

## Indianapolis Desegregation: Segregative Intent and the Interdistrict Remedy

### I. INTRODUCTION

The desegregation of this nation's public schools has, since 1954, posed a series of nearly intractable problems for the federal judiciary. In that year, the "separate but equal" doctrine of *Plessy v. Ferguson*<sup>1</sup> was discarded for the public schools, and a new era in education and law was born in the Supreme Court opinion of *Brown v. Board of Education (Brown I)*.<sup>2</sup> *Brown I* was the result of a carefully planned and executed campaign by the NAACP against legally segregated school systems.<sup>3</sup> School districts from South Carolina, Virginia, Kansas, and Delaware were initially confronted and combined in this case.<sup>4</sup> The Supreme Court held "that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment"<sup>5</sup> because "[s]eparate educational facilities are inherently unequal."<sup>6</sup>

The Court said that the inequality perceived in segregated schools stems not from the tangible aspects of education<sup>7</sup> but rather from the fact that "[s]egregation with the sanction of law . . . 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."<sup>8</sup> When the inequality appears on the face of a state statute,<sup>9</sup> the violation is ob-

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<sup>1</sup>163 U.S. 537 (1896).

<sup>2</sup>347 U.S. 483 (1954) (*Brown I*).

<sup>3</sup>AFRO-AMERICAN HISTORY: PRIMARY SOURCES 365 (T. Frazier ed. 1970).

<sup>4</sup>347 U.S. at 483 n.\*. It is interesting to note that two of the cases—those from Kansas and Delaware—were in northern states but were combined with the southern cases because the segregation of the public school facilities was mandated by state law in all four. *See id.* at 486-87 n.1.

<sup>5</sup>*Id.* at 495.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 492.

<sup>8</sup>*Id.* at 494.

<sup>9</sup>The following are examples of facially segregative laws: "The Trustee or Trustees of each township, town or city, shall organize the colored children into separate schools, having all the rights and privileges of other schools of the township." Act of May 13, 1869, ch. 16, § 3 1869 Ind. Acts (Spec. Sess.) 41, *as amended by* Act of March 5, 1877, ch. 81, § 1, 1877 Ind. Acts 124 (repealed by Act of March 8, 1949, ch. 186, §§ 1-8, 1949 Ind. Acts 603 (replaced by IND. CODE §§ 20-8.1-2-1 to -7 (1976)). "It shall be unlawful for pupils of one race to attend the schools provided by the boards of

viously offensive and is clearly subject to the strictures of the equal protection clause of the fourteenth amendment. Such laws inevitably create a dual system of education wherein blacks and whites each have their own schools. Therefore, problems of desegregating racially segregated schools arise predominantly when state action is subtle and the intent to create a dual system is less defined. This situation is more likely to be confronted in the North than in the South because southern legislators promulgated more facially segregative laws.<sup>10</sup>

The Indianapolis desegregation case,<sup>11</sup> spanning twelve years of litigation, is, in many respects, a prototype of school desegregation actions in the North. The actions creating the segregative condition were often facially neutral. Yet, the case is unique because the inter-district remedy suggested by District Judge Dillin in 1971<sup>12</sup> was relatively innovative. Interdistrict remedies had rarely been considered, much less implemented, up to that time.<sup>13</sup> The Indianapolis litigation is also unique for the very reason that there was a nine-year delay between the 1971 remedy and its "acceptance" in 1980 by the Supreme Court.<sup>14</sup> Because each school desegregation case encompasses a different factual situation, it is extremely difficult for the judiciary, inexperienced in the field of education, to formulate a coherent and cohesive body of law. The Indianapolis case can be viewed both as a stage in the evolving case law on desegregation and as one of the many disparate decisions ratified on a case-by-case basis by a Court grappling with the almost insurmountable task created by *Brown I*.

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trustees for persons of another race." S.C. CODE § 59-63-10 (1976). "White and colored children shall not be taught in the same school." VA. CONST. of 1902 § 140 (repealed by VA. CONST. art. VIII, § 1 (1971)).

<sup>10</sup>Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 287 (1965).

<sup>11</sup>The litigation included many published opinions: *United States v. Board of School Comm'rs*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973) [hereinafter cited as *Indianapolis I*]; *United States v. Board of School Comm'rs*, 368 F. Supp. 1191 (S.D. Ind.) [hereinafter cited as *Indianapolis II*], *supp. mem. of decision*, 368 F. Supp. 1223 (S.D. Ind. 1973) [hereinafter cited as *Indianapolis III*], *aff'd in part, rev'd in part, and remanded*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929, *on remand*, 419 F. Supp. 180 (S.D. Ind. 1975) [hereinafter cited as *Indianapolis IV*], *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded sub nom. Bowen v. United States*, 429 U.S. 1068 (1977), *on remand*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978), *on remand*, 456 F. Supp. 183 (S.D. Ind. 1978) [hereinafter cited as *Indianapolis V*], *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 101 S. Ct. 114 (1980). References to the litigation in this Note will be to the specific bracketed appellations.

<sup>12</sup>*Indianapolis I*, 332 F. Supp. at 679.

<sup>13</sup>See note 65 *infra* and accompanying text.

<sup>14</sup>*United States v. Board of School Comm'rs*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 114 (1980).

The purpose of this Note is to analyze the constitutional violation and the subsequent imposition of an interdistrict remedy in Indianapolis. The Indianapolis case will be compared with other case law with respect to the finding of segregative intent and will be reconciled with major decisions in other public school cases. This reconciliation will point out the infirmities in the Indianapolis opinions which enable them to be harmonized with other decisions. This Note will also indicate why the interdistrict remedy in Indianapolis would today probably be accepted on a lesser standard of segregative intent than the lower courts' opinions indicate.

## II. NORTHERN SEGREGATION

The plight of black pupils in the North began with southern racial attitudes and the great migrations of black families from the South in the first decades of the twentieth century.<sup>15</sup> Great numbers of blacks, discouraged by agricultural conditions in the South and enticed by the industrial North, arrived at their new urban homes and found themselves segregated from their white neighbors.<sup>16</sup> Although some northern legislatures had enacted facially segregative laws,<sup>17</sup> most northern segregation was the result of private discrimination, poverty, and a strong cultural identity creating distinct black metropolitan ghettos.<sup>18</sup>

Today, this isolation is perpetuated in school districts where there exists a strong policy to send children to schools near their homes: "[I]t is becoming apparent that perhaps the primary cause of . . . segregation in urban schools is the socio-economic conditions of the Negro. . . . Segregation results from adherence to the neighborhood school assignment policy."<sup>19</sup> City schools become even more racially identifiable as a result of "white flight"—the fleeing of white families from inner cities to outlying areas. This type of school segregation, called *de facto* segregation, is racial separation caused by forces unconnected to any purposeful state action<sup>20</sup> and as such has traditionally not been considered amenable to remedy. De

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<sup>15</sup>See AFRO-AMERICAN HISTORY: PRIMARY SOURCES 249-51 (T. Frazier ed. 1970).

<sup>16</sup>*Id.* "Between the years 1910 and 1920, the black population increased in Detroit by 611.3 per cent, in Cleveland by 307.8 per cent, in Gary (Indiana) by 1,283.6 per cent, in Chicago by 148.2 per cent." *Id.* at 249.

<sup>17</sup>*Keyes v. School District No. 1: Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L.L. REV. 124, 124 (1974).

<sup>18</sup>See Spear, *The Origins of the Urban Ghetto, 1870-1915*, in 2 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 153 (1971).

<sup>19</sup>40 N.Y.U.L. REV., *supra* note 10, at 290.

<sup>20</sup>J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 567-68 (1978). Racially identifiable schools create the impression of a dual system.

jure segregation, on the other hand, is created by intentional state action and is unconstitutional and remediable. The equal protection issues in northern school desegregation cases, therefore, revolve around whether the current duality in schools was caused by the more "benign" de facto segregation or by de jure segregation.

The emphasis upon finding segregative intent in northern cases was born in the Supreme Court decision in *Keyes v. School District No. 1, Denver*,<sup>21</sup> the first major northern school case to reach the Court after *Brown I*. According to the majority in *Keyes*, only those acts that have the sanction of law and are intentionally segregative violate the Constitution.<sup>22</sup> Therefore, the focus of a court's scrutiny in a northern case must be upon the actions which created a segregated school system.

Northern schools sometimes became segregated by laws that either required or permitted segregation by their specific terms, as in the Kansas and Delaware lower court cases which led to *Brown I*.<sup>23</sup> This situation makes the determination of the offense fairly simple. But intentionally segregative state action is much harder to find when facially neutral state action has created a segregated condition or aggravated existing de facto segregation. Such apparently neutral acts as gerrymandered attendance boundaries,<sup>24</sup> optional attendance zones,<sup>25</sup> free transfer systems,<sup>26</sup> and faculty segregation<sup>27</sup> have been imposed by local school boards, not by state statute.<sup>28</sup> State

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<sup>21</sup>413 U.S. 189 (1973).

<sup>22</sup>*Id.* at 198.

<sup>23</sup>*Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951); *Belton v. Gebhart*, 32 Del. Ch. 343, 87 A.2d 862 (1952).

<sup>24</sup>Gerrymandering the attendance boundaries for each school building on racial lines to maintain segregation is a fairly common practice. *See, e.g.*, *Adams v. United States*, 620 F.2d 1277, 1281 (8th Cir.), *cert. denied*, 101 S. Ct. 88 (1980); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1056 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977).

<sup>25</sup>Optional attendance zones give students in racially mixed residential areas the opportunity to select the school of their choice; the student's decision is usually based upon the predominant racial composition of the facility. *E.g.*, *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 668 (S.D. Ind. 1971).

<sup>26</sup>Students are able to attend schools outside their attendance zones and even outside their districts when a school board has instituted a system of free transfer. *E.g.*, *Cisneros v. Corpus Christi Independent School Dist.*, 467 F.2d 142, 149 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973) (crossing attendance lines); *Evans v. Buchanan*, 393 F. Supp. 428, 433 (D. Del. 1975) (crossing district lines).

<sup>27</sup>Once a dual system becomes apparent, it is not uncommon for a school board to assign teachers to buildings in accordance with their own race. *E.g.*, *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971); *Davis v. School Dist.*, 309 F. Supp. 734, 743 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

<sup>28</sup>For the purpose of charging "state action" under the fourteenth amendment, local school boards are considered agents of the state. *See Cooper v. Aaron*, 358 U.S. 1,

legislatures have also become involved by formulating laws which change or in some manner affect school district boundaries.<sup>29</sup> These kinds of state action will often have a disproportionate impact upon blacks, creating the appearance of a dual school system; however, absent a showing of an intent or purpose to racially segregate, no remediable cause of action exists.<sup>30</sup>

The problem in northern cases becomes further compounded if, once *de jure* segregation within one district has been found, a desegregation order within that district would be futile. This situation typically occurs when a court believes that an intradistrict remedy either would accelerate "white flight" and create an identifiably black district<sup>31</sup> or would merely rearrange an already racially distinct district.<sup>32</sup> In view of this dilemma, the utility of fashioning an interdistrict metropolitan remedy becomes apparent. Under an interdistrict remedy, adjacent, usually white, districts are united in some manner with the offending district in order to cure the constitutional violation. The Indianapolis case revolves around this adjunct of the northern desegregation problem and exemplifies many of the problems surrounding the imposition of an interdistrict remedy.

### III. BACKGROUND OF THE INDIANAPOLIS CASE

#### A. *Segregation and Education in Indiana*

Prior to its becoming a state, Indiana was a part of the Northwest Territory, an immense area of land ceded to the United States

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16 (1958). In Indiana, actions by school corporations are state actions because the schools are organized by the state's Department of Public Instruction. The state public school system is a state institution, thereby making the individual corporations agents of the state. *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 659 (S.D. Ind. 1971).

<sup>29</sup>*United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *Higgins v. Board of Educ.*, 508 F.2d 779 (6th Cir. 1974); *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975).

<sup>30</sup>*See Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 208 (1973). "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Id.* (emphasis in original).

<sup>31</sup>*United States v. Board of School Comm'rs*, 332 F. Supp. 655, 676 (S.D. Ind. 1971). *See* text accompanying notes 68-69 *infra*.

<sup>32</sup>*Milliken v. Bradley*, 418 U.S. 717 (1974). In the *Milliken* case, the District Court abruptly rejected the proposed Detroit-only plans on the grounds that "while [they] would provide a racial mix more in keeping with the Black-White proportions of the student population [they] would accentuate the racial identifiability of the [Detroit] district as a Black school system, and would not accomplish desegregation." *Id.* at 738-39.

by Virginia.<sup>33</sup> Pro-slavery forces existed in the Indiana area, even before the territorial cession, as a result of a combination of French, British, and Virginian colonial influences.<sup>34</sup> The pro-slavery factions were not defeated until statehood in 1816 when the state constitutional convention adopted an anti-slavery clause.<sup>35</sup> But old racial attitudes were slow to die, and the Indiana General Assembly, as well as the constitutional conventions of 1816 and 1851, promulgated patently discriminatory statutes, some of which were not repealed until 1965.<sup>36</sup> Blacks were separated from whites in most public places until after World War II<sup>37</sup> and were often the subject of private discrimination in the housing market.<sup>38</sup> Early Indiana legislators even went so far as to pass laws to exclude blacks and mulattos from the state altogether.<sup>39</sup> With this historical background, the problems that arose in education are easily understandable.

In Indiana, the right to education was traditionally considered a right conferred only upon white citizens of the state.<sup>40</sup> It was not until 1869, subsequent to the adoption of the fourteenth amendment to the United States Constitution, that education had to be provided for blacks,<sup>41</sup> and the initial legislation required separate schools for black students.<sup>42</sup> In 1877, the policy was made permissive by allowing integration when separate schools were not available.<sup>43</sup> In 1949, legislation was adopted which prohibited school segregation and included a gradual desegregation plan.<sup>44</sup> But by then, *de jure* segregation had already done its damage.

<sup>33</sup>G. COTTMAN, CENTENNIAL HISTORY AND HANDBOOK OF INDIANA 37 (1915).

<sup>34</sup>B. BOND, JR., THE CIVILIZATION OF THE OLD NORTHWEST 154 (1934).

<sup>35</sup>*Id.* at 171. The anti-slavery clause that was adopted was from the Government Ordinance of 1787 which formed the basic colonial structure of the Territory. *Id.* at 10, 171. The clause had already been adopted in Ohio. *Id.* at 171.

<sup>36</sup>*Indianapolis I*, 332 F. Supp. at 660. One law, not repealed until 1965, declared marriages between whites and blacks void. 1 REV. STAT. ch. 67, § 2 (1852), *cited in* 332 F. Supp. at 660.

<sup>37</sup>332 F. Supp. at 661. Such places included public hospitals, theatres, and state parks. *Id.*

<sup>38</sup>*Id.* at 662-63.

<sup>39</sup>IND. CONST. of 1851, art. XIII, § 1 (1852), *cited in* 332 F. Supp. at 661.

<sup>40</sup>*See, e.g.*, *Lewis v. Henley*, 2 Ind. 332, 334-35 (1850).

<sup>41</sup>*Indianapolis I*, 322 F. Supp. at 663-64.

<sup>42</sup>Act of May 13, 1869, ch. 16, § 3, 1869 Ind. Acts 41. *See note 9 supra.*

<sup>43</sup>*See note 47 infra.*

<sup>44</sup>Act of Mar. 8, 1949, ch. 186, 1949 Ind. Acts 603 (currently codified at IND. CODE § 20-8.1-2-1 (1976)). This Act reads in part:

[I]t is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex . . . and to abolish, eliminate and prohibit

The effect of the discriminatory legislative acts was most noticeable in larger urban areas, particularly Gary and Indianapolis, where the black populations were more concentrated and isolated. Although the school boards of both Gary and Indianapolis adopted policies that seemed to foster segregation, only Indianapolis has ultimately been the subject of a desegregation order.<sup>45</sup> The reason the focus has been on Indianapolis becomes apparent when one looks at the Indianapolis schools apart from the rest of the state.

### B. Segregation in Indianapolis Schools

From the beginning of state-supported education in Indiana, de jure elementary school segregation existed in Indianapolis;<sup>46</sup> however, between 1877 and 1927, blacks and whites were allowed to go to the high school of their choice. Indianapolis high schools were integrated during this period because the city had no separate high schools for blacks, and the 1877 legislative amendment to the segregation statute allowed integration if there were no separate schools.<sup>47</sup> In 1927, at the instigation of the Indianapolis Chamber of Commerce, Crispus Attucks High School was opened, and all black high school students were compelled to attend that school regardless of the distance they were required to travel.<sup>48</sup> This new facility solidified and perpetuated the dual school system in Indianapolis. The school board failed to take advantage of the gradual desegregation plan offered by the legislature in 1949<sup>49</sup> and thus later encountered problems that might have been avoided.

One of the critical dates in the Indianapolis case was 1954 when *Brown I* was decided.<sup>50</sup> The Indianapolis school board, although adopting the policy of the 1949 statute, did not incorporate the true spirit

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segregated and separate schools or school districts on the basis of race, creed or color . . . .

*Id.* at § 1, 1949 Ind. Acts at 604. The desegregation of previously segregated schools was to be accomplished on a grade-by-grade basis so that effects of discrimination would be phased out rather than flatly abandoned. *Id.* at § 3, 1949 Ind. Acts at 604.

<sup>45</sup>An action was brought against the Gary schools in 1963, but the complaint was dismissed for lack of a constitutional violation. Schools in the city were racially identifiable, but the court of appeals attributed this circumstance to de facto causes and held that there was no intent to discriminate. *Bell v. School City of Gary*, 324 F.2d 209, 213 (7th Cir. 1963).

<sup>46</sup>*Indianapolis I*, 332 F. Supp. at 664.

<sup>47</sup>*Id.* The amendment stated in pertinent part "[t]hat in case there may not be provided separate schools for the colored children, then such colored children shall be allowed to attend the public schools with white children." Act of Mar. 5, 1877, ch. 81, § 1, 1877 Ind. Acts 124.

<sup>48</sup>332 F. Supp. at 664.

<sup>49</sup>See note 44 *supra*.

<sup>50</sup>332 F. Supp. at 657-58.

of school desegregation into its actions. Construction policies and transfer plans tended to minimize any efforts at desegregation by a board which, until 1949, had built separate schools in racially distinct neighborhoods and had completely segregated the schools' faculties.<sup>51</sup> In the 1952-53 academic year, the board froze attendance boundaries along racially segregated residential lines.<sup>52</sup> By 1954, the Indianapolis system was in the throes of nineteenth and twentieth century de jure segregation and could well have been one of the test cases in *Brown I*.

The other crucial date in the litigation, as in most desegregation cases,<sup>53</sup> was the time of trial in 1968. Between 1954 and 1968, the Indianapolis school board's policies tended to maintain the dual nature of the 1954 system as well as create new segregative conditions. As racially identifiable neighborhoods grew, the school board added new schools or enlarged existing schools in line with the racial composition of the neighborhood.<sup>54</sup> Thus, racially identifiable schools were created and perpetuated. Other segregative actions by the school board included using optional attendance zones,<sup>55</sup> busing students to same-race schools when other schools were closer,<sup>56</sup> and changing attendance boundaries approximately 350 times, with ninety percent of those changes furthering segregation.<sup>57</sup> The board was not wholly to blame for the perpetuation of the dual system within IPS during this period. The board faced a radically changing racial population,<sup>58</sup> new low-rent housing projects,<sup>59</sup> and lack of cooperation by local officials with respect to zoning and use of city land for schools.<sup>60</sup> However, only the school board's actions became the initial focus of litigation that lasted twelve years.

### C. *The Indianapolis Litigation*

In 1968, the United States Department of Justice brought suit in the federal district court for the Southern District of Indiana against the Indianapolis school board alleging denial of equal protec-

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<sup>51</sup>*Id.* at 665-66.

<sup>52</sup>*Id.*

<sup>53</sup>The 1979 Supreme Court opinions concerning Columbus, and Dayton, Ohio, give less weight to the condition of a school system at the time of trial if de jure segregation existed in 1954 and had not been completely dismantled at the time of trial. See text accompanying notes 149-55 *infra*.

<sup>54</sup>332 F. Supp. at 667-69.

<sup>55</sup>*Id.* at 668.

<sup>56</sup>*Id.* at 669.

<sup>57</sup>*Id.* at 670.

<sup>58</sup>*Id.* at 672-73.

<sup>59</sup>*Id.* at 673-74.

<sup>60</sup>*Id.* at 674.

tion of the laws.<sup>61</sup> In light of the actions taken by the board both before and after *Brown I*, the trial court had no difficulty inferring the necessary segregative intent and holding that the board, acting as agent of the state of Indiana, was maintaining a de jure segregated school system at the time of trial.<sup>62</sup> The decision upon the issue of segregation was quickly rendered credible by its affirmation in the Seventh Circuit Court of Appeals and the subsequent denial of certiorari by the Supreme Court.<sup>63</sup> The *remedy* suggested in *Indianapolis I* by District Judge Dillin was the real source of controversy: Proper desegregation of the Indianapolis public schools would be best achieved by an interdistrict remedy.<sup>64</sup>

An interdistrict remedy had rarely been suggested or ordered before 1971.<sup>65</sup> District Judge Dillin, to test the efficacy of such relief, established an interim order for immediately dismantling the dual system within the Indianapolis district (IPS) and required the plaintiff to secure the joinder of outlying school districts as parties defendant to better facilitate the shaping of an interdistrict remedy.<sup>66</sup> The court's rationale was that desegregation within the district itself just would not be effective—"in the long haul, it won't work."<sup>67</sup> Because 98.5% of the black population of the county lived within IPS,<sup>68</sup> the judge feared that desegregation of only those schools would soon result in an undesirable racial balance of forty percent minority pupils in the schools, leading to increased "white flight."<sup>69</sup> Therefore, combining outer, basically white, districts with IPS would be the most effective remedial measure.

The basis for this preliminary decision was a piece of Indiana legislation passed in 1968, which prevented the growth of the IPS district into predominantly white residential areas. The General

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<sup>61</sup>*Id.* at 656. The Justice Department is empowered to bring an action under the Civil Rights Act of 1964 in school desegregation cases. 42 U.S.C. § 2000c-6(a), (b) (1976).

<sup>62</sup>332 F. Supp. at 677-78.

<sup>63</sup>*See* United States v. Board of School Comm'rs, 474 F.2d 81, 88 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). *See generally* Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case*, 9 IND. L. REV. 897, 932-33 (1976).

<sup>64</sup>332 F. Supp. 680-81.

<sup>65</sup>An interdistrict remedy had been ordered the year before in Arkansas when a white district was forced to annex a smaller black district because the boundaries had been drawn with the intent to segregate. Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1970).

<sup>66</sup>332 F. Supp. at 679-81.

<sup>67</sup>*Id.* at 678.

<sup>68</sup>*Id.* at 663.

<sup>69</sup>*Id.* at 676. Judge Dillin believed that a 40% tipping factor would create an identifiably black district rather than just a dual system. *Id.*

Assembly's action, informally entitled "Uni-Gov,"<sup>70</sup> allowed governmental reorganization in Indiana counties having first-class cities.<sup>71</sup> Indianapolis, being the state's only first-class city, was consolidated with most of the other civil governments in Marion County<sup>72</sup> in order to have a larger pool of resources for metropolitan planning and problem-solving.<sup>73</sup> In Indiana, the boundaries of any school system were traditionally and statutorily coterminous with any annexations to the civil city.<sup>74</sup> However, two weeks before Uni-Gov was approved, the legislature repealed the part of the statute providing for the expansion of school district lines in first-class cities.<sup>75</sup> Thus, IPS remained frozen with the old city boundaries and could not expand to include those outer districts which were, by 1968, becoming identifiably white.<sup>76</sup> The principal controversy after the Supreme Court refused to hear *Indianapolis I* was the legality of the interdistrict remedy which was necessary to overcome the impact of Uni-Gov.

*Indianapolis II*<sup>77</sup> and *Indianapolis III*<sup>78</sup> included the outlying school districts within and without Marion County as added defendants. The district court confirmed its choice of remedy by finding that an Indianapolis-only plan would be unsatisfactory.<sup>79</sup> Further, although the outlying districts had every right to resist school reorganization into one metropolitan system, they were nevertheless required to comply with an interdistrict remedy because the frozen IPS boundary lines made desegregation within the district virtually impossible.<sup>80</sup> District Judge Dillin then granted interim relief from busing blacks out of IPS in order to afford the legislature time to

<sup>70</sup>Consolidated First-Class Cities and Counties Act, ch. 173, 1969 Ind. Acts 357 (codified at IND. CODE §§ 18-4-1-1 to -5-4 (Supp. 1980)).

<sup>71</sup>*Dortch v. Lugar*, 255 Ind. 545, 560, 266 N.E.2d 25, 35 (1971). In this case, the Indiana Supreme Court upheld the constitutionality of the Act. See generally 47 IND. L.J. 101 (1971).

<sup>72</sup>Beech Grove, Lawrence and Speedway were officially excluded for most purposes except for the right to vote in Indianapolis elections. *Indianapolis I*, 332 F. Supp. at 676 n.93.

<sup>73</sup>See 47 IND. L.J. 101, 102 (1971).

<sup>74</sup>Act of Mar. 9, 1931, ch. 94, § 1, 1931 Ind. Acts 291.

<sup>75</sup>IND. CODE §§ 20-3-14-1 to -11 (1976). In these sections, Act of Mar. 6, 1961, ch. 186, 1961 Ind. Acts 101 was amended by Act of Feb. 25, 1969, ch. 52, 1969 Ind. Acts 57.

<sup>76</sup>See 332 F. Supp. at 663.

<sup>77</sup>368 F. Supp. 1191 (S.D. Ind. 1973).

<sup>78</sup>368 F. Supp. 1223 (S.D. Ind. 1973), *rev'd in part, aff'd in part, and remanded*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

<sup>79</sup>*Indianapolis II*, 368 F. Supp. at 1198.

<sup>80</sup>*Id.* at 1203-04. By 1973, the date of *Indianapolis II* and *III*, IPS was already 41.1% black, indicating to Judge Dillin that perhaps the tipping point in the city was much lower than he had originally believed. *Id.* at 1198.

formulate some kind of permanent plan to effect school desegregation in Marion County.<sup>81</sup> On appeal, the Seventh Circuit Court of Appeals reversed the lower court's decision with respect to districts outside Uni-Gov boundaries and remanded the rest of the case<sup>82</sup> for reconsideration in light of the recent Supreme Court decision in *Milliken v. Bradley*.<sup>83</sup>

In *Milliken*, the Court reversed an interdistrict metropolitan remedy in Detroit and demanded that an interdistrict constitutional violation be shown before such relief could be granted. "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."<sup>84</sup> Therefore, on remand of the Indianapolis case, the district court was required to find not only segregative effect but also an actual constitutional violation causing that condition.

In the 1975 district court decision in *Indianapolis IV*,<sup>85</sup> the Housing Authority of the City of Indianapolis (HACI) was an added defendant. The agency had been joined because all low-rent housing projects built under its auspices were within the IPS boundaries although it had the authority to build within five miles of the city limits.<sup>86</sup> Further evidence was heard on "the effect . . . of housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS."<sup>87</sup> Ultimately, Judge Dillin held that a limited interdistrict remedy<sup>88</sup> was warranted by the additional evidence and

<sup>81</sup>*Id.* at 1208. The court outlined possible alternatives available to the legislature in its *Indianapolis III* supplemental memorandum. *Indianapolis III*, 368 F. Supp. 1223.

<sup>82</sup>503 F.2d 68, 86 (7th Cir. 1974).

<sup>83</sup>418 U.S. 717 (1974).

<sup>84</sup>*Id.* at 745.

<sup>85</sup>419 F. Supp. 180 (S.D. Ind. 1975).

<sup>86</sup>*Id.* at 182.

<sup>87</sup>*Id.* This evidence was heard in accordance with Justice Stewart's concurring opinion in *Milliken*:

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 laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

418 U.S. at 755.

<sup>88</sup>*Indianapolis IV*, 419 F. Supp. at 183. The remedy was limited to transferring black students out of IPS. The Indiana legislature by that time had passed a law that accommodated such a remedy with the transferor district paying the transferee districts for tuition. IND. CODE §§ 20-8.1-6.5-1 to -10 (1976).

the "violation" of Uni-Gov, and he enjoined HACI from locating any more housing within IPS boundaries.<sup>89</sup> This decision satisfied the court of appeals. The Supreme Court, however, caught in a revolution of the law of equal protection, vacated and remanded the case for reconsideration in light of two then recent decisions concerning discriminatory intent.<sup>90</sup>

#### IV. THE INDIANAPOLIS REMEDY AND SEGREGATIVE INTENT

The Supreme Court referred the lower courts to the equal protection cases of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>91</sup> and *Washington v. Davis.*<sup>92</sup> Neither of these cases deal with school desegregation,<sup>93</sup> but both were important with respect to the determination of segregative intent.

In view of *Arlington Heights* and *Davis*, the discriminatory intent in IPS's practices and the disproportionate impact of Uni-Gov and HACI actions could not support an interdistrict remedy without a showing of a *purposeful* interdistrict violation.<sup>94</sup> In *Indianapolis V.*<sup>95</sup> therefore, the district court was required to look for segregative

<sup>89</sup>419 F. Supp. at 183, 186.

The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein . . . .

*Id.* at 182-83.

<sup>90</sup>*Indianapolis IV*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded sub nom. Bowen v. United States*, 429 U.S. 1068 (1977), *cert. denied*, 439 U.S. 824 (1978). Circuit Judge Tone's dissent in the court of appeals opinion foreshadowed the subsequent Supreme Court decision: 541 F.2d at 1224.

<sup>91</sup>429 U.S. 252 (1977).

<sup>92</sup>426 U.S. 229 (1976).

<sup>93</sup>*Arlington Heights* involved a claim of residential zoning discrimination. In *Washington v. Davis*, the plaintiffs alleged discrimination in the hiring practices of the Washington, D.C. metropolitan police department.

<sup>94</sup>The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. at 240 (1976).

<sup>95</sup>456 F. Supp. 183 (S.D. Ind. 1978).

intent in those acts which tended to prevent effective metropolitan desegregation. The court did not have to find that segregative intent was the *sole* motivation for the acts—the existence of *any* segregative intent would support an interdistrict remedy.<sup>96</sup>

The court's burden was further lessened because there was no need to find that the outer districts had intentionally contributed to or caused the IPS school segregation. This requirement, established by the Court in *Milliken*,<sup>97</sup> was obviated by the Indiana General Assembly which had provided an interdistrict transfer remedy that could be imposed without culpability of the transferee districts.<sup>98</sup> Thus, *Indianapolis V* dealt exclusively with finding segregative intent in Uni-Gov and HACI actions.

There were neither facially discriminatory statutes nor express statements of racial purpose present so the district court examined Uni-Gov and HACI using methods by which intent could be inferred. The court began its inquiry by examining the disproportionate impact of both forces.<sup>99</sup> It reasoned:

“The impact of the official action—whether it ‘bears more heavily on one race than another,’ . . . —may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .”<sup>100</sup>

After looking at impact, the trial court, using criteria suggested in *Arlington Heights*, examined the passage of Uni-Gov for evidence of a segregative purpose.<sup>101</sup> This standard generally guides a court in

<sup>96</sup> [A plaintiff is not required] to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one.

*Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. at 265 (footnote omitted).

<sup>97</sup>*Milliken v. Bradley*, 418 U.S. at 745. In *Milliken*, the Court stated that a constitutional violation could be proven either by discriminatory acts in one district causing segregation in an adjacent district or by racially identifiable district lines drawn by the state. *Id.*

<sup>98</sup>*Indianapolis V*, 456 F. Supp. at 190-91. The statute provides that pupil transfers can be effectuated if: (1) the transferor corporation has violated equal protection, (2) a unitary system cannot be implemented within the offending corporation, and (3) the court is compelled to order such transfers under the fourteenth amendment. IND. CODE § 20-8.1-6.5-1 (1976).

<sup>99</sup>456 F. Supp. at 185.

<sup>100</sup>*Id.* (quoting 429 U.S. at 266).

<sup>101</sup>The *Arlington Heights* case suggests that, besides impact, five other factors could be relevant to inferring intent: (1) the historical background of the decision,

considering the "totality of the relevant facts"<sup>102</sup> from which it can glean an inference of intent. In the instance of Uni-Gov, there was convincing evidence that segregation had been a factor in the decision to freeze the IPS boundaries. First, the court recounted the history of white-black relations in Indiana as well as that of Indianapolis' dual school system.<sup>103</sup> It then considered the sequence of events leading to the adoption of the Uni-Gov act and emphasized that the partial repeal of the statute allowing expansion of school boundaries occurred just prior to passage of Uni-Gov.<sup>104</sup> Moreover, the court heard testimony to the effect that the act would not have been passed if IPS were to grow with the city.<sup>105</sup> Next, District Judge Dillin examined substantive departures from prior policy. The legislature had been eliminating remnants of racially discriminatory laws since 1949 when it appeared to reverse that progress by repealing the pertinent section of the annexation statute.<sup>106</sup> From this pattern of behavior, the district court found that Uni-Gov was passed, at least in part, with the purpose of maintaining interdistrict school segregation.<sup>107</sup>

The court found segregative intent in the actions of HACI in a different manner. Using a test employed by the Sixth Circuit<sup>108</sup> and other courts of appeals, District Judge Dillin held that a presumption of segregative intent was raised because the "natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS."<sup>109</sup> HACI failed to affirmatively establish that its policies were racially neutral, and it too was found to have committed an interdistrict constitutional violation.<sup>110</sup>

To remedy these intentional violations, the district court enjoined HACI from further building within IPS and reinstated its 1975 order to transfer a certain percentage of blacks from IPS to the

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(2) any "specific sequence of events leading up to the challenged decision," (3) substantive departures in policy, (4) departures from usual procedure, and (5) any administrative or legislative history. 429 U.S. at 267-68.

<sup>102</sup>Washington v. Davis, 426 U.S. at 242.

<sup>103</sup>456 F. Supp. at 186-87.

<sup>104</sup>*Id.* at 187.

<sup>105</sup>*Id.* This testimony was given by then-Mayor Richard Lugar.

<sup>106</sup>*Id.* at 188.

<sup>107</sup>*Id.*

<sup>108</sup>See NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

<sup>109</sup>456 F. Supp. at 189.

<sup>110</sup>*Id.*

outlying districts within Uni-Gov's boundaries (the county lines).<sup>111</sup> The court determined the number of pupils to be transferred by calculating approximately how many children would have gone to schools in outlying districts absent the HACI violation.<sup>112</sup>

Except with respect to two districts within Uni-Gov limits,<sup>113</sup> the Seventh Circuit Court of Appeals affirmed the lower court's order<sup>114</sup> by holding that the interdistrict remedy was justified because of the violations by both Uni-Gov and HACI.<sup>115</sup> The court also stated that the form of the order was proper in light of the "specific incremental effects" of HACI's actions.<sup>116</sup> The court of appeals emphasized that even though there would be some difficulty determining the exact segregative effects attributable to Uni-Gov alone, a remedy could have been ordered commensurate with the impact.<sup>117</sup> The opinion further indicated that the lower court had the power, if necessary, to transfer students from outlying districts into IPS because the state action had had interdistrict effects.<sup>118</sup> Whether these measures will be implemented is difficult to determine. Nonetheless, the district court's order was deemed effective on October 6, 1980, when the Supreme Court denied certiorari.<sup>119</sup>

## V. SCHOOL DESEGREGATION AND SEGREGATIVE INTENT

### A. Generally

The various dispositions of the Indianapolis case demonstrate the difficulty inherent in finding segregative intent in desegregation cases. In accordance with *Keyes*, segregative intent must be found in order to establish a constitutional violation.<sup>120</sup> Courts have had little difficulty discovering segregative intent in the South because of

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<sup>111</sup>*Id.* at 191.

<sup>112</sup>*Id.* at 190. This approach had recently been approved by the Supreme Court in *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977). The Court remanded the case to the district court to limit the desegregation remedy to effect the school distribution that would have been present without the constitutional violation. *Id.* at 420-21.

<sup>113</sup>The Beech Grove and Speedway judgments were vacated and remanded to determine whether HACI had jurisdiction to operate in those locales. *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1116 (7th Cir.), *cert. denied*, 101 S. Ct. 114, 115 (1980).

<sup>114</sup>*Id.* at 1117.

<sup>115</sup>*Id.* at 1111.

<sup>116</sup>*Id.* at 1112-14.

<sup>117</sup>*Id.* at 1113.

<sup>118</sup>*Id.* at 1115.

<sup>119</sup>*Bowen v. Buckley*, 101 S. Ct. 114 (1980).

<sup>120</sup>See text accompanying notes 21 & 22 *supra*.

numerous facially discriminatory actions.<sup>121</sup> To date, however, the Court has not explained how lower courts in northern cases are to find segregative intent absent such actions. Instead, the Court refers them to non-school cases such as *Arlington Heights*<sup>122</sup> (housing/zoning) and *Washington v. Davis*<sup>123</sup> (employment). Thus, lower tribunals are left to their own devices in finding purposeful segregation in school cases.

Another reason courts have experienced difficulty finding segregative intent in school cases is that the case law is still evolving. The body of decisions regarding this requirement is growing but is by no means creating a logical pattern.

1. *Methods of Finding Intent.*—Courts and commentators generally discern two separate approaches for finding segregative intent: the subjective method and the objective method. However, these labels are actually misnomers. The categories are better named for the type of evidence used by the courts in finding segregative intent: direct evidence and indirect evidence.

The purported subjective approach for finding discriminatory intent involves the examination of the "subjective" motivation of the officials promulgating the actions.<sup>124</sup> Intent is established under this theory by means of direct evidence of discriminatory motives. Such evidence includes facially discriminatory statutes and overt expressions of racial motivation made by the persons involved in the decision-making.<sup>125</sup> However, it is highly unlikely that there actually is a test for subjective motivation; segregative intent *is* subjective motivation. Facially segregative actions are automatically unconstitutional because segregation is not a proper legislative goal. When the motivation is not readily apparent, however, other factors have to be entered into evidence from which an actor's subjective motivation, or intent, can be inferred.<sup>126</sup> Courts then use indirect indicia of intent which can be used as evidence of motivation.

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<sup>121</sup>See generally text accompanying notes 9 & 10 *supra*.

<sup>122</sup>429 U.S. 252 (1977).

<sup>123</sup>426 U.S. 229 (1976).

<sup>124</sup>See Comment, *Proof of Racially Discriminatory Purpose under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HARV. C.R.-C.L.L. REV. 725, 733 (1977); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 321 (1976).

<sup>125</sup>*Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (pattern of segregative action included "statements of express intention not to counter anti-integration sentiment").

<sup>126</sup>One court has expressly stated this concept. "[W]e treat the District Court's finding of a lack of racial motivation as irrelevant in the face of his findings of foreseeable effect [based on objective evidence]." *Hart v. Community School Bd. of Educ.*, 512 F.2d 37, 51 (2d Cir. 1975).

Indirect evidence of segregative intent includes such acts as gerrymandered boundary lines and free transfer systems. These acts can be motivated by legitimate objective educational reasons as well as by covert segregative intent, hence the term "objective" approach. However, when direct evidence of discrimination is not available, courts must rely on this indirect evidence to infer segregative intent. Thus, it is apparent that courts do not rely on subjective or objective approaches to find segregative intent. Rather, they rely upon the two types of evidence these approaches are based on.

Finding intent from indirect evidence is the most commonly used approach in northern desegregation cases.<sup>127</sup> This method has given rise to several so-called "objective" tests and is, for that reason, the more successful procedure for finding segregative purpose in widely differing fact situations. The analysis using indirect evidence has been called "objective intent,"<sup>128</sup> "institutional intent,"<sup>129</sup> the "foreseeability test,"<sup>130</sup> "cumulative violation,"<sup>131</sup> "the *Omaha* presumption,"<sup>132</sup> and even "totality of the facts" test.<sup>133</sup> Regardless of the name appended to it, the approach is essentially the same: The court looks at what was done, how it was done, and who was affected.

One of the indirect analyses that has been used successfully is whether segregation or maintenance of existing segregation was a natural, foreseeable result of the official action.<sup>134</sup> Another of the more comprehensive indirect analyses is for a court to look at patterns of official conduct, such as drawing school attendance lines that maintain or increase segregation<sup>135</sup> or planning school construction.<sup>136</sup> Such patterns are not mutually exclusive, and many practices that tend to segregate are often combined and viewed as a whole. For such a case, the decision in *Washington v. Davis*<sup>137</sup> suggests that "an invidious discriminatory purpose may often be inferred from the

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<sup>127</sup>See, e.g., cases cited notes 134-36 & 141 *infra*.

<sup>128</sup>See Note, *supra* note 124, at 328.

<sup>129</sup>*Id.* at 334.

<sup>130</sup>See Comment, *supra* note 124, at 732.

<sup>141</sup>*Id.* at 734.

<sup>132</sup>*Id.* at 735.

<sup>133</sup>Note, *Finding Intent in School Segregation Constitutional Violations*, 28 CASE W. RES. L. REV. 119, 162 (1977).

<sup>134</sup>*NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1047 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *United States v. School Dist.*, 521 F.2d 530, 535 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Hart v. Community School Bd. of Educ., N.Y. School Dist. #21*, 512 F.2d 37, 50 (2d Cir. 1975); *Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

<sup>135</sup>*Booker v. Special School Dist. No. 1, Minneapolis*, 351 F. Supp. 799, 808 (D. Minn. 1972).

<sup>136</sup>*Morgan v. Kerrigan*, 509 F.2d at 592-93.

<sup>137</sup>426 U.S. 229 (1976).

totality of the relevant facts.”<sup>138</sup> Similarly, a court can find that a school board was motivated, at least in part, by a segregative purpose by looking for “institutional intent.” This route is very much like the one used in *Arlington Heights*<sup>139</sup> and *Indianapolis V* except that the court looks solely at the acts of the school board and at whether a less segregative alternative is available absent a strong educational justification for the choice made.<sup>140</sup> The various tests also subsume a method known as “the *Omaha* presumption” in which a presumption of intent arises when official acts or omissions have created a foreseeably segregative condition. The presumption may only be rebutted if the defendant board can establish that discriminatory intent was not a motivating factor.<sup>141</sup> Though this method was used in *Indianapolis V* for the HACI offense, the Supreme Court questioned the validity of this presumption in 1979.<sup>142</sup> It appears, therefore, that the prior success of this test is probably attributable to the weight of the indirect evidence.

Although each test has distinctive features, they are virtually interchangeable and often not clearly distinguishable. Rather than searching for the “best” method or waiting for the Supreme Court to select one, courts have required plaintiffs to bring forth as much evidence as possible that appears to indicate segregation. The courts have then judged that evidence by whatever method suits their tastes or as equitably as possible. Generally, school boards which have engaged in a great number of suspect acts will be required to dismantle the effects of those acts. Fewer and unconnected actions will usually not require a remedy because they are often explainable by *de facto* conditions. Whatever approach is used, the Supreme Court has usually demonstrated its amenability to the approach by denying certiorari.<sup>143</sup>

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<sup>138</sup>*Id.* at 242.

<sup>139</sup>See note 101 *supra*.

<sup>140</sup>See Note, *supra* note 124, at 334-35.

<sup>141</sup>*United States v. School Dist.*, 521 F.2d 530, 535-36 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). See generally Note, *Intent to Segregate: The Omaha Presumption*, 44 GEO. WASH. L. REV. 775 (1976); Comment, *supra* note 124, at 735.

<sup>142</sup>Referring to the Sixth Circuit’s emphasis upon *Oliver v. Michigan State Bd. of Educ.*, the Court said:

We have never held that as a general proposition the foreseeability of segregative consequences makes out a *prima facie* case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants.

*Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536 n.9 (1979).

<sup>143</sup>See cases cited notes 125, 134 & 171.

2. *Recent Trends in the Supreme Court.*—The Court's tacit approval speaks well of the lower courts' treatment of such a sensitive issue, but it also indicates wise restraint from establishing any one standard as the rule. Because of the great disparity in the history, school organization, disputed official acts, and other facts relevant to each case, a single rule would be virtually impossible to formulate.

The Court's restraint is even more apparent when one considers some of the decisions from the Fifth Circuit. Because it is situated in the South, this particular court of appeals has had to deal with numerous school desegregation cases.<sup>144</sup> The constitutional issue, as that court views it, does not necessarily depend upon the de jure/de facto distinction drawn by the Supreme Court in *Keyes*. The court in *Cisneros v. Corpus Christi Independent School District*<sup>145</sup> stated that "while [discriminatory motive and purpose] may reinforce a finding of effective segregation, [they] are not necessary ingredients of constitutional violations in the field of public education. We . . . hold that the racial and ethnic segregation that exists . . . is unconstitutional—not de facto, nor de jure, but unconstitutional."<sup>146</sup>

The *Keyes* decision, requiring intent, would seem to preclude reliance on *Cisneros*. However, the Court declined to hear *Cisneros* four days after the decision in *Keyes* was handed down. Commentators<sup>147</sup> and at least two Justices<sup>148</sup> have suggested either that the de jure/de facto distinction has no merit or that de facto segregation should be dismantled also. Generally, their arguments are the same: Segregation is just as harmful whether it is de facto or de jure.

Although the Supreme Court has never espoused the Fifth Circuit's approach, two recent cases have diminished the significance of the de jure/de facto distinction to some extent. In *Columbus Board of Education v. Penick*<sup>149</sup> and *Dayton Board of Education v. Brinkman (Dayton II)*,<sup>150</sup> the Court in essence ruled that if racially identifiable schools existed in 1954 and still exist at time of trial, the school board has failed in its affirmative duty to dismantle the dual

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<sup>144</sup>See generally F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH xii, 565-72 (1978).

<sup>145</sup>467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973).

<sup>146</sup>*Id.* at 149.

<sup>147</sup>See Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); 40 N.Y.U.L. REV., supra note 10; Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304 (1973).

<sup>148</sup>In *Keyes*, both Justices Powell and Douglas decried the use of the distinction because it did not ameliorate segregation caused by a neighborhood school policy where there was private housing discrimination. 413 U.S. at 214-53.

<sup>149</sup>443 U.S. 449 (1979).

<sup>150</sup>443 U.S. 526 (1979).

system, and an appropriate remedy must be imposed.<sup>151</sup> The determination of present intent in the Columbus and Dayton districts was based upon the foreseeable consequences and impact of official actions which showed that the boards were perpetuating past segregative practices rather than eliminating them.<sup>152</sup> This method of finding present intent was approved as early as 1973, in *Keyes*, when the Court stated that:

a connection between past segregative acts and present segregation may be present even when not apparent . . . . Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition . . . .<sup>153</sup>

The approach in *Columbus* and *Dayton II* is best described in a recent review:

The approach to . . . school desegregation that the Supreme Court endorses . . . has four elements: first, the existence of identifiably black schools in the school system in 1954[;] . . . [s]econd, a legal determination that the existence of such schools in 1954 . . . [created] a continuing constitutional duty to eliminate identifiably black schools[;] . . . [t]hird, an intensive and detailed examination of school system actions since 1954 in order to determine whether the school system has taken all feasible actions to eliminate the identifiably black schools[;] . . . [f]ourth, the conclusion that the only way to eliminate the identifiably black character of some schools is to modify the neighborhood school policy through appropriate racial transfers . . . so that no school has a distinctly black enrollment . . . .<sup>154</sup>

The Court's current view, then, is that when a district combines the vestiges of a 1954 de jure situation with actions which have the foreseeable consequence of disparate racial impact, the system has not been effectively dismantled. The Court may have "accepted" any mode of finding intent so long as a lower court's decision was not clearly erroneous, but its focus since *Brown I* has been primarily

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<sup>151</sup>443 U.S. at 461; 443 U.S. at 541.

<sup>152</sup>443 U.S. at 464; 443 U.S. at 536 n.9.

<sup>153</sup>413 U.S. at 211.

<sup>154</sup>Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 2-3 (1980).

upon a school board's affirmative duty to dismantle a dual system rather than the board's purpose in maintaining it.<sup>155</sup>

It is with reference to this attitude that the Indianapolis interdistrict remedy can be understood. Circuit Judge Tone's 1979 dissent in *Indianapolis V* is probably more correct than the majority's rationale when he states that "today's decision cannot, I think, be reconciled with the distinction between *de jure* and *de facto* segregation."<sup>156</sup> The Court's current trend away from the importance of the *de jure/de facto* distinction explains part of the reason why the Indianapolis remedy was not overturned. The Court's disposition of the Indianapolis case is further understood when one considers other interdistrict cases.

### B. Interdistrict Remedies

1. *Interdistrict Remedy and Segregative Intent.*—*Milliken v. Bradley*<sup>157</sup> is the first and essentially the only opinion by the Supreme Court on the interdistrict remedy and public schools. According to *Milliken*, plaintiffs must show an interdistrict violation with an interdistrict effect in order to obtain such a remedy.<sup>158</sup> Typically, intentional acts of an adjacent school district or racially drawn district lines constitute such a violation and elicit the necessary effect.<sup>159</sup> In *Milliken*, the Court could find neither type of violation.<sup>160</sup> Detroit, therefore, had to dismantle its own *de jure* system, but as a district it remained identifiably black.<sup>161</sup>

Many courts have tried to avoid this result, especially in the North where urban areas have a great concentration of minorities. Their cure for the problem has often been to initially suggest, and even order, interdistrict relief as soon as they find that the "city" district is operating a dual system. The interdistrict actions found to support the remedy generally fall into one, if not both, of the *Milliken* categories—district actions or legislative redistricting.

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<sup>155</sup>*Keyes v. School Dist. No. 1, Denver*, 413 U.S. at 220-21 (Powell, J., concurring in part and dissenting in part); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968) ("School Boards such as the respondent then [1954] operating state-compelled dual systems were nevertheless 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.").

<sup>156</sup>*Indianapolis V*, 637 F.2d at 1130.

<sup>157</sup>418 U.S. 717 (1974).

<sup>158</sup>*Id.* at 744-45.

<sup>159</sup>*Id.* at 745. See text accompanying note 84 *supra*.

<sup>160</sup>418 U.S. at 748.

<sup>161</sup>*Id.* at 759.

There is also the occasional anomaly, as in Indianapolis, in which housing is deemed to create an interdistrict effect. However, for a court to order any interdistrict remedy, it must find the interdistrict act violative. That is, the act must be accompanied by segregative intent.

Segregative intent, as well as an interdistrict act, were missing in *Milliken*. As in the intradistrict cases, however, the Court failed to elucidate the standards a court is to use to determine segregative intent. Thus, courts are left with the same direct and indirect methods used in finding intradistrict violations. In some cases, these methods are appropriate; in others, their use seems less reliable, if they are actually used at all.

2. *Interdistrict Violations by School Districts.*—The easiest interdistrict violations to ascertain are those that are blatantly, if not expressly, segregative in purpose. The interdistrict order in Louisville<sup>162</sup> was designed to remedy just such practices. The Louisville district was one of three school districts in Jefferson County, two of which were operating state-mandated dual systems at the time of trial.<sup>163</sup> Before *Brown I*, the two latter districts had actively engaged in segregative practices by disregarding boundary lines and transferring blacks into an inner city school for blacks because the county system had no such school.<sup>164</sup> The lines were also ignored when one high school, belonging to the Louisville district, was built within another district's system, and white students from both districts attended it.<sup>165</sup> In an action for interdistrict relief, the court held that prior disregard for district lines "for the purpose and with the actual effect of segregating school children among the public schools of the county on the basis of race" required an interdistrict remedy.<sup>166</sup>

School boards have been involved in other more ingenious methods of segregation, some of which did not require courts to infer intent. In *Lee v. Macon County Board of Education*<sup>167</sup> and *Wright v. Council of Emporia*,<sup>168</sup> boards attempted to secede from county-wide

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<sup>162</sup>Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975).

<sup>163</sup>510 F.2d at 1359-60.

<sup>164</sup>*Id.* at 1360.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 1361. The court also believed the remedy appropriate because the school boundaries and city limits of Louisville were not coterminous, and the presence of almost 10,000 children, mostly white, between the two lines aggravated the problem. *Id.*

<sup>167</sup>448 F.2d 746 (5th Cir. 1971).

<sup>168</sup>407 U.S. 451 (1972).

desegregation plans. In each case, the court focused upon the adverse effects of the action which would ultimately have created an interdistrict violation if allowed to attain fruition.<sup>169</sup> As stated by the court in *Lee*, "The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on the desegregation of the county school district."<sup>170</sup> The violation was actually prevented in both of these cases, but their precedential value is in their analyses. The courts' relative indifference to the element of intent in these cases explains, to a certain extent, the acceptability of decisions in which legislatures were involved. Courts have often looked to the segregative effect as of utmost importance, with segregative purpose as a secondary consideration.

3. *Interdistrict Violations by State Legislatures.*—Several interdistrict violations have been found and corrected within the second *Milliken* category in which the state legislature or the state school board, rather than the local school district, has promulgated a violative policy or statute. Violations of this nature usually involve the drawing or redrawing of district lines, but the manner of finding intent sometimes differs.

The Eighth Circuit has been particularly active in correcting segregation flowing from legislative actions. In *Haney v. County Board of Education*,<sup>171</sup> a 1970 Arkansas case, the Eighth Circuit Court of Appeals ordered the annexation of a black school district to a larger, more populous, white district in order to achieve a "unitary non-racial school system."<sup>172</sup> A prior opinion in the litigation justified the remedy in this fashion: Because the state of Arkansas had required separate schools for blacks and whites,<sup>173</sup> school district lines drawn for school reorganization had racial contours and were violative as a matter of law because they were a reflection of that earlier policy.<sup>174</sup>

Five years later, in *United States v. Missouri*,<sup>175</sup> the Eighth Circuit again ordered annexation of a racially identifiable school district.<sup>176</sup> The district in question had been separated from the

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<sup>169</sup>448 F.2d at 752; 407 U.S. at 462.

<sup>170</sup>448 F.2d at 752.

<sup>171</sup>429 F.2d 364 (8th Cir. 1970).

<sup>172</sup>*Id.* at 369.

<sup>173</sup>*Haney v. County Bd. of Educ.*, 410 F.2d 920, 923-24 (8th Cir. 1969).

<sup>174</sup>*Id.* at 926. The school districts were not required to be distinctly separate, "[b]ut the fact that the various reorganized districts in Sevier County reflect a bi-racial system of education by district lines must be accepted as more than mere coincidence." *Id.* at 924.

<sup>175</sup>515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

<sup>176</sup>515 F.2d at 1373.

other adjacent districts in 1937 and had been excluded ever since from reorganization plans formulated by the county and state.<sup>177</sup> The court ordered its annexation with two adjoining districts on the basis of intent as found in *Keyes*, and later in *Columbus* and *Dayton II*:<sup>178</sup> "Intentional school segregation in the past may not be ignored in assessing the impact of present inaction which has the effect of maintaining segregation."<sup>179</sup>

Very recently, another Arkansas case was decided which involved a fact situation similar to that in *Haney*—district lines were drawn as a reflection of the same statute. But in *Morrilton School District No. 32 v. United States*,<sup>180</sup> rather than finding purpose as a matter of law the court of appeals followed much the same reasoning as was used in *United States v. Missouri*. It found that the impact of the discriminatory statute was still being felt;<sup>181</sup> therefore, sufficient intent was present to justify an interdistrict remedy to eliminate all vestiges of state-imposed segregation.<sup>182</sup>

An interesting and distinctively northern case in which both the school board and legislature created the need for an interdistrict remedy is *Evans v. Buchanan*.<sup>183</sup> That case dealt with the school segregation situation within and without Wilmington, Delaware.

Delaware, at one time, had state-imposed segregation.<sup>184</sup> Even after *Brown I*, New Castle County schools were involved in a transfer system across district lines<sup>185</sup> which, as in Louisville, established a certain amount of interdependence among the districts. For many years, the only high school in the county that would accept black students was in Wilmington itself. Consequently, cross-district transportation of blacks was required.<sup>186</sup> Also, the district court in *Evans* found that various governmental authorities had contributed to the racial disparity between the city and the rest of the county,<sup>187</sup> in much the same manner the district court in *Indianapolis*

<sup>177</sup>*Id.* at 1370.

<sup>178</sup>See text accompanying notes 149-55 *supra*.

<sup>179</sup>515 F.2d at 1370.

<sup>180</sup>606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

<sup>181</sup>606 F.2d at 225-26.

<sup>182</sup>*Id.* at 228-29.

<sup>183</sup>393 F. Supp. 428 (D. Del.), *aff'd*, 423 U.S. 963 (1975). The litigation began as one of the companion cases in *Brown I* under the designation, *Belton v. Gebhart*, 32 Del. Ch. 343, 87 A.2d 862 (1952). Because there have been so many reported opinions, this Note will confine itself to the district court opinions which found the constitutional violation to require interdistrict relief and which granted the remedy.

<sup>184</sup>393 F. Supp. at 432.

<sup>185</sup>*Id.* at 433.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 438. This action helped create a situation whereby 75% of the county's black students attended school in Wilmington. *Id.* at 439.

*IV* had found HACI actions segregative.<sup>188</sup> These violations included acts by the New Castle County Housing Authority<sup>189</sup> and discrimination in the private housing market sanctioned by state officials until 1968.<sup>190</sup> One of the more decisive factors in the *Wilmington* case, however, was the passage of the Education Advancement Act of 1968.<sup>191</sup> This Act provided for school reorganization throughout the state with the exception of Wilmington. The Act also included factors to be considered when reorganizing but failed to include any criterion for reorganization on the basis of race. Therefore, the court held that the statute created a suspect racial classification<sup>192</sup> which contributed to segregation by maintaining district lines on the basis of race.<sup>193</sup>

In addition to the segregative cross-district transactions, the court inferred segregative intent from the impact of all the other more "neutral" actions.<sup>194</sup> On the basis of these violations, the court declared pertinent provisions of the legislative act "nonconstitutional"<sup>195</sup> and, a year later, ordered the consolidation of most of the county's school districts.<sup>196</sup>

From these representative cases, it is evident that determining intent when considering an interdistrict remedy is a much less strenuous task once intradistrict de jure segregation has been found. A court's emphasis is upon the additional segregative impact of the official actions rather than upon the purpose for which they were formulated. Attributing such importance to impact is consistent with the renewed Supreme Court attitude that the affirmative duty to dismantle de jure segregation will not allow any hindrance or inaction to stop its full fruition. The Indianapolis case came at the right time and involved the right type of violation.

## VI. ANALYSIS OF THE INDIANAPOLIS CASE

### A. *Non-Educational Violations*

The Indianapolis litigation has one component present in few other cases: the state actions which affected school desegregation were only tangentially concerned with education.

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<sup>188</sup>See note 87 *supra* and accompanying text.

<sup>189</sup>393 F. Supp. at 435.

<sup>190</sup>*Id.* at 434.

<sup>191</sup>56 Del. Laws, ch. 292, § 6 (1968) (current version at DEL. CODE ANN. tit. 14, §§ 1001 to 1005 (Supp. 1980)).

<sup>192</sup>393 F. Supp. at 442.

<sup>193</sup>*Id.* at 445-46.

<sup>194</sup>*Id.* at 438, 442-43.

<sup>195</sup>*Id.* at 447.

<sup>196</sup>*Evans v. Buchanan*, 416 F. Supp. 328, 353 (D. Del. 1976).

The two factors purporting to cause interdistrict segregation in the schools—Uni-Gov and HACI—did not have the educational emphasis that school board actions or legislative redistricting have had. The district court could have found a legitimate state purpose for the creation of Uni-Gov and could have corrected the housing violation without taking affirmative action with respect to the schools.

Metropolitan reorganization and public housing can have a distinct impact upon a school system, but their purposes are to affect altogether different aspects of society. If there were a segregative intent involved in these kinds of decisions, their cure would eventually eliminate their respective constitutional violations as well as school segregation. Cases have arisen which deal with these kinds of state actions individually. One case has even demonstrated that the issue of school desegregation does not alter the consideration of such a state action on its own merits.<sup>197</sup>

In *Higgins v. Board of Education*,<sup>198</sup> the Sixth Circuit confronted a situation much like the problem encountered with Uni-Gov. The reasoning of this case could have been used to justify the propriety of maintaining pre-existing school district boundaries within Uni-Gov. The Michigan legislature passed a senate bill which changed prior law by preventing the boundaries of a school district from expanding with civil annexation in second-class cities.<sup>199</sup> Certain suburbs of Grand Rapids actively supported and partially financed this bill which would affect only Grand Rapids and one other city.<sup>200</sup> Although the question concerning an interdistrict remedy was mooted by the fact that Grand Rapids was not operating a segregated system, the court of appeals nevertheless determined that there was no constitutional violation in the passage of the senate bill.<sup>201</sup> The bill was justified on the grounds that suburban school districts would otherwise lose a substantial portion of their tax bases because most of the areas annexed were industrial, and the few children affected did not warrant such a loss.<sup>202</sup>

The propriety of the boundary problem created by Uni-Gov could also have been justified with a more specialized test for intent. A focus on *legislative* intent rather than segregative intent might have garnered sufficient governmental justification to overcome the

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<sup>197</sup>See *Higgins v. Board of Educ.*, 395 F. Supp. 444 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).

<sup>198</sup>395 F. Supp. 444 (W.D. Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974).

<sup>199</sup>395 F. Supp. at 473. Senate Bill 1100 was modified to become Act 177 of Public Acts of 1962 and is currently found at MICH. COMP. LAWS § 380.401 (Supp. 1980-81) where it differs in substance because of school reorganization.

<sup>200</sup>395 F. Supp. at 473.

<sup>201</sup>508 F.2d 779, 797 (6th Cir. 1974).

<sup>202</sup>395 F. Supp. at 474.

suspicion of an illicit discriminatory purpose.<sup>203</sup> Metropolitan reorganization has importance on its own merit without regard to its tangential effect upon schools.

The other anomaly in the Indianapolis case is the interdistrict effect attributed to housing. *Hills v. Gautreaux*,<sup>204</sup> a 1976 Supreme Court case, effectuated an interdistrict housing remedy for violations by the Chicago Housing Authority and the United States Department of Housing and Urban Development (HUD). The offense was entirely within Chicago's city limits, the only location where the two agencies had selected sites for public housing<sup>205</sup> although they had the power to operate within a three-mile radius from the city limits.<sup>206</sup> The Court determined in *Hills* that the district court had authority to force HUD to start selecting sites and assistance outside of Chicago, the power to do so already having been conferred by law.<sup>207</sup> Unlike the schools in *Milliken*,<sup>208</sup> there would be much less disturbance of local control because the agencies were not authorized to seek locations within other incorporated areas.<sup>209</sup> No relief was ordered for those people currently living at the discriminatorily selected sites, but then, unlike the Indianapolis case, the issue of school desegregation demanding immediate relief was not involved. With HACT's violations, it would have been simple to stop at a housing remedy which would have effectuated school desegregation sooner or later, and probably would have been less expensive for the school board.<sup>210</sup> This consideration, as well as the arguably legitimate state purpose for Uni-Gov, had to have created substantial problems in justifying an interdistrict desegregation order. At least one circuit court judge recognized this.

### B. Dissension in the Indianapolis Case

When reading the 1980 Seventh Circuit opinion of *Indianapolis V*, one wonders whether the majority and the dissent are speaking of the same case. Circuit Judge Tone, whose research into the problem forced him to change his vote in *Indianapolis IV*,<sup>211</sup> wrote three

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<sup>203</sup>See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 131.

<sup>204</sup>425 U.S. 284 (1976).

<sup>205</sup>*Id.* at 286.

<sup>206</sup>*Id.* at 298 n.14.

<sup>207</sup>*Id.* at 306.

<sup>208</sup>418 U.S. 717 (1974).

<sup>209</sup>425 U.S. at 298-99 n.14.

<sup>210</sup>Comment, *Housing Remedies in School Desegregation Cases: The View from Indianapolis*, 12 HARV. C.R.-C.L.L. REV. 649, 687 (1977).

<sup>211</sup>541 F.2d at 1224 n.\* (Tone, J., dissenting).

strong dissents based specifically on the failure to demonstrate segregative purpose.<sup>212</sup> His most recent dissent disputes the majority's conclusion that the Uni-Gov act and HACI evinced the requisite intent for supporting an interdistrict remedy.

Judge Tone did not view the Uni-Gov act as fulfilling the *Arlington Heights* factors as they were used by the majority and the district court. He found no historical background of the act itself that showed segregative purpose.<sup>213</sup> He also concluded that past rejections of proposed consolidation in Marion County were warranted by financial reasons and the goal of local school district autonomy.<sup>214</sup> He completed his repudiation of Uni-Gov's role in the controversy by pointing out that the repeal of the statute, which had made school boundaries coterminous with civil annexation, was unnecessary because Uni-Gov was not an annexation by the city but rather a governmental reorganization imposed by the state.<sup>215</sup>

As for HACI, Judge Tone minimized its actual effect by explaining that its function in site selection was limited. Most of the locations were selected by a "turn-key" method, whereby a private developer selects the site and turns the project over to the housing authority after it is built.<sup>216</sup> The remaining sites were selected by a mayoral task force.<sup>217</sup> HACI's involvement was therefore *de minimus*. Judge Tone thus bemoaned the majority's reliance upon the disparate racial impact of a *de facto* situation, the only rationale he perceived as actually supporting the decision.<sup>218</sup>

### C. *The Indianapolis Case—A Result-Oriented Decision?*

*Indianapolis V* was a case whose time had come. Nine years had been spent litigating essentially the same issue, the interdistrict remedy. As a newly applicable Supreme Court opinion was handed down, the case was returned to the district court. First, there was *Milliken v. Bradley*.<sup>219</sup> Then, there were *Arlington Heights*<sup>220</sup> and

<sup>212</sup>*Id.* at 1224 (Tone, J., dissenting); 637 F.2d at 1119 (Tone, J., dissenting); 573 F.2d at 415 (Tone, J., dissenting). Judge Tone's dissent in *Indianapolis IV* warned the court of appeals of the deficiency in its decision because it did not include a finding of intent as prescribed by *Washington v. Davis*, 426 U.S. 229 (1976). He further denounced the majority's reliance upon a "'racial impact'" theory. 541 F.2d at 1227 (Tone, J., dissenting).

<sup>213</sup>*Indianapolis V*, 637 F.2d at 1119-20 (Tone, J., dissenting).

<sup>214</sup>*Id.* at 1121 n.14. This is similar to the rationale accepted in the *Higgins* case. See text accompanying notes 198-202 *supra*.

<sup>215</sup>637 F.2d at 1122 (Tone, J., dissenting).

<sup>216</sup>*Id.* at 1125-26 (Tone, J., dissenting).

<sup>217</sup>*Id.* at 1126 (Tone, J., dissenting).

<sup>218</sup>*Id.* at 1129-30 (Tone, J., dissenting).

<sup>219</sup>418 U.S. 717 (1974).

<sup>220</sup>429 U.S. 252 (1977).

*Washington v. Davis*.<sup>221</sup> Actually, the most important decisions were *Columbus*<sup>222</sup> and *Dayton II*,<sup>223</sup> two cases which could have considerably eased the burden of finding segregative intent in Indianapolis if they had been decided sooner.

In the *Indianapolis V* decision, the district court and the court of appeals, to a certain degree, contorted a school desegregation case to fit into the molds of housing and employment decisions. The analyses from these kinds of cases are generally inapplicable in a school desegregation case, except that a finding of segregative intent is required and disparate racial impact alone is insufficient. In the Indianapolis case, the courts did an excellent, but at times unconvincing, job. The fault is not theirs; it lies with a lack of guidance. And yet, no blame can fairly be laid upon the Supreme Court either. School cases differ too much to afford a discernible pattern to their offenses and cures. Since *Brown I*, the Court has accepted various kinds of "segregative intent" and has drawn the line only when intent cannot be found at all.<sup>224</sup> That is why *Indianapolis IV* had to be remanded—no claim of segregative intent had been made. And that is why *Washington v. Davis* and *Arlington Heights* were suggested as the ruling authority—not because they instructed upon finding intent in the school context but because they simply required that segregative intent must be found to create a constitutional violation under equal protection.

There are two explanations of why *Indianapolis V* was not overturned. First, the litigation after *Indianapolis I* involved essentially a remedy case, as opposed to a violation case. Dual level litigation involving both violation and remedy stages is not atypical because

[t]he school desegregation problem usually is divided into the violation and the remedy stages. In the first stage, the Court seeks to determine whether the school board or another state agency engaged in unconstitutional discrimination; the second prescribes the contours of the plan necessary to correct the violations. The difficulty in the first stage is in going . . . to the determination that the conduct was intentional or purposive discrimination.<sup>225</sup>

Different considerations are inherent in each phase. In the Indianapolis case, the initial violation stage was concluded with a find-

<sup>221</sup>426 U.S. 229 (1976).

<sup>222</sup>443 U.S. 449 (1979).

<sup>223</sup>443 U.S. 526 (1979).

<sup>224</sup>No intent to support an interdistrict remedy was found in *Milliken*, 418 U.S. at 745.

<sup>225</sup>Lane, *The Principles and Politics of Equal Protection: Reflections on Crawford v. Los Angeles City Board of Education*, 10 Sw. U.L. REV. 499, 521 n.107 (1978).

ing of de jure segregation in IPS in 1971. The ensuing nine years were spent vindicating the proposed remedy. Segregative intent still has to be found to justify an interdistrict remedy because the extent of any desegregation order must be justified by an equivalent violation.<sup>226</sup> But a brief survey of interdistrict cases has shown that once a de jure intradistrict system is discovered, very little further proof of intent is demanded. Thus, it appears that *Milliken*, in which an interdistrict remedy was denied, is the exceptional case rather than the rule.

It is also possible that *Indianapolis V* would have been just as acceptable even if it *had* been decided upon the racial impact theory denounced by Circuit Judge Tone. Indianapolis had a de jure segregated school system at the time of trial, and there had been an affirmative duty to dismantle it since 1954. If *Brown I* is considered a court-imposed mandate to desegregate a dual system, an analogy can be made to the Supreme Court's holding in *United States v. Scotland Neck City Board of Education*.<sup>227</sup> In that case, a legislature attempted to carve out a new school district in the face of a court order. "[I]f a state-imposed limitation . . . operates to inhibit or obstruct . . . the disestablishing of a dual system, it must fall."<sup>228</sup> HACI and Uni-Gov are those "state-imposed limitations" which prevented "the disestablishing of a dual system." The necessary intent, therefore, could have been established by this duty to desegregate IPS combined with the foreseeable consequences of disparate racial impact and interdistrict effect from Uni-Gov and HACI activities.<sup>229</sup> These factors would most likely have been sufficient indications of segregative intent for a Court which had just handed down *Columbus* and *Dayton II*.

## VII. CONCLUSION

Unlike many commentaries on school desegregation cases, this one has a conclusion. There is no need to speculate as to what might happen in the next phase of litigation. Later issues arising in the Indianapolis case will not deal with the essential constitutional problem that took nine long years and almost a whole generation of school children to finish.<sup>230</sup> The case began with the IPS intradistrict

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<sup>226</sup>*Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977).

<sup>227</sup>407 U.S. 484 (1972).

<sup>228</sup>*Id.* at 488 (quoting *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971)).

<sup>229</sup>It must be remembered that the Court has denigrated the intent standard used to find HACI violations, the *Omaha* presumption. See note 142 *supra*.

<sup>230</sup>It will be interesting to note how the case in St. Louis will be decided in the wake of *Indianapolis V*. In the most recent St. Louis opinion, the court has required

violation, but the struggle centered around an interdistrict remedy for which no equivalent violation had initially been determined. At the conclusion of the lengthy litigation, the district court and the court of appeals justified the interdistrict relief by concluding that two governmental non-educational forces were motivated by segregative purposes. This finding fulfilled the Supreme Court's desideratum that only *de jure*, purposeful, segregation can be judicially corrected. The case therefore ended with a remedy for a violation.

The decision in the Indianapolis case will be difficult to follow because school cases make poor factual precedent. However, it is an excellent example of the effects of changing law and the individuality of each case. There probably will never be one definitive approach to finding segregative intent in school cases. Unlike housing and employment cases, school desegregation cases cannot be defined in terms of a single practice or decision.<sup>231</sup> The historical background, alleged violations, and school organization, among other factors, differ in school cases making them more difficult to judge than other kinds of equal protection litigation.

Another difference that sets school cases apart from other equal protection cases is their remedies. In school desegregation cases, the effects of the discrimination are continuously operating upon the children and cannot be cured as simply as other equal protection violations. In housing and employment cases, an injunction or a remedial order for the immediate plaintiffs can be instituted. But in school cases, the affected parties can only receive appropriate relief in some form of affirmative action, such as consolidation or busing.

The Indianapolis case also demonstrates another problem encountered in most northern school cases—absent overt discrimination, courts are compelled to infer intent in these cases. There are no guidelines for this procedure, which creates difficulties for the courts. The Indianapolis case shows the weakness in this kind of judicial treatment because a remand to the lower courts was required as each new pertinent decision was handed down.

But there is also strength in the flexibility inherent in this approach. Flexibility has allowed courts to look toward a result before a constitutional violation is actually found and to remedy segregative conditions that are more suggestive of *de facto* conditions than *de jure*. The continuing nature of school desegregation violations and the adverse consequences they can engender necessitate

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the joinder of outlying districts in order to determine whether an interdistrict remedy would be appropriate. *Adams v. United States*, 620 F.2d 1277, 1295-96 (8th Cir. 1980) *cert. denied*, 101 S. Ct. 88 (1980).

<sup>231</sup>Lane, *supra* note 225, at 521 n.107.

such strong action, perhaps upon less proof of discriminatory intent than in other cases. This is where the Indianapolis case fits. The litigation was result-oriented, an approach that the Supreme Court seems to have accepted without quarrel. If a court can find the slightest indicium of segregative intent or a former de jure system with a failure to affirmatively dismantle it, a desegregation order is not likely to be overturned absent an inequitable remedy.

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