cases where proof of state segregative action would be more difficult.

The "harm theory" of segregation is one possible justification for a structural approach to violation. School Boards have an affirmative duty to desegregate because otherwise they cannot possibly offer equal instruction or equal "psychological development" to black and white children. This theory was put to the test in several northern cases.

But in circuit after circuit northern courts did not find school districts in violation of the constitution, even though the systems were to some extent segregated, and even though there was some evidence of educational harm, see Bell v. School City of Gary, Indiana, 324 F 2d. 209 (7th Cir. 1963); Barksdale v. Springfield School Committee, 348 F. 2d. 261 (1st Cir. 1965); Downs v. Board of Education of Kansas City, 336 F. 2d. 988 (10th Cir. 1964); Deal v. Cincinnati Board of Education, 369 F. 2d. 55 (6th Cir. 1966).

In all of these cases the primary theory advanced by the plaintiffs was that black children had been denied equal educational instruction. The plaintiffs attempted to advance the argument that de facto segregation alone was sufficient to require a remedy because it had the same harmful effects on black children that the de jure desegregation to be found in the south had on southern black children. While the plaintiffs sometimes attempted to show acts by the school board designed to segregate blacks, these alleged segregative efforts were successfully explained away by the boards. These cases exhibited a general unwillingness on the part of the lower courts to adopt a structural interpretation of Brown based upon the premise of educational harm.

They refused to attribute inequalities in educational attainment or achievement to the social organization of education, or to see these inequalities from a macro-justice perspective. They adopted what Chesler, et al., (1979) calls a consensus model of achievement which attributes

educational inequality to background characteristics of students which school systems are working (albeit unsuccessfully) to overcome. A "conflict model" which would attribute inequalities to the social organization of instruction, would presumably move the courts toward a structural model of violation.[19]

On the other hand, the lower courts were more receptive to a line of argument that the school boards had specifically engaged in actions which had the purpose and effect of segregating schools. Such an argument had won early on in Taylor v. Board of Education of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961), it had been part of Judge Skelly Wright's decision in Hobson v. Hansen 296 F. Supp. 191 (D.C.C. 1967) and following that case had proved successful in several cities, see Spangler v. Pasadena Board of Education 311 F. Supp. 501 (D.C. Cal. 1970); Johnson v. San Francisco Unified School District, 339 F. Supp. 1315 (N.D. Cal. 1979); United States v. Board of School Commissioners, 332 F. Supp. 655 (S.D. Ind. 1971) (Indianapolis); Booker v. Special School District N. 1, 351 F. Supp. 799 (D. Minn. 1972) (Minneapolis); Davis v. School District 443 F. 2d. 573 (6th Cir. 1971), (Pontiac, Michigan); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971) (Detroit).

These cases, however, might be based upon an individualistic model of violation in the school cases, requiring no more than the factually neutral operation of a neighborhood school policy without exception. It was up to the Supreme Court to choose between these theories and between an individual structural approach to violation in the northern cases. The opportunity arose in Denver, Colorado.

C. Denver and Detroit

In 1973 and 1974 the Supreme Court turned to Northern cases. In Denver and Detroit, it established the basic line of argument to be followed

in non-southern litigation. As these two cases play such a large role in the law of school desegregation, especially with respect to the individual structural tension at the merit and remedy level, it is worth while spending some time on their facts as well as the legal theories.

They key theoretical issue at the Denver trial was the proof necessary to show that the schools were unconstitutionally segregated. To repeat the preceding discussion, the Court had two general options. First it could hold that segregation per se, that is the mal-distribution of black and white students constituted a violation because of harm to black children (the Springfield, theory) or second it could follow the Hobson v. Hansen line that particular acts of the school board (boundary lines school construction site choice, etc.) exhibit an intention to segregate and, therefore, constitute a violation of the Constitution.

On the facts, Denver presented both alternatives to the Court. Plaintiffs based their claim for relief both on intentional acts of the school board (efforts to separate white and black children in the changing neighborhood of Park Hill); and on the grounds that the predominately black schools in the "core city schools" provided unequal educational opportunities. As to these latter schools the plaintiffs argued, a) that this segregation has been intentionally created and maintained under the guise of a neighborhood school policy, or b) (more structurally) regardless of whether this segregation was the result of intended or unintended school board action, it was accompained by measureable and intangible consequences which inevitably resulted in a deprivation of equal educational opportunity for minority students, (see Pearson and Pearson, 1978: 193).

In this opinion Judge Doyle (313 F. Supp. 61) concluded that the school board intentionally took steps to keep the Park Hill schools segregated, but found that segregation in the "core city schools" was <u>not</u> intentionally

created. He did find, however that "an equal education opportunity is not being provided," in these schools and he held that they, too, must be desegregated as a way of overcoming the effects of segregation. Both sides appealed Judge Doyle's order. Plaintiffs argued that a) Judge Doyle had errored in his failure to find intent in the school district's setting of school attendance boundries with regard to the core city schools, and b) Judge Doyle erred in his failure to find that a neighborhood school system is unconstitutional where it produces segregated schools in fact, regardless of intention. The defendants, of course, appealed the finding that the Park Hill schools had been intentionally segregated.

The Tenth Circuit opinion (445 F. 2d. 990 (1970)) affirmed Judge Doyle's finding that the Park Hill schools had been intentionally segregated. As to the Core City schools, however the appellate court rejected the trial court remedy. It agreed with Judge Doyle that "a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided that plan is not used as veil to further perpetuate racial discrimination." (445 F. 2d. 1004). Accepting Judge Doyle's finding that the segregation in the Core City schools was de facto in nature, the Tenth Circuit concluded that the Constitution provided no remedy for segregated schools which are in some way educationally inferior, if the segregation is not caused by state action.

Given that the Park Hill schools were intentionally segregated, and that racial segregation per se, without evidence of purposive conduct on the part of the school board did not violate the Constitution, the remaining issue was whether the plaintiffs had proven segregative purpose in the core city schools. And this point turned in part on the burdens of proof. The Appellate Court concluded that the plaintiffs, who had the burdens of proof in this matter, had failed to meet it.[20]

"Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on plaintiffs to prove that racial imbalance exists and that it was caused by intentional state action. Once a prima facie case is made, the defendents have the burden of going forward with the evidence. They may attack allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interest. But the intitial burden of proving unconsistutional segregation remains on plaintiffs. Once plaintiffs prove state imposed segregation, justification for such discrimination must be in terms of positive social interests which are protected or advanced. The trial court held that cross appellants failed in their burden of proving (1) a racially discriminatory purpose and (2) a casual relationship between the act complained of and the racial imbalance admittedly existing in those schools," 455 F.2d. at 1006.

The plaintiff's appeal in Denver made two arguments. First, they argued that the Tenth Circuit erred in finding that unequal educational opportunity alone was not sufficient to find for the plaintiffs. Their second argument was that the court below erred in requiring the plaintiffs to carry the burden of proof in each and every part of the Denver school system before the burden of going forward with the evidence would shift to the board with respect to a given school. Specifically, the plaintiffs argued that they did not have the burden of proving unconsitutional purpose in the "core city schools," once they had shown illegal purpose in the Park Hill area. A school district should not be compartmentalized in this fashion.

The Supreme Court decision on these issues established the framework for northern cases. Basically the court agreed with plaintiffs that the appellate court established too high a standard in demanding that the plaintiff

carry the burden of proof throughout the litigation as to every school. The Court, in our language, moved toward a "pattern and practice" analysis of the discrete events found that the proof of purposive segregation in the Park Hill district was sufficient to meet the plaintiffs burden of making prima facie case with regard to the entire school district.

"Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. On the contrary, where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system. This is merely an application of the well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent,' II Wigmore, Evidence 200 (3rd ed. 1940)" 37 L. Ed. 2d. at 56-563) 413 U.S. at 207.

But, the burden thus shifted could not, said Justice Brennan, be rebutted by "some allegedly logical, racially neutral explanation." Rather the burden required proof sufficient "to support a finding that segregative intent was not among the factors that motivated" the school board action, (Id. at 210). Thus in a stroke Justice Brennan struck a serious blow to the excuse that the school board was pursuing a "neighborhood school policy."

The Supreme Court, however, went even further in its opinion. In proving that Park Hill schools were intentionally segregated, the plaintiffs had shown enough, without rebuttal, to prove that the Denver School system in fact a "dual school system." "....where Plaintiffs proved that the school

authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system," (Id. at 201).

Judge Doyle was instructed to decide whether the board's policy with respect to Park Hill made the entire school system a dual school system. Absent a rebuttal available to the district that the Park Hill area was a separate, identifiable and unrelated section of the school district and thus should be treated separately (admittedly a nearly impossible obstacle) the court was to determine if these acts converted the system into a dual system. And if so, the District Court's obligation was determined by Green. The school district would then have an affirmative duty to desegregate the entire system "root and branch." Indeed, only in the absence of such a finding would the question of presumptions vis a vis the "core city schools" come into play.

In the event of Judge Doyle found that the Park Hill schools were not a isolated part of the district. The Judge found the conclusion "inescapable" that the Denver schools system was a dual system within the Supreme Court's definition, (368 F. Supp. 207 (1973)).

How should we understand the Denver case? What did the Supreme Court do and what did it fail to do? First the court rejected a structural approach justified by alleged unequalities in student performance. Had the court adopted such a position it would have placed an affirmative duty on school boards to desegregate upon proof of educational harm to black children.

Note, however, that such a decision, if based upon an educational harm theory, had dangers of its own. The educational (and psychological) harm theory of an affirmative duty would seem to argue that there is a Constitutional violation only insofar as there is a demonstratable educational harm flowing from the segregation. If this is a matter of proof then the existence of a violation would turn upon considerations such as the quality of education, psychological consequences of segregation, quality of faculties, etc. If such a line were followed, it is interesting to speculate on the nature of proof. Would proof of a violation hinge upon the existence of demonstratable inequalities such as teacher training or results on achievement tests? Would speculative evidence of psychological and moral harm be permissible?

To the degree that measurable factors would be considered, would the relevant comparisons be between all black and all white students; or between black students in segregated schools versus black students in integrated schools; or between black students in black schools and white students in white schools? And would not all of this, no matter how done, lead to the ultimate result means that defendents would be allowed to make a "factual attack" on Brown by proving no educational or psychological harm?[21]

The second point to be observed in Keys is that despite separate opinions by Mr. Justice Powell and Mr. Justice Douglas, the court refused to adopt a purely structural model of violation based upon the fact of separation per se. Those two justices would have abolished the de jure - de facto distinction and declare segregated schools inherently unequal.[22] Mr. Justice Douglas's position rests upon the rationale that the distinction should be abolished because all school assignments are school system decisions, and

therefore state action; i.e. all is really school board intention, (413 U.S. 189 at 215, 216). Mr. Justice Powell, however, provides a different rationale, closer to what we have called a structural approach.

> "Rather, the familiar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities, (413 U.S. at 222, 223)."

Justice Powell supports this line of argument by noting that some such position is necessary to support the conclusions of the earlier decisions in Green and Swann.[23] Since the remedy imposed by Swann undermines the argument that the only violation to be remedied is that caused by the purposeful actions of the school board, the definition should be altered to justify the remedies which have been ordered. Thus the existence of segregated schools would, for Powell, create a prima facie case of violation and the board would have the burden of showing they were operating an integrated system, primarily by showing serious efforts to desegregate, 413 U.S. at 225, 226).

Note that such a position is not justified on an educational harm theory. If it is to be justified it must be on an approach focused at separatism per se. To again quote Justice Powell,

> "I would now define [the fundamental principle] as the right, derived from the Equal Protection Clause to expect that once the State has assumed responsibility for education, local school boards will operate integrated school systems within their respective districts, 413 U.S. 225, 226.[24]"

The Court, however, refused to abolish the de facto - de jure distinction, and maintained the requirement that the plaintiff prove segregative purpose on the part of the school board. Thus the court backed away from a structural model of the violation. Standing alone the outcome data (e.g. a segregated school system) would not suffice. Nevertheless, despite the retention of the de jure language, the Keys case constitutes a shift in the direction of a more structural approach. Through the use of the language of presumptions, and burdens the court in fact made proof of school segregation fairly easy for plaintiffs. The key phrase is "dual school system." Until Denver the phrase shared a common sense and a legal meaning. A system was dual where, by law, black and white children were kept in separate facilities and taught by faculties of their own race. Now dual meant a district in which some "meaningful" number of schools within the district were in some way altered by school efforts to segregate. The schools did not have to be all black or all white. Nor would all the segregation within these schools have to be attributable to school board efforts.

By adopting the language of a "dual school system" the court took the southern theory of the cases as developed from Brown to Swann and applied it to the north. It recognized that local school boards can produce results similar in kind, if not magnitude, to southern statutes. School board decisions are at times guided by the desire to maintain separate public education for white and black children. Boards have, on a smaller scale, promoted segregation.

This effort, however, is only part of the cause of northern segregation, and thus the correction of only the segregation caused by board action per se might lead to a limited amount of desegregation at the remedy stage, (c.f. Dworkin, 1977). By adopting the dual school system language the court created the legal foundation for one set of remedies, as outlined in Swann,

for both the north and the south. Indeed it might have appeared that the court had sub silentio abolished the de jure requirement in northern cases. Whether this was the case depended upon the interpretation of several ambigious phrases. What proofs would plaintiffs have to show to make a prima facie case? Would defendents ever be successful in pleading "neutral" criteria such as neighborhood schools as a justification for their action? What constitutes a "meaningful" portion of a district so as to allow the presumption of a dual system? Would the "all vestiges" and "root and branch" language in Green and Swann mean the same thing in northern cases as in southern ones? The Keys case raised nearly as many questions as it answered.

Detroit: Root and Branch Northern Style

In most large American metropolitan areas, the old core city has become increasingly black as whites have migrated to the suburbs,[25] (see Tauber, 1969, 1975; Farley 1975, 1978). One such city is Detroit. In 1970, the school population was over 65% black. To desegregate the city alone, even under a racial balance standard would leave much to be desired. Or so thought Judge Julius Roth.

Detroit was tried as a single district school case. The proof was what was to become the standard set of considerations used by plaintiffs to prove a northern violation. It included evidence of: altered attendance boundaries, changes in feeder patterns from elementary to secondary schools, the use of optional attendance areas in changing neighborhoods, construction and location of new schools; intact busing of black children from overcrowding black schools to empty classrooms in white schools, and on one occasion the cross district busing of black children from an overcrowded black school to

another black school when white schools with space available were closer.[26]

The defense was also traditional. While generally accepting the plaintiff's interpretation of pre 1960 acts of segregation, the board argued that their efforts in the preceding ten years did not indicate any segregative purpose.[27]

The importance of the Detroit case emerged only at mid-trial. The attorney for the intervenors, the Concerned Citizens for Better Education, (basically a white parent group) thought that the plaintiffs would be entitled to a remedy as the trial progressed. In July of 1971, in search of a metropolitan remedy, he moved to join as defendents the eighty-six school districts in the Detroit SMSA. The initial request to join was not accepted and Judge Roth proceeded to make findings against the Detroit school board and the state.[28]

The court asked for remedy plans from all the parties. The board offered a plan which provide for 38,000 upper elementary pupils to have racially mixed classes two half days a week. The NAACP plan sought a 65-35 black white ratio in each school in the district. The plan would require that 100,000 pupils be reassigned. The two key plans, however, were those of the State Board of Education and the white parent group. The state plan would replace Detroit and 35 suburban districts with six new districts each including part of Detroit. This would reduce the total black enrollment in the six new districts from 65% to 35%. The plan also provided for the future inclusion of more districts in the SMSA if needed to preserve integrated schools. The intervening white Detroiters also presented a

plan which included 66 school districts in a single assignment area. In reaction to these two plans many suburban districts moved to intervene as defendents. The court allowed the intervention but prohibited the new parties from raising factual or legal issues already adjudicated. Their role was limited to helping the court construct a remedy.

By this point in the trial, as occasionally happens in school cases, the relative positions of the parties was no longer clear. The Detroit board was very much in favor of a metro solution, arguing that a city only plan would create a totally black city district surrounded by white suburbs. The whiteparent group, C.C.B.E., also supported a metro remedy, feeling that they alone should not bear the "costs" of integration. The NAACP, on the other hand, was less amenable to this approach. First, they knew it would cause delays in any plan. And second, they had recently litigated a metro case in Richamond VA., which had been rejected by the court of appeals. The Supreme Court had affirmed the lower court by an equally divided 4-4 decision 412 U.S. 92 (1973). Detroit was not the ideal test case to retry that issue. But Judge Roth was not to be deterred from this direction. He rejected the NAACP plan because "the racial composition of the student body is such that the plan's implementation would clearly make the entire Detroit public school system racially identifiable as black," (Hain 1978: 258). Judge Roth wanted an area of sufficient size that after the desegregation plan went into effect there would be no racially identifiable schools. The area included 153 school districts with 780,000 students. Twenty five per cent of the students in this area were black.

Roth, of course, had touched upon a key issue concerning remedy. If Brown, qua Keys required a "root and branch" approach to northern cases then in cities like Detroit a thorough going plan of racial balance would produce

an entire school district which was in common sense terms racially identifiable. In the particularized logic of school law, the schools would not be identifiable in the sense that every Detroit school would look like very other school. But in every other sense; the perception of the Detroit area community, the perception of teachers and pupils in the district, and in the view from Lansing and Washington, the Detroit schools would be racially identifiable as black. The Constitutional value of a single community would not be served. And insofar as "white flight" and "tipping point" arguments are true,[29] the Detroit schools would likely become more and more identifiable in the future. (Today the Detroit school district student population is approximately 85% black.)

A Detroit plan offered neither to effectuate a substantial desegregation of black students in the Detroit metropolitan area, nor to provide a stable desegregation solution. The Sixth Circuit, recognizing this logic, upheld Judge Roth in June of 1973 in an en banc hearing, 484 F. 2d. (6th Cir. 1973) (en banc). The legal ground for the wider remedy was the fact that the Detroit schools were segregated by acts of the State of Michigan and acts of the Detroit board which were attributable to the State. It held that under Michigan law local school districts are merely instruments of the State, created for administrative convenience. Central to the 6th Circuit opinion was the holding that the inclusion of the suburbs did not require a finding that each suburb was independently guilty of intended acts of segregation. The case was appealed by the suburban districts.[30]

In a 5-4 decision the Supreme Court reversed. Chief Justice Burger held that while in some cases it would be proper to desegregate across district boundaries, this could only be done in a case where there was a showing of "a constitutional violation within one district that produces a

significant segregative effect in another district," 418 U.S. 717, 744-745. The plaintiffs had the burden of showing such an effect. The court found that in Detroit the violations, and their effects were limited to the Detroit district....[31] The action of the State would not alone suffice to require a metropolitan remedy.[32]

The result was that plaintiffs were left with a city only plan in Detroit. Judge Roth died shortly before the Supreme Court reached its decision, and Judge Robert DeMascio took over the case. The remedies proposed by the parties tells us a good deal about the state of school desegregation in the post-Denver, post-Detroit northern cases.

The NAACP continued with a proposal for the elimination of racially identifiable schools in the city. The standard proposed by their expert, Gordon Foster defined a desegregated school as one having the same racial composition as the district, plus or minus 15%. At the time it was proposed this formula would require schools to be between 57.5 and 87.5% black.[33] The plan contained no "educational components" and ignored internal regional boundaries which had been established in Detroit during an earlier "decentralization" movement.

The school board's plan proposed to desegregate the remaining majority white schools, using as many black students as necessary to do the job. Over 100 blacks schools were left untouched (Main 1978: 274). The plan also had a long list of educational "components" which were designed to improve education and ease the transition to the new system. The list included items like: Guidance and Counseling; Vocational Education; School Community Relations; Testing; Curriculum Design; and Student Rights and Responsibilities.[34]

In critiquing each other's plans, the defendants said that the NAACP plan would not successfully desegregate the schools because it would lead to resegregation, and would move many children for marginal changes in racial composition, (Hain 1978: 276).

The plaintiffs argued, on the other hand, that districts which were 70% black were no different than those which were 70% white, and tellingly, that the defendants plan, by leaving 40% of the school children in one race schools, would create a new dual school system, one integrated and the other strictly segregated. The court in this case adopted the defendant side of the argument. DeMascio believed, as Roth had before him, that the Detroit schools could not be desegregated adequately within the boundaries of the city. Not having Roth's alternative of a cross-district plan, DeMascio, chose to implement a plan which moved very few children, and thus accomplished a minimal amount of desegregation.[35]

DeMascio clearly believed that a plan such as that proposed by the NAACP would not work in a district like Detroit. "Plaintiffs contend that there is only one Constitution equally applicable to all school districts. Thus they argue that since we would not hesitate to apply their parameters to a 72.5% white school district, we should equally apply them to a 72.5% black school district. We think such an argument in the contest of this school district is superficial. The argument ignores that fact that the "practicalities of the situation" which the Constitution requires that we take into account, would be different if the school district were 72.5% white," Mem. Op., Aug. 15, 1975, at 81 (Hain 1978: 281).

The "practicalities of the situation" were apparently that the plaintiff plan would lead to the exodus of the white and black middle

class, and thus create a school system "Hostile to intellectual achievement," and "incapable of delivering basic educational services," (Hain 1978: 281).

On the other side of the coin, DeMascio believed that if blacks were represented in all Detroit schools in some substantial proportion (30-50%), the psychological impact of forced segregation would be gone since there would be no schools from which blacks were excluded (Hain 1978: 280). The Court's plan bused 9% of the children in the District, reassigned 2% more. It omitted 80% of the black students in Detroit from the plan. Fifty of the sixty-two white majority schools remained majority white, (Hain 1978: 284-295).

The appellate court basically affirmed DeMascio's order 540 F. 2d. 229 (1976). It did require of DeMascio that he include three largely black regions of the school district in this plan. DeMascio had left them out of the argument that it would be futile to include them in light on the marginal improvement in desegregation which could be gained. More importantly, however, the Circiut Court rejected the plaintiff plan which would require substantial transportation yet still leave most Detroit students in schools which were between 75% and 90% black.

"Our considered judgement is that plaintiff's plan would accelerate the trend toward rendering all or nearly all of Detroits schools so identifiably black as to represent universal school segregation within the city limits," 540 F. 2d. at 239 (6th Cir. 1976). Thus the very structural logic which pushed Judge Roth toward a metropolitan remedy in the first instance was now employed to justify a remedy which left most black Detroit school system children segregated in the schools they inhabited when the litigation began.

If in terms of our models of responsibility the Denver case is ambigious, the Detroit case is not. Here, with respect to interdistrict violation, the court returned to a individualistic interpretation of the liability question. Traditional district boundaries were Constitutional unless plaintiffs could either show a specific intention to draw them so as to segregate students or specific effects of intentional segregation in one district which increased segregation in another district. In a city like Detroit where city-suburb lines were drawn decades earlier, the first proof is not possible. And as to the latter proof, by refusing to hear the housing evidence the court cut off the most logical way the plaintiffs could show an inter-district harm. Specific acts of a board within a district are unlikely to have direct segregative effects in another district, but they may have substantial indirect effects through the housing market. Yet neither city nor suburb had any constitutional duty to act so as to limit inter-district segregation. Nor did the State Board of Education, which had ultimate legal responsibility for all school district boundaries.

As to remedy, the Supreme Court adopted the individualistic position that the Constitution "does not require any particular racial balance," 418 U.S. 717 at 740-741. It equated systems which have 80% black students in each classroom with districts which have 20% black students in each classroom.

In southern cases the drift of the lower court opinions is that a system is not unitary until the school board could no nothing more to further desegregate the schools. In Detroit this affirmative duty is cut short by the formalism of school district boundaries. And, as we have seen, even within the Detroit district, the root and branch standard of Swann is honored only in the breach.

Two kinds of issues remained after Denver and Detroit. First, there is the obvious question of whether, and in what circumstances, a metropolitan plan can be ordered. Second there are the questions left over from Denver, and not discussed in Detroit, about what set of acts and omissions constitute unconstitutional segregation in northern cases. Thus from Milliken v. Bradley two lines of cases emerged. The first, which may be called the special circumstances cases, pursued metropolitan remedies in situations where it would appear, usually by actions of state legislatures, that inter-district violations had occured. The second branch of cases directly examined the questions of intent and affirmative duty. We will first mention the metropolitan cases.

D. The Special Metro Cases

In his concurring opinion in Detroit, Justice Stewart held out the hope that metropolitan cases might be successful under "other factual circumstances."

"Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines.... by transfer of school units between districts....or by purposeful racially discriminatory use of state housing or zoning law, then decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate," 418 U.S. 717 at 755-756 (1974). Several such cases have arisen, in Louisville, Wilmighton, Del, Indianapolis, Atlanta, and recently in Cincinnati. In the first three cases, the lower courts have ordered inter-district plans. In Atlanta the trial court has found no inter-district violation and the Cincinnati case is scheduled to go to trial in January of 1980.

In both Louisville and Wilmington the courts were dealing with school boards which had run a dual school system before Brown. This made a significant difference in Louisville where the appellate court held that unlike Detroit, where the suburbs had not been found guilty of discrimination, the Louisville suburbs had practiced discrimination. And moreover, "school district lines in Kentucky have been ignored in the past for the purpose of aiding and implementing continued segregation," Newburg Area Council v. Board of Education of Jefferson County 510 F. 2d. 1358, cert denied, 421 U.S. 931 (1975). Kentucky law provided for the merger of districts within a county even without the county school board permission. The Louisville board, acting under this provision, voted itself out of existence shortly after the Supreme Court denied certiorari.

In Wilmington again there was pre 1954 de jure segregation throughout the city and suburban systems. A three judge court found the city, the suburbs and the state of Delaware guilty of unconstitutional segregation, 393 F. Supp. 428 (1975). The segregation clearly had reciprocal effects which crossed district boundaries. For years the suburban districts sent many black students to city schools for their education. Thus the court held "de jure segregation in New Castle County was a cooperative venture involving both city and suburbs," Id. at 437.

In addition a crucial element in Wilmington was the passage of a state school consolidation law in 1968 which permitted the state board of education to consolidate districts for a year without approval of the voters of the affected districts. But, the law explicitly excluded Wilmington, and Wilmington contained 44% of all black pupils in Delaware. The court ruled that the statute was unconstitutional, Id. at 441. The law made it difficult for the state board to use consolidation to reduce segregation

and implicitly created a suspect racial classification. Finally, the court based its decision upon the housing evidence which the Supreme Court had refused to hear in Detroit. It found that federal and local housing policies, especially with reference to public housing, had reinforced racial separation. Public housing authorities had placed 98% of the units in the city of Wilmington with the effect of concentrating poor and minority families in the city, Id. at 428.

The use of the housing information is important because unlike the special consolidation law which was unique to Delaware, the housing case might be proved in nearly all cities. In a per-curium decision in 1975 the Supreme Court upheld the lower court opinion, Evans v. Buchanan 423 U.S. 963 (1975) and this gave at least tacit approaval to the housing argument. A new petition of certiorari however, was filed in the fall of 1978, and is still pending before the court. It thus remains unclear whether the court will expand the area of inquiry to this key issue.

In Indianapolis, another state statute again led to an attempt for an inter-district remedy. In 1969, the General Assembly of Indiana enacted a law providing for a unified government designed to consolidate many services in Marion County. The school districts, however, were specifically excluded from the statute. The court found this exclusion to be racially motivated, designed to prevent inter-district desegregation, 456 F. Supp. 183. The court also found that the Indianapolis housing authority and the Metropolitan Development Commission of Marion County had impermissably segregated student through the location of all public housing projects within the city of Indianapolis. Judge Dillon estimated that some 7,000 black pupils might have been afforded a desegregated education in suburban schools if public housing decisions had not restricted construction to

the city. These findings have been supported by the 7th Circuit 573 F. 2d. 400, 408.

In Atlanta, however, the lower court recently issued an opinion finding no inter-district violation between the city and two suburban county school districts, Armour v. Nix, Civil No 16708 (Sept. 24, 1979). The court found that while there was widespread school and housing segregation in the metropolitan area in the past, some of which clearly had an inter-district effect, no recent violations had occured. Since each of the school districts in question was either now unitary or under final court orders the Supreme Court's decision in Pasadena v. Spangler 427 U.S. 424 (1976) makes the test of impermissible behavior one of "subjective discriminatory intent described in Washington v. Davis and Village of Arlington Heights," (Id. at p. 26). The past history segregation is, thus no longer relevant to an inquiry concerning present day constitutional violations, (id). As to the housing case, the court was "convinced from defendant's evidence that present day governmental actions in no way contribute to residential segregation," Id. at 30, and "that whatever effect past housing violations have had upon the schools is too attenuated to constitute the type of violation which would justify imposition of an inter-district remedy," (Id. at 32).

The "special circumstances" of these cases and the varied outcomes makes it unclear whether a metropolitan plan can be successful without unique factors. Thus far, the courts have refused to move away from an individualistic model of violation in metropolitan cases.

E. In The Questions of Intent and Incremental Harm--The Tentative Retreat to Individualism

While the metropolitan issue has been waged in speical cases, a more

fundamental conflict has occured with regard to two key elements in the proof of northern cases: a) the nature of the intent required to prove a violation, b) and the degree of desegregation which can be ordered if a violation is found.

While the Keys and Milliken cases left unresolved the question of exactly what must be proved to produce a prima facie case of unconstitutional de jure segregation, the proof question involves matters of quantity and quality of evidence.

In terms of quality we may imagine a continum from a formal admission that acts are undertaken to segregate, (e.g. southern statutes), to acts which have the consequence of segregating students but for which the board has alternative reasons. Since in northern cases it is unlikely that the plaintiffs will uncover any subjective evidence on intent to segregate, the case must rest upon objective evidence. The school board will claim that decisions were made not to segregate but to further a neighborhood school policy, or to relieve overcrowding. The quality of evidence, therefore will be much enhanced if the plaintiffs can show acts of the school board which can not be justified by these other alternatives.[36]

The more difficult cases exists where a board's action segregates schools but also has alternative explanations. Here questions of quantity become relevant. If there is one act which segregates it may tell us little about a school board. If, however, there are a series of acts then the objective evidence becomes stronger. The plaintiffs proofs in school cases involve stringing together a series of acts, and a showing that where the board had a choice it consistently took the segregative option. A central question concerning such evidence is whether a plaintiff could prove a prima facie case simply by showing that the school board could foresee that the outcome of

their choice (e.g. site selection) would be to perpetuate or further desegregation.

In Kalamazoo the Sixth Circuit answered the question affirmatively.

"A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies," (Oliver v. Michigan State Board of Education) 508 F. 2d. 178, 182 (6th Cir (1974) cert denied 421 U.S. 963 (1975)).[37]

What the district and appellate court attempted to accomplish in Oliver was a negligence theory of school board liability. No longer would proof of purpose be required to make a prima facie case. Instead, it would suffice to show that the board had alternatives which were less segregative, and that they refused to act on these alternatives. The negligence theory is halfway between a sharp de facto - de jure distinction and an abolition of the distinction. It is a move toward a more structural interpretation insofar as it demands of a board that it understand and react to the social and demographic organization of the community.

In two non-school cases, Washington v. Davis 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), the court rejected such language. In these two cases, the first concerning the constitutionality of a test given prospective policemen in Washington, D.C. where a greater proportion of black applicants failed, and the second concerning the refusal of a Chicago suburb to grant a zoning change for the construction of integrated public housing, the court rejected an "impact" test. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination,"

Washington v. Davis 426 U.S. at 242. Quoting Keys, the court said the key requirement in school cases was "a current condition of segregation resulting from intentional state action....the differentiating factor between de jure segregation and so-called de facto segregation...is purpose or intent to segregate," 426 U.S. at 235 citing Keyes v. School District No. 1, 413 U.S. 189, 205, 208 (1973).

One should not overstate the importance of the new intent cases. As Justice Stevens observed in his concurring opinion in Washington v. Davis, "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the court's opinion might assume." The results, however, were soon felt in school cases. The Supreme Court remanded the cases in Austin and Indianapolis for futher consideration in light of these two cases.

Importantly, the court did not say that disproportionate impact is irrelevant, only that, standing alone, it could not constitute a violation. As Justice Powell noted in Arlington Heights information on historical background, specific sequence of events leading to an action, departures from normal procedural sequence, and substantive departures may all help in proving intent 429 vs. 252 at

Nevertheless, the decisions in these two cases indicate a commitment to an individualistic model of responsibility in the school cases. They move away from an interpretation which assesses the validity of acts based upon their impact on segregation, toward a decision based upon purpose. They evidence a willingness to assume that school board decisions may be racially neutral even in the circumstances where the foreseeable impact of the decisions is segregative (see Dworkin, 1976). This assumption of neutrality is at the heart of individualism.[38]

Impact-Incremental Segregative Effect

While the Detroit opinion cited the Denver opinion with approval, there was one respect in which the opintons are contrary. In supporting the Detroit only plan, and justifying its refusal to go beyond the city line, the Chief Justice argued that the remedy in school cases may not go beyond the violation. Since there was no proof of an inter-district violation there could be no remedy.

In Denver, this problem had been finessed through the "dual school system" presumption. No proof of the specific impact of the violation was necessary. The Detroit language, however, once again put into question the extent of the permissible remedy and suggested that it must be limited to the segregation actually caused by de jure acts of the state (in this case the school board). Were such standards to be adopted within districts as well as between them, the remedy which could be ordered would be greatly restricted. Thus the Detroit case cast a faint but threatening shadow over the dual school system presumption in Keys. The shadow seemed to lengthen in Dayton, Ohio 433 U.S. 406 (1977).

In Dayton there had been a tug of war between the District and 6th Circuit Courts concerning the extensiveness of the remedy. In Brinkman v. Gilligan 503 F. 2d. 684 (6th Cir. 1974) and Brinkman v. Gilligan 518 F. 2d. 853 (6th Cir. 1975), the appellate court rejected trial court remedies as being insufficiently broad, and finally ordered the trial court to adopt a system wide plan for the 1976-1977 year. The record, however, was skimpy as to violation. The District Court had found only: 1) a variation in racial composition between schools in the district, but no evidence of these being caused by discriminatory purpose; 2) the use of optional zoning in three high schools which had no direct implication for grade

schools; and 3) the school board's decision of a resolution by an earlier board calling for remedial measures to decrease segregation.

On this record the Supreme Court reversed the 6th Circuit opinion calling for a system wide remedy. "The Court of Appeals simply had no warrant in our cases for imposing the system wide remedy which it apparently did. There had been no showing that such a remedy was necessary to 'eliminate all vestiges of the state imposed school segregation.'"

Judge Rehnquist stated what was required in such cases:

> The duty of both the District Court and the Court of Appeals in a case such as this, where madatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teacher or staff. Washington v. Davis.... If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how must incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have beeen in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a system wide remedy. [my italics]

Again, as occured after Washington v. Davis, the court remanded other cases for consideration inlight of Dayton I.[39]

The Dayton opinion, was a further shift toward an individualistic model. In light of Dayton II and Columbus (infra), the importance of the first Dayton opinion is severely limited. Nevertheless, Dayton I suggested, for the first time since Green, that the remedy, like the violation should be judged by an individualistic standard. The language of incrementalism implies that the remedy need only return a district the position which would have existed if school boards had behaved neutrally.

F. The Resurrection of the Structural Approach

After Dayton I, many observers would have said that the Court was well

on the road to a position which would soon put an end to most desegregation efforts.[40]

If, in fact, a strong intent rule were established and remedy were reduced to harm caused by these intended efforts, then the litigation of such cases would not be worth the expense. Winning would be more difficult, and even with a victory the plaintiffs could expect a remedy which would produce only minor alterations in school assignments.

The Dayton case was remanded to the trial court for supplemental evidentiary hearings, and Judge Rubin reviewed the entire record. Upon completing this review, he entered a judgement dismissing the complaint. The judge found that, although there were instances of purposeful segregation in the past, the plaintiffs failed to prove that these acts, some of which were over 20 years old, had any current incremental segregative effects. According to the trial judge, the plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, in any of the challenged policies and practices of the Board, 446 F. Supp. 1232, 1238, 1241 (SD Ohio, 1977).[41]

The appellate court reversed, Brinkman v. Gilligan 583 F. 2d. 243 (6th Cir. 1978). It concluded that the trial judge had made erroneous findings of fact and had also made errors of law, Id. at 247. The Court of Appeals interpreted the incremental segregative effect langauge to mean not that each illegal act must be separately assessed as to its incremental effect on segregation, but rather that the nature of northern cases is that segregation is produced through the incremental effects of many actions. The task of the court is to assess the overall impact of such acts. It was in this posture that the case returned to the Supreme Court.

The court granted certiorari in Dayton and in the Columbus case, where the trial judge had earlier ordered a system wide remedy and had refused to alter it following Dayton I. The Court of Appeals affirmed, 583 F. 2d. 787 (6th Cir. 1978), but the implementation of the plan was stayed by Justice Rehnquist. Columbus 99 S. Ct. 2941 (1979) and Dayton 99 S.Ct. 2971 (1979) stand as the latest court pronouncements in the area.[42] They completely reversed the trend toward an individualistic model as evidenced in Detroit, Washington v. Davis, Arlington Heights, and Dayton I.

The Court adopted the line of argument presented by the trial judge in Columbus: that the school districts in these two cities were intentionally segregated on the basis of race when the Supreme Court decided Brown in 1954. Since that time, the school boards in these cities have been under an affirmative duty to dismantle the then existing dual school system.

The trial court found that as a direct result of cognitive acts or omissions, the board in 1954 maintained an enclave of separate black schools on the east side of Columbus 429 F. Supp. at 236. The Supreme Court noted that under such circumstances, "proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself its prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case," Keys, at 203.[43]

In the key portion of the opinion, the Supreme Court held: "Where a racially discriminatory school system has been found to exist, Brown II imposes the duty on local school boards to 'effectuate a transition to a racially non-discriminatory school system,' 349 U.S. at 301. "Brown II was a call for the dismantling of well-entrenched dual systems," and school boards operating such systems were "clearly charged with the affirmative

duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," Green v. County School Board, 391 U.S. 430, 437-438 (1968). "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment," 47 LW 4926 (1979).

"The Board's continuing 'affirmative duty' to disestablish the dual school system' is therefore beyond question...., and it has pointed to nothing in the record persuading us that at the time of the trial the dual school system and its effects had been disestablished. The Board does not appear to challenge the finding of the District Court that at the time of trial most blacks were still going to black schools and most whites to white schools. Whatever the Board's current purpose with respect to racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies. The Board 'never actively set out to dismantle this dual system' 429 F. Supp. at 260," 47 USLW 4926-4927.

"But the measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. As was clearly established in Keys and Swann, the Board had to do more than abandon its prior discriminatory purpose. The Board had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system, and the Board has a "heavy burden" of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends,'" 47 LW 4947.

In both cases the Appellate Court found, in addition, that post Brown conduct in some ways increased segregation in the systems, but the most reasonable reading of Columbus and Dayton II would be that even if all subsequent action had only perpetuated the segregation existent at the time of Brown, the school boards would be in violation.

As the Chief Justice notes in a concurring opinion in the Columbus case, nothing in "our previous decisions provides foundation for this novel legal standard" that boards have been under an affirmative duty to desegregate their schools for the last 25 years, 47 LW 4929. Indeed the affirmative duty in earlier cases has been a duty to fully desegregate a system after a finding that the district is in violation. In these cases, the duty appears to exist regardless of a court finding of contemporary intentional segregation, and if a court declares a system dual in 1954, then unless the board has taken affirmative steps to end segregation, it will be in current violation. Nor will the earlier violation be seen to have attenuated in its effects through the passage of time, or the demographic effects which may occur in the interim. Thus the incremental segregative effect discussion in Dayton seems largely irrelevant to the remedy question in such cases.

The two Ohio opinions once again re-establish a structural model of remedy in the school cases. The remedy focuses upon results. In Columbus, almost one half of the 96,000 students will be reassigned, and in the smaller Dayton school districts about 15,000 students will be transported to schools. Approximate racial balance will be achieved in the great majority of the schools in these systems.

The Court has taken a more structural position on the violation question as well. Indeed, here, the Court has never spoken as firmly. In districts which operated a dual system in the Keys sense in 1954, and one

must presume that nearly every system with more than a few minority students did, the obligation is to act so as to desegregate. Protestations of neutrality in board decisions will apparently fail. The most obvious basis for the claim of neutrality is the neighborhood school. But in the Columbus case, the trial judge stated that "those who rely on it as a defense to unlawful school desegregation fail to recognize the high priority of the consitutional right involved," 429 F. Supp. at 258. And the lower court implied that the adherence to a neighborhood school concept with knowledge that the predictable effects of such a policy will be segregated schools, it is a factor to be considered in determining whether an inference of segregative intent should be drawn, Id. at 255. Proof of a neighborhood school policy is, by this reasoning, evidence of a consitutional violation, not evidence of innocence. Such a position is fundamentally structural. It rejects an analysis based on individual intention to segregate and replaces it with an analysis which looks to the outcome of decisions within the context of urban residential segregation.

In addition, by rejecting the idea that past segregative acts are attenuated in their consequences with the passage of time, the Supreme Court implicitly expanded the scope of matters legitimately in dispute. Two metaphors may capture the change in perspective. The incremental segregative effect position of Rehnquist in Dayton I views past school board acts like pebbles thrown into a pond. The ripples may last forever, but slowly they become less and less important in their effects on the surface of the water. Eventually we may say they have no measureable effect. Evidence of pebbles thrown long ago are not relevant to present problems.

The seond metaphor is not a pebble on a pond, but the cornerstone of a building. Misplaced, it influences all of the subsequent edifice. Other factors

may come into play, but because of the early act the structure will always be a bit askew. Early effects such as the segregative policy of the Columbus School District 30 or 40 years ago are not to be discounted due to the passage of time. They determine the way in which the system will grow over the next half century. Historic patterns, as organizational contexts, are what create discriminatory results out of apparently neutral acts. Such a perspective moves the court a good deal closer to a structural model.[44]

Yet with all of this the court does not take the final step and reject an individual model of violation. It reaffirms the Keys analysis as the central theory of violation. One should not believe that this is the last word from the court. If the last few cases teach any lession, it is that the area is still in turmoil, and left unresolved are the difficult questions of metropolitanism. But the Keys approach has now withstood seven years of assault and appears more firmly entrenched than ever. The Rehnquist led assault has failed to stem the tide, and one suspects that if this point of view could not win in Dayton, then there are few places where it could succeed.

III. Justifying a Structural Approach

The Dayton II and Columbus opinions come as a great relief for those who feared that the experiment in school desegregation was about to come to an end. They seem to assure that at least in the short run the Supreme Court will not turn its back on the vast amounts of segregation to be found in American education. Yet in the wake of these two opinions there is a sense of disquietude which must be similar to that Professor Wechsler expressed 20 years ago. (Wechsler, 1959)

The disquietude manifests itself most obviously in the fact that the recent cases are premised upon a judicial fiction. The centerpiece of the fiction is the concept of the dual school system. To say that Dayton, or Denver before it, ran a dual system at the time of trial is to give the term a legal meaning which is unrelated to its historical, common sense meaning.

For this core comes two further fictions. First, that school boards like Dayton were put on notice in 1954 that they had a duty to dismantle the "dual school system" and their failure to do so is a willed act. Second, that the harm caused by intentional state action has as its consequence the entire segregation of the school system, and thus the appropriate remedy is the racial balancing of the system.

The fictions, however, are only the manifest part of a deeper problem. In Columbus and Dayton, as in Denver before, there is a basic contradiction in the opinions. In each the Court clings to the de facto-de jure distinction. Thus in a narrow sense, it has remained true to the individualistic model of violation insofar as it is based upon the proof of intended acts.

There is however, a gulf of significant proportions between the argument that schools are de jure segregated because a plain and immediate statute of the state legislature formally seperates students by race, and the argument that schools are de jure segregated because of school board actions 25 years ago which even then were formally neutral. Yet the fiction of Dayton and Columbus is that these cases are really the same.

The de jure-de facto distinction is maintained, and the court argues as if intentional segregation is still the core of its holding. Yet the results reached not through the careful analysis of the evidence, but through the use of the evidentiary devices of burdens of proof and presumptions. Based upon this analysis the court proclaims not that school boards have an obligation of racial neutrality, but that they have an obligation of affirmative action. Thus the fiction at the violation stage, that the court's results are really premised upon a finding of intentional segregation by the state, spills over to the remedy stage as well. If the violation is indeed to be premised upon the intentional segregative acts of school boards, and therefore the remedy is to cure the effects of the acts, what are these effects?

Dayton I attempted to address this question with little success. The difficulty with the first Dayton opinion is that is appeared to define the effect too narrowly. The narrowest reading of Dayton I might be that the effect is limited to the actual observable movement of school children attendent upon particular segregative acts of school boards. Thus if a boundary is gerrymandered, the effect is limited to the children thus moved. If feeder patterns are altered, the effect might be cured by redrawing them in a neutral fashion. Plaintiffs might reasonably complain that this is too narrow an understanding. The interrealtionship between residence choice and school racial composition

is such that the existence of racially identifiable school has repercussions which go beyond the pupils moved. (See social science brief in Columbus.) But if Dayton I appears to define effect too narrowly, it at least remains true to the individual interpretation of the violation. Dayton II and Columbus fail to deal with the issue at all.

Following the presumptions established in Keys, these opinions divorce the question of harm from the stated source of violation, i.e., the intended segregative acts of school boards. It is one thing to say that the consequences of past de jure segregation have a present impact which goes beyond the immediate effects of the segregative decisions. It is another thing to assume that if there were no de jure segregation in the past there would in fact be no segregation today (Dworkin 1976; Yudof, 1978). Not only is such an argument intuitively implausible, it is contridicted by what data we have on housing choices. (Farley, et. al. 1978) Yet in ordering a systemwide remedy designed to balance school systems racially the courts implicitly adopt this latter position.[45]

Between the remedy and merit stages, therefore, there is a contradiction in the opinions. While the language of the opinions is that of a individual model, the results cannot be based upon such an approach. Neither the findings on the merits, nor the remedy imposed is a rational conclusion from the premise that the constitutional wrong is intended segregative state action.

The contradiction is further highlighted by the wavering positions the court has adopted while considering what matters are properly in dispute. The examination of the ancient history of school desegregation in Dayton and Columbus suggests a wider scope of analysis designed to prove a "pattern and practice" of segregation establishing segregated education. On the other hand, the court has refused to decide whether a housing case is directly relevant to

the school litigation (see p. supra). Such data would of course, widen the scope of the investigation and push toward a more structural analysis. At the other extreme, the court has largely banished discussions of educational and psychological harm from the realm of relevant information.[46] And it has treated school district boundaries as real barriers to an understanding of the demographics of cities. It would appear that certain evidence is sometimes included because it furthers the more structural objectives of the court's understanding of remedy; and at other times certain evidence is excluded as being incompatable with the more individualistic understanding of the violation.

Given this analysis of the school cases, we are left with two issues. The first by way of a question 'Why has the court refused to abandon the individualistic model of the violation when the general thrust of the remedy certainly speaks to such an understanding? And the second issue is whether a more structural model of violation can be justified. Let us deal with each question in turn.

1) Why has the Court refused to adopt a structural model of violation?

We will suggest three general reasons why the court has maintained an individualistic perspective. They are: a) a theoretical perspective on rights, b) the problem of determing the limits of a structural right, and c) the difficulty of justifying the remedy from a structural perspective.

a) First, there is a fundamental question about a structural perspective on rights which relates to the rule of law itself. As opponents have long noted, it is most certain that we would not wish all of our rights and duties to be determined on the basis of group membership. Graglia, 1978. (Glaser,) Freedom of speech, the free exercise of religion, protection against unreasonable searches and seizures, the right to a speedy, public trial, the right to vote, etc. are rights which we would not wish to hinge upon our membership in any group.

As we would not wish it to be the law that registrars should make rules to ensure that whites and blacks vote in equal proportion in elections, how is it we may wish school boards to make rules causing whites and blacks to go to school together. Is there anything about the equal protection clause which differentiates it form these other Constitutional provisions? Unless there is, it is difficult to justify a movement toward a structural interpretation.

b) Second there is a problem of determining the limits of a structural theory of violation. It would be a mistake to believe that the court is unable to see the problem from a structural perspective, the idea is not new in the legal or the social science literature. (see, Fiss, 1978; Bickel, 1970; Knowles & Prewitt, 1969; Blauner, 1972; Friedman, 1975). Neutral rules, honestly arrived at can produce segregative outcomes. Yet a difficulty remains in understanding where to stop. There is a "slippery slope" quality to the structural approach.

Most crucially, what remains of the concept of state action under such a theory? The present problem of racial inequality and isolation in public education is the product of government discrimination, private discrimination, and personal choice and individual abilities. School segregation is partly due to the segregative purpose of the school board, but is partly due to residential housing patterns. They in turn are in part due to governmental segregative acts. (see Forman, 1975:37), but are also due in part to individual choice. (See Farley, et. al. 1978) Black-white differences in school achievement are similarly due to factors related both to schools and personal background. (see Coleman, 1965) Partitioning the effects of these various factors is nearly an impossible task.

An individualistic model of violation does not provide an easy answer to this problem as witness Dayton I and Dayton II, but a court uncertain of its position is on safer grounds by remaining with the language of intentionality, for it is always possible to increase of decrease the scope of the violation by creating or destroying presumptions or shifting a burden of proof. The individualistic model does not burn any bridges.

A structural model, on the other hand requires a more fundamental and less revocable Constitutional step. By looking at results it conflates these different causes. The school board becomes responsible not only for its own intended wrongdoing, but for tolerating or permitting all forms of racial isolation and inequality in schools. Such a position is difficult or impossible to justify if there is no way to define the limits of this view of rights. If every unequal outcome raises an equal protection claim the right is unlimited and the remedy unimaginable. To justify a structural view of violation we must have some outlines of the evidence needed to say that some inequality or some isolation is not to be attributed to state action.

c) Finally the reluctance of the court to adopt a structural model of violation may, ironically, be related to the problem of justifying a structural model of remedy.

When adopts an individualistic model the justification of the remedy is most appropriately defined by a backward looking "but-for" test. As the wrong is the intended misdeed of someone (or some group) the remedy is to put people back into the position they would have enjoyed but for the wrongdoing.

With a structural interpretation, however, this type of justification cannot suffice. The remedy must be forward looking, designed to achieve new institutional arrangements. The difficulty confronting the courts is, simply, that it has not been demonstrated that successful remedies exist.

The failure of the educational harm theory of strict liability is a case in point. In many lower courts, and implicitly in Keys, this theory has been rejected at least in part because there is no persuasive evidence that any remedy the court was prepared to order would in fact cure the problem.

Evaluations of school desegregation do not indicate the large positive effects that were once expected in terms of achievement gains and increased self esteem of minority students. (Weinberg, 1975; Stephan, 1978; St. John, 1975; Cohen, 1975; Epps, 1975). A favorable interpretation of Judge DiMascio's remedy in Detroit suggest that he concluded that no remedy open to him (i.e., within the boundaries of the city), could effectively promote a structural integration of school children. Therefore, he did as little as possible.

Given these three reasons for refusing to move toward a structural understanding of violation we may turn to the second question. Can we overcome these objections and justify a structural approach.

2) Justifying a Structural Approach

a) As to the first problem, one may argue that it is possible to distinguish the Equal Protection Clause from other rights. The Equal Protection Clause is protecting what we might call "contingent rights".

In his admirable essay on "Legal Responsibility and Excuses" H.L.A. Hart makes the observation that the "right" to certain excuses in the criminal law, and indeed invalidating conditions in civil transactions may be of no use to "individuals in society whose economic or social position is such that the difference between a law of strict liability and a law that recognizes excusing conditions is of no importance.

"If starvation forces him to steal, the values the system respects and incorporates in excusing conditions are nothing to him. This is of course similar to the claim often made that the freedom that a political democracy of the Western type offers to its subjects is merely formal freedom, not real freedom, and leaves one free to starve." (Hart, 1968:50-51)

What Hart is noting is that some rights are "contingent" upon other factors if they are to be enjoyed. They are not solely a matter of personal choice and individual ability.

While all rights may to some extent be contingent, there are degrees of contingency. The values of structural integration and equality embodied in the Equal Protection Clause are values which are highly contingent upon the structural arrangement of institutions. Such rights and values must be understood in this way if they are to be achieved.

We may better understand this category of rights using John Rawls' perspective on social justice. Rawls distinguishes two principles of justice, "lexically ordered".[47] The first principle deals with liberties, including liberty of conscience, and freedom of the person as well as the liberties involved in the participation in political affairs (Rawls, 1971:201). The second principle deals with social and economic inequalities (see Rawls, 1971: 60-61, 302-303).

Now it is not always clear whether some rights, or principle of justice falls within the first or second principle. Nevertheless, we can in general allocate values in this fashion. Free speech certainly falls within the first principle. A "right to a minimim wage" would fall within the second principle. The values implicit in the school cases, community and equality, fall basically within the second principle. They involve social and economic isolation and inequality.

The argument to be advanced is that the rights and values falling within the second principle may be understood and dealt with as structural problems, often affecting groups of citizens, without unduely threatening the rights and values expressed in the first principle. Indeed to equate the two sets of principles such that we always treat both from an individualistic perspective not only limits our abilities to achieve the ends expessed in the second principle, but by doing so, seriously erodes the equal worth of the value of liberty. (Rawls, 1969:204).

b) The second problem deserves a somewhat longer discussion. The present contradiction in the opinions is nowhere more evident that in the way the court has dealt with evidence. The proof of intention is at best ellusive.[48] The presumptions of duality and the justifications for shifting the burden of proof have become more and more tenuous. In its most recent opinions, the Court has dealt with the very difficult problem of partitioning between institutional and personal choice causes of segregation raised in Dayton I by sweeping them under the rug in Dayton II and Columbus. (see Rhenquist dissent in Columbus

) Thus in discussing the evidentiary problems involved in a structural approach we should not contrast this to some ideal under an individualistic interpretation.

In adopting a structural perspective on the violation we must admit that it may be impossible to precisely partition causes of the present isolation and inequality of black Americans, and that personal choice, personal prejudice, and institutional arrangements constantly interact to perpetuate our present circumstances.

We must further recognize that the violation is not to be defined in terms of the segregation caused by individual school board actions, or the immediate isolation or achievement of particular students. From this perspective the key evidentiary issues are no more individualistic for plaintiffs that they are for defendants. The suit, first and foremost, is about the position of blacks and other minorities in society, not the immediate situation of individual school children. Likewise it is about the organization of schooling, not the sins of past board members or administrators. The limits of the cases must be structural and distributional in nature. (see, Brickman, P, et. al (1980).

This does not mean, however, that we cannot make distinctions, or that once adopted a structural model commits the courts forever to a group oriented jurisprudence, or that everything that calls itself a group must be treated as such. While it is difficult to formulate specific criteria in advance of adjudications, the general outlines of appropriate limits can be stated. There is not a better starting place than the language in the famous footnote in the Carolene Products Case. 304 U.S. 114 at 152 (1938)

Justice Stone noted that while the general presumption of constitutionality of legislative decisions is to be measured by the existence of some rational basis of judgement within the knowledge and experience of the legislature; less judicial leeway may be given to certain types of legislative actions. Specifically he suggested that, "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry".[49]

The key concept in this passage is that of a discrete and insular minority. While the term is certainly imprecise, we can give it meaning within the context of the value to be pursued through the Equal Protection Clause: the structural-integration of Americans.

From this value premise black Americans constitute a discrete and insular minority. Polish, or Italian, or German, or even Japanese Americans do not. The difference between these latter groups and blacks may be defined in terms of their structural integration. In terms of their educational attainment, their occupations, their income and their degree of residential isolation the latter groups are within the mainstream of our society. (See Burkey, 1978; 360-400).

Such evidence as to insularity helps to both define the occasions for a structural understanding of violation and establish the limits of this interpretation. Some of the groups mentioned above were once, by the criteria stated, discrete and insular minorites themselves. The change in their position, and the gulf between their current position and that of black Americans can be demonstrated. We should not suggest that such an analysis will be easy, and as in all such matters it is difficult to draw the line, but the relevant criteria are not unknowable, and the analysis would remove us from the judicial fictions which now entangle us.[50]

c) Finally, to justify a structural approach to the Equal Protection Clause we must justify the remedy. Surprisingly, this is the most difficult task of all.

From one point of view one of the most striking aspects of the school cases is the extent to which the tail has wagged the dog. It would appear that the courts have determined the nature of the remedy and then gone about the business of constructing a violation argument which could support the judgement. The Court has consistantly altered presumptions and burdens so that the "findings" might support the outcome. The courts have demanded that school boards adopt remedies which promise realisticly to work, and work now.

Yet in several respects the remedies have not worked. They have had only a marginal effect upon the educational achievement of black students. See Crain & Muhard, 1978. In large cities they have occasionally proved to be self defeating due to the departure of white children from the school system. (See Rossell, 1978.) A failure for the remedy to produce results seriously undermines the structural approach.

One thing which both an individualistic and a structural approach to violation share is that old legal maxim, "ought implies can". From a structural perspective this must mean that it is possible to reorganize the social organization of schooling so as to move the society in the direction of greater community and equality between black and white students. If this is impossible the structural interpretation of violation cannot be justified.

In such matters of course impossibility is a relative term. A dictatorship could indeed compel the values under consideration through brute force. It could assign people residences, jobs, schools, churches, in such a way so as to insure equality and community, but at a cost few would wish to pay. Thus the impossibility of which we speak is defined by the limits imposed by other values of equal or greater importance, many of which are defined in Rawls' first principle of justice. Some of the more recent critics of school desegregation efforts have premised their disagreement upon an argument that present efforts are not working. (See, Edmonds, 1974; Glazer 1972; Armor, 1972). It may be that these critics are correct, that the remedy is impossible, but before arriving at such a conclusion we should reflect upon the extent to which indeed the dog has wagged the tail; that is the extent to which the individualistic approach to violation has narrowed and confined the remedies thus far pursued.

The individualistic model has restricted remedy in three critical ways. First, is the limitation imposed by Milliken vs. Bradley. By requiring proof of intention in each school district, and by refusing to allow the use of data on systematic housing segregation in metropolitan areas, the courts have made desegregation of large metropolitan areas a virtual impossibility. A structural analysis would allow a successful metropolitan suit if plaintiffs can show that the demographics of urban areas have systematically restricted blacks to certain areas of the metropolis. Indeed the cross-district remedy is central if we are to achieve one key part of the Equal Protection Clause purpose; to create one community.

The second way the individualistic model has restricted remedy is by focusing almost all the effort to racial balancing, while devoting little effort to educational equality.

The first tentative steps in that direction occured in Milliken II Milliken vs. Bradley 433 U.S. 276 (1977) in which the Supreme Court upheld a variety of "educational components" in Judge DeMascio's remedy order.[51] While this particular set of components may not achieve the desired results the case opens up a wide variety of possibility beyond racial balancing.[52]

Finally a major roadblock to the incorporation of educational programs is the inability or unwillingness of both federal judges and plaintiff attornies to view the case as a structural problem at the end of the litigative phase. In the typical case the attorney is involved in the remedy only until an original plan is put in place. Subsequent involvement is contingent upon active complaints by individuals who feel agrieved. Then the problem is typically treated as a grievance would be in a labor relations case; a problem of a given individual or group of individuals which can be ironed out. Rarely do the plaintiff lawyers adopt a more structural posture toward an ongoing remedy.

In the initial drawing up of a plan most judges prefer that the school district perform this task. There are good reasons behind such a practice. A school board and school administration which draws up a plan "owns" it in a way that it will never own a plan drawn by plaintiffs or a third party expert.

After the plan is in place, however, the federal judge is typically anxious to be rid of a case which may already have been on his docket for years. The judge of course receives annual reports from the school system about the status of the integration plan. These reports generally focus upon the degree to which the district is in compliance with the original remedy. If the remedy is primarily concerned with racial balance, so is the report.

All of this is in part premised upon the belief by the federal judge, and the plaintiff attorneys that they should leave as much of the remedy as they can to the board and administration because these groups are the experts on how to run a school system. In one sense this is certainly true. Yet it might strike one as odd that an organization which has just been declared in violation of the Constitution because of its past pattern and practices of segregation is now given the task of providing integrated, quality education with little supervision. (See Monti 1979).

In fact when it comes to long term remedy both the plaintiff counsel and the judges are likely to retreat into a more individualistic orientation, as if the sins really were specific past misdeeds, rather than the organization of education. The strategy has not provided remarkable success.

The alternative, suggested by Fiss, is a much deeper involvement in the remedy process.

"The remedial phase in strucutral litigation is far from episodic. It has a beginning, maybe a middle, but no end --well almost no end. In involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. The task is not to declare who is right or who is wrong, not to calculate the amount of damages or to formulate a decree designed to stop some discrete act. The task is to remove the condition that threatens the constitutional values...the remedy involves the court in nothing less than the reorganization of an ongoing institution, so as to remove the threat it poses to constitutional values. The court's jurisdiction will last as long as the threat persists" Fiss, 1979: 27-28.

To provide but one example which involve a key issue left unresolved by the present case law,[53] when is a school district unitary? While we may rely upon outcome criteria measures to determine this, there is another, more significant view suggested by a special master in one important desegregation case. The district is unitary when, within the school administration, there is a significant bureaucracy, financially and organizationally entrenched, which has as its task the consideration of racial integration and quality education of minority children. Given the shifting tides of residential housing patterns, this criterion seems preferable to any "final" desegregation plan. But such a group will not emerge without the continuing involvement and prodding of the federal court.

This is a task which some (including many judges say the courts are ill-trained and ill-equipted) to undertake. The use of a master can certainly help in this effort (see Fiss p.56, and accompanying fns) but the judge must adopt an "architectural relationship" to the organization.[54] That is what 25 years of litigation have taught, that is what a structural solution requires. That is what is needed to fulfill the mandate of Brown and the values underlying the 14th amendment.

FOOTNOTES

1 See, Wechsler, 1959; Cahn, 1955; Cahn, 1956.

2 See, Yudof, 1978; Fiss, 1974; Fiss, 1979; Bell, 1976; Bell, 1980; Dworkin, 1976.

3 Most criminal cases, for instance consider both intention questions and negligence questions. This can be seen from the fact that a proper defense to a criminal charge may take the form of lack of intention (mistake, insanity, etc.) and a lack of ability to avoid the act (self defense, duress). These latter pleas do not speak to one's lack of intention, but to one's inability to avoid the conduct in question. They claim the action was unavoidable, and therefore, are essentially a denial of negligence.

4 For example the reform movement which created the juvenile court in part wished to redefine the nature of the dispute between children and the state from one which focused upon the legally defined criminal deeds of the individual to a general inquiry about the child's background and problems. (See Platt 1969).

5 Here we need not get into the question of suspect classifications and the special burdens falling upon legislatures in certain circumstances. See, Karematsu v. United States, 323 U.S. 214,216(1944); Hirabayshi v. United States, 320 U.S. 81,100(1944); Bolling v. Sharpe, 347 U.S. 497,499(1954); McLaughlin v. Florida 379 U.S. 184, 18 (1964).

6 (Black, 1960:427). See p.63 infra for a fuller discussion of this point.

7 See, Fritz, 1963; Washburn, 1975. The value at issue is more fairly described by that old phrase, the "melting pot", which suggests assimilation in the public and secondary institutions of society. The integration of private and primary institutions such as the family may follow, but is not part of the purpose of the E.P.C. What is important to note is that the value of integration is to be distinguished from a goal of structural pluralism designed to provide equal, but seperate societies for black and white Americans.

8 See also,
Brown v. Bd. of Education I 347 US 483, 48-n.13)

9 Most obviously the plans tended to disregard (or purposively ignore) the intimidation which kept some black families from exercising this choice. See, Green vs. County School Bdg. of New Kent County 391 U.S. 430, at 4_n5. See U.S. Commission on Civil Rights, 1967. More subtly, the plans typically did not attempt to alter the educational program within formerly white schools. Equality was defined as equality of opportunity with little or no consideration given to helping black children overcome years of inferior schooling. Not only would this impede the achievement of educational equality, it also acted as a deterrent to black parents when they considered sending their children to the "white school".

10 In Griffin v. Prince Edward County the court held that a school board could not close the public schools and support private schools. It said that the lower courts could in fact order the county supervisors to levy taxes to provide public schools. 377 U.S. 216 (1967). Several other schemes to use state funds to support "private schools" were struck down. See Poindexter v. Louisiana Financial Commission 275 F. Supp 833 (E.D. La. 1967) aff'd per curiam 389 U.S. 215 (1968).

Earlier the court struck down transfer procedures which allowed minority to majority transfers. Goss v. Board of Education, 373 U.S. 683 (1963). In both the Prince Edward case and in Bradley v. School Board of Richmond, 382 U.S. 193 (1965) the court said that the time for deliberate speed had run its course. And And In Rogers v. Paul, 382 U.S. 198 (1965) the court held that faculty desegregation was part of the relief required by the Brown decision.)

11 On this issue see; Dunn 1967; Recent Cases, 1967; Comment, 1967).

12 There were two companion cases to Green; Raney v. Board of Education of Gould School District, 391 U.S. 450; and Monroe v. Board of Commissioners of the City of Jackson, TN, 391 U.S. 450. The Raney facts were basically similar to those in Green. In the Monroe case the trial court had established a neighborhood plan for junior high schools, but there was a "free transfer" provision allowing any child to transfer to another school if space were available. The unsurprising result was to maintain the racial character of the high schools. One remained all black, another 99% white. The Supreme Court rejected this plan.

During the preceeding year the 5th Circuit had reached the same result on freedom of choice plans in an appeal consolidating a number of tests of HEW guidelines. United States v. Jefferson County Board of Education, 372 F.2d 836, (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (5th.Cir 1967). cert. denied, 389 U.S. 840 (1967). Judge Wisdom said: "the only school desegregation plan that meets constitutional standards is one that works" 372 F2d at 847.

13 Upon remand from the Supreme Court the district court in Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955) had so held and the boards had relentlessly urged this interpretation on the courts.

14 The question of faculty desegregation had been dealt with in the United States v. Montgomery county Board of Education, 395 U.S. 225 (1969) where the court upheld an order by Judge Johnson requiring that the faculty be desegregated by assigning teachers to each school in roughly the same ratio of black to white teachers in the district. This position was affirmed in Swann.

15 Again, as in Green, important issues were left undecided in Swann. First, the court explicitly refused to decide whether a showing that school segregation is a consequence of types of state action other than school board decisions is a Constitutional violation requiring remedial action by a school desegregation decree. (Id. at) This issue reemerged in Detroit, with the Court once again side-stepping the question. Thus the Court has consistantly avoided this key question concerning what matters are properly in dispute.

Second, at the conclusion of his opinion Chief Justice Berger stated, "At some point, these school authorities and others like them should have achieved full compliance with this decision in Brown I. The systems will then be "unitary" in the sense required our decision in Green and Alexander."

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. (Id at). The issue left unanswered by this passage is exactly what constituted a "unitary" system under Green, Alexander, and Swann. Attempts by some judges to declare districts unitary have met with mixed results. One point of view might hold that the affirmative duty to maintain a balanced system should never be removed from a formally dual system as long as continuing imbalance can be avoided. (See Judge McMillan in Swann 334 F. Supp 623 (W.D.N.C. 1979)

The language in the last paragraph of Swann, however, suggests that a less rigid interpretation of the state's affirmative duty may be in order. As yet, the Supreme Court has refused to deal with this issue.

16 Missouri, Ex. Rel. Gaines v. Canada, 305 U.S. 337 (1937); Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

17 See citations in Fn # 1.

18 See also, Evers v. Jackson Municipal School Districts 357 F. 2d 663 (5th Cir 1966) rejecting any attempts"to overturn Brown on a factual showing."

19 Compare Barksdale v. Springfield School Committee, 237 F. Supp. 543 (1965) supporting a de facto rule, where the judge urged that racial concentration in one's school communicates to the blacks child that blacks are different from (inferior to) white children; and Bell v. School City of Gary 213 F. Supp. 819 (1963) rejecting a defacto rule, where the trial judge stated: "A comparison of achievement tests sheds little or no light on the quality of instruction unless there is a corresponding showing of ability to learn".

20 It may be helpful to ground the burden issues in the testimony which actually goes on in such trials. What is almost always presented by plaintiffs is testimony about site selection, boundary drawing, assignment of teachers by race, etc. If the judge is convinced, as Judge Doyle was in the Park Hill area, that these choices tend to show a segregative purpose on the part of the board, then the board must go forward with the evidence, most basically by arguing possible excuses to the activities under investigation. The excuses are almost invariably overcrowding (to justify boundaries), and neighborhood student assignment.

21 See, e.g. (Armor, 1972; 1973; Pettigrew, et al 1973; Crain & Mahard, 1978).

22 See, Goodman, 1972; Fiss, 1965; Wright, 1965; Note 1976. Most of this literature is favorable to abolising the distinction and supports Mr. Justice Powell's line of argument. But see, Graglia, 1976.

[23] "As the remedial obligations of Swann extend far beyond the elimination of the outgrowths of the state-imposed segregation outlawed in Brown, the rationale of Swann points inevitably toward a uniform, constitutional approach to our national problem of school desegregation". Id. at 223 .

[24] It should be noted, however, that much of what Mr. Justice Powell purchases in the first half of his opinion he sells in the latter half. By giving great weight to the virtues of neighborhood schools, and by asserting that non-board causes of segregation are beyond the reach of the school cases, he concludes with a minimalist remedy. (See 413 U.S. at 241-252).

[25] Tauber & Tauber, 1969; Tauber, 1975; Farley, 1975; Farley, 1978.

[26] In addition in Detroit there was evidence on differences in achievement levels between black and white students, the racial assignment of teachers to schools, and the failure of the state of Michigan to finance school transportation in Detroit will paying 75% of transportation costs in most school districts. Finally, the plaintiffs put on a substantial housing case designed to show the extent and causes of residential segregation in the metropolitan area. While most of the housing case might be considered to be legally irrelevant from an individualistic position many have considered it to be critical in persuading a reluctant judge toward the view that wide spread discrimination existed in Detroit and that this general pattern might also exist in the school system.

[27] For instance, the board had changed some student assignment patterns and made minor boundary shifts which increased desegregation; it revised the open enrollment policy to permit pupil transfers only if they improved racial balance of the receiving school; it required that busing to relieve overcrowding must be desegregative as well. (Hain, 1978:228).

[28] He found that the Board had segregated students through the use of attendance boundary changes, optional attendance zones, grade structures, feeder patterns, building site selection and other means. 338 F. Supp 582, 585-586.

[29] See, Coleman, 1975; Pettigrew & Green, 1976; Ravitch, 1978; Rossell, 1978; Wolf, 1977.

[30] The NAACP and Detroit Board found themselves on one side against the State of Michigan and the suburban defendants. The Justice department, as amicus curiae, allied itself with the suburbs.

[31] The court added "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy". (Id. at 745) This latter statement, of course, does not say the same thing as the passage cited in the text. This statement requires interdistrict violations. It is not clear what those would be. If limited to collusions between two school boards to further segregation, they certainly would be rare, although there was one such case in Detroit concerning black students from the Carver school district. The interdistrict violations, however, might apply to seperate actions in seperate school districts. Of course many suburban districts have never had an opportunity to "show their colors" in as much as they have no black students. With a strict reading none of these issues need to be decided in Detroit since the court found no interdistrict effect.

[32] Justice Stewart, who joined the majority in the 5-4 opinion also wrote a concurring opinion in which he said that while on the facts in Detroit there was no evidence of a violation affecting districts other than the city, he would be willing to consider constitutional violations by officials other than school boards or administrators in assessing a remedy. He would expand the realm of issues legitimately in dispute. For example, he noted, schools might be desegregated across district lines if state officials used state housing or zoning laws in a "purposeful, racially discriminatory" manner. (Id. at 755). The majority refused to consider the housing case which the NAACP had put on early in the trial because they said that the Court of Appeals had refused to consider it. (Id. at 723 n.7)

Fn. # 32
Con't.

They thus sidestepped a key issue in school desegregation, the interrelationships between housing and schools. The NAACP has, however, continued to make the housing testimony part of their evidence in these cases, and in the recent Supreme Court decisions in Columbus and Dayton a group of social scientists has filed an amicus brief discussing the nexus between housing and schools.

33 This fall in Detroit a school which was 100% black would not be racially identifiable by this formula.

34 For a fuller discussion of this issue see p.45 infra)

35 The Supreme Court left open the possibility that the plaintiffs could try and prove an inter district harm, and thus achieve a right to a cross district plan. The NAACP has not chosen to pursue this line as of yet.

36 For example, in the recent Columbus case in the 1960's, a group of white students were bused past their neighborhood school to a whiter school, and the District court could "discern no other explanation than a racial one for the Moler discontinuous attendance area for the period 1963 through 1969" 429 F. Supp. 26 247.

37 See also,
United States v. Texas Educ. Agency 532 F2d 380,392 (5th Cir. 1976), vacated and remanded sub nom Austin Independent School District v. U.S. 429 US 990 (1977).

38 Most instructive here has been the reluctance of the circuits to adopt such a standard. See, United States v. Texas Educ. Agency 564 F.2d 162, 118-69 (5th Cir. 1977); Armstrong v. O'Connell 451 F. Supp 817,824 (E.D. Wisc. 1978) See Generally, note, Reading the Mind of the School Board: Segregative Intent and the De facto/De jure Distinction, 86 Yale L.J. 317 (1976) The resistance of the District and Appelate Courts to the formalistic Swing of the Supreme Court is a topic well worthy of investigation.

39 School District of Omaha v. United States, 97 S. Ct. 2905 (1977); Brenan v. Armstrong, 97 S. Ct. 2907 (1977). In Milwaukee, Minneapolis, Omaha, Austin, and Indianapolis, hearings were held to measure the "incremental segregative effect" of the unconstitutional school board acts.

40 Contra see, Taylor-1978.

41 In St. Louis the trial court wrote a similar opinion, with a similar outcome. Judge Meredith found that the plaintiffs failed to show segregative intent and segregative effect sufficient to justify a finding that the schools were unconstitutionally segregated. ____ F. Supp. ____ (1979). In Austin, Omaha, and Minneapolis, however, upon remand in light of Dayton I, the trial judges found that the systems were segregated, the defendents failed to carry their burden of showing that the segregation was not district-wide, and ordered system-wide remedies. ____ F. Supp. ____.

42 This term the Court gave a ruling in the Dallas Case ____ U.S. ____ (197) which developed no new law.

43 In a footnote, the court rejected the argument that Dayton I in any way altered or limited the portions of Keys and Swann allowing inferences of genera, system-wide purpose and current, systemwide impact from evidence of discriminatory purposes, which resulted in substantial current segregation. Nor does it alter the appropriateness of a system-wide remedy absent a showing by the defendant of what part of the current imbalance was not caused by the constitutional violation.

44 For a good discussion of the Court's use of history see, Charles A. Miller, The Supreme Court and the Uses of History (Cambridge, Mass: Belkap Press (1969).

45 This contradiction is not new to Dayton and Columbus. Writing about Swann, Fiss noted:

"The net effect of Charlotte-Mecklenberg is to move school desegregation further along the continuum toward a result oriented approach...[The predominant concern of the Court in Charlotte-Mecklenberg is in fact the segregated pattern of student attendance, rather than the causal role played by past discriminatory practices... The court made no serious attempt to either to determine or even speculate on the degree to which it contributes to present segregation. Nor did the Court attempt to tailor the remedial order to the correction of that portion of the segregation that might reasonably be attributable to past discrimination. The court moved from a) the undisputed existence of past discrimination to b) the possibility or likelihood that the past discrimination played some causal role in producing segregated patterns to c) an order requiring the complete elimination of those patterns. The existance of past discrimination was thus used as a "trigger" -- and not for a pistol, but for a cannon. Such a role cannot be defended unless the primary concern of the court is the segregated patterns themselves, rather than the causal relation of past discrimination to them." (Fiss, 1971:704-5). "We might say of the second Dayton opinion, however, that the cannon now has a hair trigger."

46 We should note that although the outcome of cases has not explicitly rested upon educational harm and housing data, plaintiffs almost uniformly present evidence on these questions. In another paper Betty Rankin-Widgon, Debby Kalmus, Mark Chesler and myself have discussed the various types of information introduced and the reasons for introduction. Chesler, et. al. 1980.

47 By lexical order Rauls means that the rights detined by the first principle must not be traded for rights defined by the second principle. Thus equal liberty is not traded for greater equality in social welfare. (See Rands sections 8,11,14,1961.

48 See,
Eisenberg 1977, Simon, 1978, Note 1976; Perry, 1977.

49 For a not dissimilar view, focusing upon the hidden prejudice of governmental groups when dealing with race, see Dworkin, 1976: 21).

50 An analogy which may help in understanding the problem, if not the solution is that of automobile accidents. Accidents are caused by a complex mixture of personal carelessness and structural factors (e.g., wet roads, mechanical failure, etc.) A movement to no-fault accident insurance is in part a judgement that accidents may be seen as the inevitable by-products of placing high speed machines weighing thousands of pounds in close proximity to one another. The solution recognises the structural nature of the problem, but it also conflates both structural and individual causes into one definition of responsibility. If we were to return to horse and buggy days it might indeed be wise to consider a return to a negligence standard of responsibility.

51 These included 1) remedial reading and communication skills program, 2) the creation of five vocational education centers in areas such as construction trades, transportation and health services, 3) two technical high schools focusing on a business cirriculum, 4) a uniform Code of Conduct, 5) a Community Relations program, 6) an inservice training program for the instructional staff, 7) a testing program to insure no discriminatory testing procedures, 8) a counseling and career guidance program, 9) inclusion of multi-ethnic studies in the curriculum, and 10) plans for "co-curricular activities with other artistic and educational institutions. See, Levin "School Desegregation Remedies and The Role of Social Science Research 42. Law & Contemp. Probs. 1 (1978).

52 Indeed a substantial body of literature now exists on how to operate a multi racial classroom so as to further educational cooperation and equality. See, Johnson and Johnson, 1978; Patchen, 1977; Cohen, 1976; Henderson, 1977; Michaels, 1977.

53 See,
Pasadena vs. Spangler, 19 ; Baton Rouge, 19 ; Swann, 19 .

54 On this point Derick Bell would agree, if not with the remedies presently proposed.

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