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ABSTRACT

This paper discusses some of the ways in which social science research can be useful to the courts in school desegregation litigation. A discussion of specific legal cases is used to illustrate areas where the courts have needed social science research. Several areas that can be analyzed by social scientists include: (1) housing segregation, (2) state and school officials' actions that may represent intentional school segregation, (3) racial and economic segregation of housing in metropolitan areas, (4) the interdistrict effects of official discrimination, and (5) resegregation. This paper does not reveal all of the many uses and misuses that courts have made of social science evidence. A list of references includes all court cases and acts cited. (Author/AM)

MEETING THE COURTS' RESEARCH NEEDS

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MEETING THE COURTS' RESEARCH NEEDS

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In recent years social scientists have been called upon with increasing frequency to educate the courts about the realities of American society. This paper will discuss some of the ways in which social science research can be useful to inform the court in school desegregation litigation.

First, in every northern school case, the court must decide whether segregation was caused by intentional acts of state officials or by fortuitous circumstances. Second, where plaintiffs seek a metropolitan areawide remedy to desegregate schools because the minority population is concentrated in the central city, while suburbs are predominantly white, it is necessary to explain why metropolitan areas have become segregated. Third, also where a metropolitan remedy is sought, it is necessary to determine if the actions of state officials and suburban school boards have increased segregation in the central city. Fourth, after a school system is under a court order, and the school system becomes resegregated, either among schools or within schools, it is necessary to determine whether school board actions have contributed to the resegregation.

The Supreme Court in deciding the case of Milliken v. Bradley (1974), stated that the remedy for intentional segregation of Detroit schools could not involve suburban school districts that had not caused Detroit's problem.

In a separate concurring opinion, Justice Stewart wrote that the case might have been decided differently had plaintiffs shown that

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metropolitan areas were segregated due to governmental actions. However, he added that the causes of residential segregation are "unknown and perhaps unknowable" (Milliken, 1974:756). Many social scientists, I suspect, would consider the causes to be complex, but still knowable.

Broadly speaking, the information is important because if school segregation has been caused by governmental action, it is unconstitutional, and the courts are obliged to find a remedy. If the causes are entirely private, they are not illegal under the Fourteenth Amendment, which reads:

> nor shall any State...deny to any person within its jurisdiction the equal protection of the laws [emphasis added].

It is not quite that simple, because judges differ. The Supreme Court has only hinted that it might order school desegregation when segregation is attributable to governmental actions by officials who have nothing to do with the school systems -- sewer commissioners, zoning boards, and so forth.

I. WHY EVIDENCE IS NEEDED THAT OFFICIAL ACTION HAS SEGREGATED HOUSING

In Swann v. Charlotte-Mecklenburg (1971), the landmark Supreme Court case that ordered cross-district busing where that was the only effective remedy for de jure school segregation, the Court paid considerable attention to the segregated housing that had necessitated transportation. Chief Justice Burger, writing for a unanimous Court, noted repeatedly that residential patterns in the city and county resulted in part from Federal, State, and local government actions, as well as from school board policies that probably accentuated those

patterns. He added that the court would save for another day the question of whether school segregation is illegal when the evidence shows that segregation is a consequence of other types of state action, without any discrimination by school authorities (Swann, 1971:23).

In a footnote to the majority opinion in the Detroit case (Milliken, 1974:729, footnote 7), the Supreme Court observed that the District Court had concluded (Milliken, 1971:587, 593) that housing in the Detroit metropolitan area was segregated partly due to government agencies, such as FHA and VA, that past discriminatory practices have a continuing and present effect, and that school authorities are obliged to compensate for these practices and avoid their incorporation into the school system. However, the Court of Appeals (Milliken, 1973:242) stated specifically that it was affirming the district court's judgment without relying on testimony related to housing. The Supreme Court, therefore, stressed that the case no longer presented any question related to housing.

Justice Stewart, in his concurring opinion, however, implied that the Court might well consider that the discriminatory application of state housing laws might justify the transfer of pupils across district lines. This particular case, he said, contained no record that residential patterns were in a significant measure attributable to governmental activity.

It has been suggested that it is unfair to place too great a burden on schools to undo unconstitutional actions by other governmental institutions. Such a position probably arises from a misconstruction of Justice Burger's opinion in Swann. When he said, "One vehicle can carry

only a limited amount of baggage" (Swann, 1971:23), he did not imply that school desegregation need not undo the effects of residential segregation, but rather that schools cannot alone make up for all the injustices of human existence (Compare Jencks, 1972:255). One can argue that the distinction between school-board-created and other-government-agency-created violations of children's constitutional rights is an artifical legalism. Perhaps it would place too great a burden on minority-group children if courts by creating an artificial distinction, were to relegate them to segregated schools, denying a legal remedy for illegal actions by the government.

II. DE JURE SEGREGATION IN THE NORTH: DELIBERATE ACTION BY STATES AND BY SCHOOL OFFICIALS

The second area inviting analysis by social scientists is that of actions by states and school officials to see if they have intentionally segregated schools. The need for this information arises in many kinds of court cases, first and foremost, to make the initial determination of de jure segregation. This requires digging out a variety of evidence necessary to every northern school desegregation case, since it is always necessary to prove intentional segregation.

Frequently cases include evidence that the site and size of new schools were determined for racially discriminatory purposes or with full knowledge that the action would result in one-race schools (See especially, Swann, 1971; Keyes, 1970; Arthur v. Nyquist, 1976; U. S. and Buckley v. School Board, 1971; Reed v. Rhodes, 1976; U. S. and Webb v. School Board, 1975); that students

are shunted into segregated tracks within schools (Hart, 1974; Hobson, 1967); that mobile classrooms were used to increase racial isolation (Keyes, 1970); that entire classes of black children were bused in tact to white schools, and taught separately for an entire semester or more, instead of integrating the minority pupils into the white school (Amos v. Board of School Directors of Milwaukee, 1976; Reed v. Rhodes, 1976); that transportation was employed for discriminatory purposes (Keyes, 1970; Milliken, 1973; Evans v. Buchanan, 1976); that transfer policies, optional zones and feeder patterns were manipulated to keep the races apart (Keyes, 1970; Morgan v. Hennigan, 1974; Evans v. Buchanan, 1976; Hart, 1974; Reed v. Rhodes, 1976: Arthur v. Nyquist, 1976; U. S. and Buckley v. Board, 1971; Milliken v. Bradley, 1973; U. S. and Webb, 1975).

Buffalo's school board gave a special twist to discriminatory transfer policies. (Arthur v. Nyquist, 1975) As the area around one high school was in transition from a white ethnic neighborhood to a predominantly black one, the school board--fully aware that it was accelerating the trend--dropped Polish, Italian, Hebrew, and Russian from the school's curriculum from 1960-1972, allowing students to transfer out of the neighborhood high school to study the languages elsewhere. By way of contrast, when language programs were requested at schools in other parts of the city, the board was notably responsive, instituting curricular changes that made transfers unnecessary. The Buffalo school board also discriminated in admissions to vocational schools.

Another crude segregative tool was used in Cleveland (Reed v. Rhodes, 1976). Minority pupils were contained in overcrowded schools on double sessions in the Hough area, where schools were not only separate but demonstrably unequal, while white schools not far away had empty seats.

Second, as mentioned above, to decide if a metropolitan remedy is called for, it is necessary to determine if action by states or by suburban school officials has had a segregative effect on inner city schools.

It may be asked whether this kind of fact collecting is really social science. I suggest that it is, if the term is understood to encompass all studies that seek to understand the causes of social phenomena.

Third, after a school district adopts a desegregation plan, and a system becomes resegregated either among schools or among classes within individual schools, it becomes necessary to unravel whether the segregation occurred as a result of actions by school officials, by other government agencies, or by impersonal demographic factors. If the causes are not attributable to improper governmental acts, there is no legal remedy.

III. RESEARCH NEEDS NOT EXAMINED IN THIS PAPER

This paper will not review all of the many uses and misuses that courts have made of social science evidence. Two recent publications may be of interest to persons wishing to explore that area: "The Courts, Social Science, and School Desegregation," (Law and Contemporary Problems, 1975)

and "Education, Social Science, and the Judicial Process" (Anson and Rist, editors, 1976).

Nor will the paper evaluate the wealth of literature related to whether or not segregation is harmful to children. Proof of harm is neither essential nor enough to prove a violation of the Constitution. (Deal v. Cincinnati, 1966) Harm is not the reason segregation is of itself a denial of equal educational opportunity. The key to Brown (1954) is that the state requires education. What the state requires or provides, it must provide without racial discrimination or a stigma of social inequality. If proof of the existence of harm were required, the outcome of a case might depend on how thick skinned the victim was, rather than on whether the state acted legally.

On the other hand, proof of harm to children may possibly take on a new significance to justify certain educational remedies.[2] For example, in the latest installment of Milliken v. Bradley (1976), the district court ordered the establishment of vocational centers, the development of comprehensive reading programs, in-service training for teachers, a program to insure fair testing, a uniform code of conduct and due process procedures, a school-community relations program, and counseling and career guidance. The costs of the court-ordered programs are to be shared by the city of Detroit and the state of Michigan. The state was also ordered to pay a major portion of the cost of buses. The Supreme Court has granted certiorari to review whether the district court's equitable powers permit it to order a state to pay for this array of educational programs to undo the effects of

segregation. It may develop that the Court will insist on more evidence than the Sixth Circuit required that the harm caused by state action justifies these educational programs. Most of the proof presented to the Milliken court went to Detroit's financial plight and the state's responsibility for education. It did not focus on the educational necessity for the specific programs ordered by the court. However, it is by no means unique for a court to order an errant defendant to pay for costly programs or to require the levy of taxes to support schools. (See for example, Griffin, 1964.)

An interesting extra wrinkle for social scientists and courts to consider is whether we can and ought to distinguish harm caused by any or all segregation (racial isolation) and that caused by de jure segregation (isolation with the stigma of official sanction). The courts would presumably only feel obligated to remedy the effect of de jure segregation.

IV. HOW TO SHOW THE COURTS WHY METROPOLITAN AREAS ARE SEGREGATED

Some of the most interesting recent legal developments--mostly discouraging at the Supreme Court level, more encouraging in a few state and lower federal courts--concern racial and economic segregation of housing in metropolitan areas. The following brief survey of the law in this field is intended to point to some kinds of segregative state action that courts have recognized. In these cases courts have been convinced that racial and economic separation is not the result of private decisions alone. A few courts have noted--and held to be illegal--a variety of tools used by suburban communities to exclude the poor.

One reason courts are reluctant to take this direction is because it runs counter to a general trend in land use law in the last half century. (Some key decisions are Village of Euclid v. Ambler, 1926, and, more recently, Village of Belle Terre v. Boraas, 1974, and Construction Industry v. Petaluma, 1976.) Zoning boards and other planning agencies have been permitted broad leeway under their "police power," to zone for the public health, safety, and general welfare. The legal issues until very recently have centered on the community's need to plan rationally, balanced against a property owner's right to use his land as he pleases. Particularly since the 1920s the courts have tended to support the collective right to plan (largely because it was thought to enhance property values) over the rights of the individual property owner. The only major constraints were (1) the property owner must be left with some use for his land; (2) he must be afforded procedural due process, and (3) the planners must not have acted entirely arbitrarily.

Against this tide, the civil rights forces have won some significant cases--mostly in a few state courts--supporting the general proposition that planning is fine so long as it is not used as a subterfuge to exclude minorities and the poor. In one case the plaintiffs gathered vast quantities of evidence to prove that zoning policies and sewer moratoria were at least partly motivated by racial considerations, and a federal court agreed that this was illegal. (Kennedy Park Homes, 1970) A few courts have ruled that it is impermissible for a community to use zoning ordinances or enforcement

policies to ban multifamily dwellings entirely; thus effectively excluding all low income persons. (Appeal of Girsh, 1970; National Land and Investment Co. v. Easttown, 1969. A similar argument was used in an effort to invalidate the exclusion of mobile homes, but it failed. Vickers, 1962.)

Courts have usually required proof that actions were racially motivated, a requirement necessary in any school desegregation case. Other courts have merely asked whether there was a disproportionate racial impact. The Supreme Court has recently emphasized that it will require strict proof of intent; discriminatory effects alone are not enough to demonstrate a violation of the Fourteenth Amendment (Washington v. Davis, 1976). Some cases, in addition, have required proof of the illegitimacy of nonracial reasons for a community's policy that had an exclusionary impact (Golden, 1972; see Village of Arlington Heights, 1971, footnote 21).

One line of cases has focused on the discriminatory purpose and impact of (1) concentrating low-income federally-assisted housing in black neighborhoods within a city, especially when combined with discriminatory tenant-assignment practices (Hills v. Gautreaux, 1976), and (2) excluding low-income housing entirely from white suburban neighborhoods (Crow v. Brown, 1972). In a decision with important implications for school desegregation, the Supreme Court has required the Department of Housing and Urban Development (HUD) to consider an entire metropolitan housing market in planning the location of new low-income housing to remedy HUD's violation of statutory and constitutional rights (Hills v. Gautreaux, 1976).

A variety of state cases have questioned zoning exclusively for single-family homes on large lots. (National Land and Investment Co., 1969; Oakwood at Madison, 1971). New Jersey courts in particular have handed down far-reaching decisions concerning housing that should be examined by anyone interested in the subject of metropolitan segregation. They go beyond any other jurisdictions in not requiring proof of discriminatory intent, in support of a general principle that a community cannot legally ignore the needs of the poor who live in the effective housing market area. One case (Southern Burlington NAACP v. Mount Laurel, 1975) ruled against the exclusionary zoning practices of one town. In another (Urban League of Greater New Brunswick v. Mayor and Council, 1976) the court examined the exclusionary practices of a large area consisting of many jurisdictions, pointed to economically exclusionary zoning that allowed practically no multi-family dwellings, and required the development of a regional remedial plan.

One case just reversed by the Supreme Court (Village of Arlington Heights, 1975, 1977), on grounds that there was no adequate showing of intent, included proof that a virtually all-white suburb of Chicago practiced a zoning policy of excluding federally-assisted housing that would have been 40 percent minority. This and similar cases involve proof that minorities are overrepresented on waiting lists for low-income housing, that minorities are concentrated in certain parts of the metropolitan area, that suburban districts refuse to rezone to permit low-income housing, thus reenforcing the existing housing pattern, and

that the justifications provided by the suburb for its actions are not sufficient under the cirumstances. Sometimes there is evidence that the governing board succumbed to community pressures, acted contrary to previous cases or standards. Proof in these cases is difficult, and not all cases are won by plaintiffs. (Golden, 1972; Skilken, 1975. For further discussion of these and other cases in New York, Pennsylvania, Michigan, and Rhode Island, see Williams, 1975.)

Suburban communities have used a variety of ploys to avoid building any low-income housing. One line of cases that entails difficult proof involves communities that have placed special legal restrictions on building federally-assisted housing. The restrictions pass constitutional muster in most instances unless the racial motivation is clear. The Supreme Court has said that it is all right for a community to require a special referendum before permitting public housing to be built, where, as in California, referenda are commonly required under other circumstances. (James v. Valtierra, 1972. In this instance the Court also found the racial implications unclear.) The Court said it had not been proved that the poor or minorities were singled out for special, discriminatory treatment. On the other hand, courts may look on the matter differently where referenda are required only for public housing (Cornelius v. City of Parma, 1974), or where there is better evidence on the record of discriminatory impact (SASSO, 1970). Increasingly, the Supreme Court is requiring stricter proof of discriminatory intent. Some circuit courts accept proof of intent by inference from proof that segregation was the natural and foreseeable

consequence of official acts (U. S. and Webb, 1975; Hart v. Community School Board, 1974; Oliver v. Michigan, 1974; Reed v. Rhodes, 1976), but the Supreme Court says discriminatory effects alone are insufficient (Village of Arlington Heights, 1977; Washington v. Davis, 1976; U. S. v. Texas, 1976).

In school desegregation cases, as well as housing cases, it is necessary to prove that segregation has been caused by state action. To analyze why metropolitan areas are segregated, the problem must be broken down into at least three components. First, why have people (largely white, it turns out) moved to the suburbs? Second, why are particular inner cities predominantly black? Third, why are blacks excluded from the suburbs? Research findings in these areas have been summarized in the Clearinghouse for Civil Rights Research (Center for Naitonal Policy Review, 1976).

Some of the most useful work in this area has been done by Taeuber (1976), who has served as an expert witness in school desegregation litigation. He has pointed to the transportation, business, aesthetic, fiscal, political, and employment considerations that have impelled people to the suburbs. Federal policies have contributed to the movement. FHA and VA financing were available--supplemented by tax policies that favor home buyers over home renters--just as the suburban building was occurring. Federal highway and urban renewal programs helped decimate central cities. Federal agencies as well as private businesses moved to the suburbs, even in defiance of federal policies that preclude moves by federal agencies unless there is housing available for low and moderate income employees.

Fortuitous demographic factors have contributed to the concentration of minorities in central city ghettoes: the pursuit of jobs in the cities, as opportunities in the rural South declined; high birth rates. Again, federal policies have accentuated the trend, as FHA financing was available only in racially homogeneous neighborhoods, public housing policies were discriminatory and so forth.

The third component--how and why blacks have been excluded from the suburbs--is the crucial area for further research. A number of social scientists (Pettigrew, 1974; Taeuber and Farley in Wayne Law Review, 1975) have shown that blacks are not in the suburbs in the proportion one would expect them to be, were the only basis for exclusion economic. The government has accentuated private segregative activity. HUD has feebly enforced Fair Housing laws (Civil Rights Act, Title VIII, 1968) that bar racial steering and require affirmative marketing of housing that is in anyway federally aided. HUD has also cooperated with local agencies in the discriminatory location of public housing that has created ghettoes (Hills v. Gautreaux, 1976).

Moreover, HUD has violated statutory requirements that community development block grants must provide for the needs of low and moderate income persons. A recent federal case vividly depicts HUD's behavior, and includes a thorough analysis of the requirements of the Housing and Community Development Act of 1974, and HUD's failure to fulfill them (City of Hartford, 1976). The Act requires the dispersal of low and moderate income housing throughout metropolitan areas. U. S. District Judge Blumenfeld decided that HUD had abused its discretion

and illegally approved community development block grants to seven suburban communities around Hartford, in violation of Title I of the Act. HUD failed to administer the program affirmatively, as clearly required by law, to expand low and moderate income housing opportunities in the Hartford suburbs. In applying for funds, communities are required to have a Housing Assistance Plan (HAP. 42 U.S.C. §5304 (a)(4)). To develop the HAP, communities must survey their need for low and moderate income housing, based in part on an estimate of the needs of persons "expected to reside" within their borders (§5304 (a)(4)(A)). The estimate should be based on a realistic projection of the influx of low-income residents. HUD had illegally waived the requirement for six communities. East Hartford supplied a HAP, but HUD abused its discretion in arbitrarily approving the grant without considering information supplied by the city of Hartford. The court ruled that it is insufficient to base a suburban community's estimated need for low and moderate income housing on the waiting list for housing in that community alone. Moreover, the availability of housing through the East Hartford Housing Authority was not publicized outside of East Hartford itself.

Along the lines of the cases previously discussed, there is a need for much more research to determine the extent to which public policies have reenforced and encouraged acts of private discrimination. Although restrictive covenants were held to be unenforceable in 1948 (Shelley v. Kraemer), their effect on residential patterns remains. In all of these cases, exclusionary intent is the most difficult to document.

Frequently it is difficult to show the racial intent or effect of policies that are more patently discriminatory against the poor, rather than overtly racial. All proof of racial motivation is difficult.

One problem is a lack of accurate data. This void may be partially filled as a result of a suit recently brought by a coalition of ten civic and civil rights groups against the Federal Reserve Board, the Federal Home Loan Bank Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (National Urban League, et al., 1976). The main purpose of the suit is to force the agencies to use their regulatory powers to prevent discrimination by private lenders, including the practice of redlining (refusing to lend to persons in black, racially mixed, or changing neighborhoods). A second purpose, necessary to enforcement and to monitoring the quality of enforcement, is to require lenders to keep data by race, ethnicity, and sex, so examiners can detect discriminatory patterns. Social scientists may find the data useful, and would do well to look into the data requirements of the agencies to see if they can be made more useful.

As indicated at the start, evidence of housing discrimination by government agencies is primarily needed in order to make a case for a metropolitan areawide remedy for city segregation. While it is not certain how courts will treat discrimination by non-school officials, it is essential to develop the evidence of governmental policies that have led to the systematic containment of minority population in central cities and a few isolated suburban communities. Thus far the courts have been unwilling to justify a metropolitan, interdistrict remedy by a bare finding that any other

remedy would be ineffective, combined with the state's legal responsibility for education and the Fourteenth Amendment requirement that states, in carrying out their responsibilities, may not discriminate.

In Milliken v. Bradley (1974) Justice Stewart seemed receptive to housing evidence. Several lower federal courts have shown interest in evidence of housing discrimination, without resting the decision on it. The most comprehensive exposition of housing evidence in a school case is in Hart v. Community School Board #21 of Brooklyn, N. Y. (1974 and 1975). In Indianapolis (U. S. and Buckley, 1975 and 1976), Omaha (U. S. and Webb, 1975), Buffalo (Arthur v. Nyquist, 1976), and Wilmington (Evans v. Buchanan, 1976) cases, the district courts discuss housing discrimination. The Cleveland case (Reed v. Rhodes, 1976) provides the kind of evidence that a court is most apt to find compelling, a showing of collaboration between school and housing authorities in selecting sites for schools and housing projects that promoted racially identifiable and segregated neighborhoods and schools.

One recent opinion by Justice Powell, concurred in by the Chief Justice and by Justice Rehnquist, indicates a lack of sympathy on the part of certain members of the Supreme Court to the introduction of housing evidence. When the court sent the Austin, Texas, case (U. S. v. Texas Education Agency, 1976) back to the Court of Appeals to reconsider its decision in light of another recent Supreme Court case (Washington v. Davis, 1976)—an occasion that usually does not call for an elaborated opinion—the three justices decided to express their distaste for recent developments in desegregation law. Justice Powell wrote that "Economic pressures and

voluntary preferences are the primary determinants of residential patterns." The justices did not think it necessary to refer to any social science evidence to justify this dictum. (Professor John E. Coons criticises this sort of judicial behavior in Anson and Rist, 1976.) While the opinion lacks legal force, since it does not represent the views of a majority of the Court, it can add a measure of confusion to public understanding. It can also raise false and therefore destructive hopes in districts under court order for intentional act of segregation, such as Milwaukee, that their obligations to desegregate will disappear (New York Times, 1977).

V. HOW TO DEMONSTRATE INTERDISTRICT EFFECTS OF OFFICIAL DISCRIMINATION

In Milliken v. Bradley, the court said that a metropolitan area remedy was uncalled for, absent any indication of an "interdistrict violation." The ramifications of this term are far from clear. Presumably it includes an intentional segregative act by one school district that has a significant segregative effect in another district. It also includes the deliberate drawing of a district boundary for purposes of racial separation. Justice Stewart's concurring opinion implies he would also look to the interdistrict effect of acts by non-school public officials (Milliken, 1974:755), such as zoning boards, housing authorities, and sewer commissions.

Without entering the Farley-Taeuber-Coleman white flight debate (see, for example, Social Policy, 1976) about whether the process of desegregation causes white flight, it would probably be generally accepted that segregation within a city does not have a segregative interdistrict effect. It would not cause city white families to flee to the suburbs. Suburban segregation, on

the other hand, might well increase segregation within a city by encouraging white flight. Meanwhile, it might discourage blacks with the economic means to migrate to the suburbs from doing so if their children would once again find themselves in segregated schools. Segregation in the suburbs may also discourage inner-city school systems from acting to desegregate voluntarily, out of fear that to do so might induce white flight. These are mere guesses. More concrete evidence is needed.

Evidence of the simplest kind of segregation with interdistrict effect has already found its way into a few cases. Before Brown (1954), it was not uncommon for cities and suburbs in the North and South to cooperate for segregative purposes, sending suburban black children to inner-city black schools, for example. This kind of evidence was deemed insignificant in Detroit (Milliken, 1974), since it involved only two of the 54 suburban districts, but found to be more important in Wilmington and New Castle County, Delaware (Evans v. Buchanan, 1976) and Louisville and Jefferson County, Kentucky (Newburg Area Council, 1974).

The state of Delaware committed a more blatant and recent violation by carrying out a program to provide interdistrict transportation of students to private and parochial schools. The racial implications of this law were assumed rather than proved, and the decision rested on firmer ground. But other states may well have similar transportation laws, and it is not far-fetched to hypothesize an interdistrict segregative effect. It would be interesting to investigate the racial impact of all public programs that aid private and parochial schools. For purposes of a metropolitan remedy, the evidence must point to the specifically interdistrict application and effect of the aid.

Both Wilmington and Indianapolis cases involved state manipulation of the boundary between school districts in ways that had segregative effects. In both cases the court found that the purpose of the state's action--or at least the foreseeable consequence--was the containment of black school children in the central city. In Delaware a state law temporarily authorized the consolidation of school districts by the State Board of Education without the usually required referendum. The law specifically excluded Wilmington, which had 44 percent of the state's black students, and which was the only majority-black school system in the state. The law ostensibly excluded Wilmington because it was intended to promote the consolidation of small districts, but it effectively prevented the dismantling of a dual school system. The court said that the law was unconstitutional because it placed an impermissible burden on the black children of Wilmington, since they could only desegregate their schools by means of a referendum not required of other districts.

In the Indianapolis case, the court also saw a racially discriminatory intent and effect of actions establishing school district boundaries that were on their face racially neutral. In 1969 the municipal government of Indianapolis and the governmental units of Marion County (which includes Indianapolis) were consolidated to form a countywide government, Uni-Gov. While as a policy in Indiana, school districts are coterminous with units of general government, in this instance schools were specifically excluded from the jurisdiction of Uni-Gov. In fact, evidence was introduced in court that the suburban districts were reluctant to consolidate without

assurance that schools were not involved. Moreover, sixteen days before Uni-Gov was enacted, the legislature abolished the power of the Indianapolis school system to follow municipal annexation, should Indianapolis decide to annex neighboring communities in Marion County. The court of appeals noted that everyone was aware that 95 percent of the blacks in Marion County lived in the inner city, and that a school case was pending in federal court. Regardless of legislative motive, the law in fact served as a substantial cause of interdistrict segregation.

In the Cleveland case (Reed v. Rhodes, 1976) a record was also made of segregative actions by the state. The Ohio Board (1) waived the minimum educational requirement of a five-hour school day in the Hough area to permit double sessions from 1956-1961, when empty classes abounded in white schools; (2) did nothing about discriminatory teacher assignment by race and experience, although up to 1966 it had power to revoke charters to individual schools, and after 1966, it had power to revoke charters to the entire school district; it did nothing, although it was aware of segregation in Cleveland, and aware of its own remedial power as a state board.

Although this kind of evidence does not prove interdistrict effects, it establishes state responsibility for intentional segregation and justifies ordering the state to implement a remedy by demonstrating that the state has the power to redistrict. If the court will follow reasoning in a recent housing case (Hills v. Gautreaux, 1976) in which intentional segregation by HUD justified the court's ordering HUD to design a metropolitan areawide housing remedy, a similar remedy that could ignore

school district boundaries might be justified in a school case.

Another case with interdistrict implications involved St. Louis county (U. S. v. Missouri, 1975). A district was split for discriminatory reasons, and districts later refused to consolidate despite clear state and county responsibility to desegregate, when consolidation was the only effective remedy.

While the Indiana and Delaware laws may seem at first glance to be almost unique and unlikely to find counterparts elsewhere, they may not be such rarities. The more one searches, the more evidence emerges of suburban ingenuity. Apartheid attitudes manifest themselves in many of our laws and institutions. The difficulty is not in the scarcity of official acts, but in analysis and proof. From the legal standpoint, discriminatory official acts by a state are especially promising bases for requiring a metropolitan remedy. They are the most obvious violations of the Fourteenth Amendment, and must unavoidably require the state to formulate an effective remedy, regardless of political subdivision lines that are creatures of the state.

VI. EVIDENCE OF OFFICIAL ACTS THAT CAUSE RESEGREGATION

The last area to be discussed here concerns resegregation. It divides into two questions: (1) how long may a district court retain jurisdiction over a school district to insure that it remains desegregated? and (2) what kinds of resegregative acts are significant?

The first issue is important because it may determine the extent to which courts can remedy resegregation after a desegregation order has been fully implemented. Part of the problem is defining what constitutes full implementation of an order. This depends upon whether the court requires a fully unitary

system (including what a unitary system is), or only the remedy of narrowly-defined specific violations. As the law now stands, a dual school system must be eliminated "root and branch" (Green, 1968). However, Justice Powell would change the law so that a school system is required to appear as it would have looked, had a specific violation not occurred.

> The extent of integration sought to be achieved by busing [is that which] would have existed had the school authorities fulfilled their constitutional obligations in the past. (U. S. v. Texas, 1976:3413).

Social scientists might consider how to explain to the court that this is an impossibly iffy requirement. The outcome of many cases will depend upon whether the Court sticks by Green.

In Swann (1971:32-33), Justice Burger wrote for the Supreme Court that:

> [i]t does not follow that the communities served by such [desegregated] systems will remain demographically stable, for in a growing, mobile society, few will do so...[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

This position was recently reiterated when the Supreme Court dealt with resegregation in Pasadena (Spangler, 1976). Justice Rehnquist said a district court is not allowed to require the maintenance of a particular racial balance in the schools. Reassignment could only be required to remedy segregative actions chargeable to the school board itself or to the court decree itself.

> [H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns (Spangler, 1976:2705).

Failure to readjust attendance patterns to correct racial imbalance would not be considered a discriminatory act. In fact, in Pasadena the district court had not required specific rigid racial percentages; it had merely required that children of minority groups should not constitute the majority of any school. Nor had the district court ever enforced the correction of discriminatory faculty assignment practices. The dissent by Justices Marshall and Brennan questioned the majority's definition of a unitary school system. Since discrimination in faculty assignments had not been remedied, the system was not unitary, so the district court acted properly in attempting to remedy all discriminatory aspects of the school system, according to the dissenters.

An even more restrictive view of remedies is expressed in the minority opinion of Justice Powell in the Austin, Texas case (U. S. v. Texas, 1976) discussed above.

Some resegregation has also occurred in Louisville since the 1975 desegregation plan was ordered into effect. The district court (Newburg, 1976) ducked the issue of causation by determining as a matter of fact that the school district had never fully complied with the 1975 court order. However, Professor James Coleman testified as an expert witness that resegregation among schools had occurred due to white flight, and ought not to be remedied by the court. (It is unclear from the court's opinion whether the white flight was alleged to have resulted from fortuitous forces or the court order.)

To determine whether classes within ostensibly desegregated schools have become resegregated due to official acts of discrimination, it is necessary to examine all aspects of school programs. Some areas that have been the subject of litigation are testing, grouping, and tracking (Hobson, 1967; see also, Mills and Bryan, 1976), and improper placement in classes for the mentally retarded (Larry P. v. Riles, 1972). Problems of proof in these cases are formidable, since testing and grouping are legitimate educational tools, and the Supreme Court insists on proof of more than discriminatory impact. (Washington v. Davis, 1976) Disciplinary policies have also been challenged when they lead to disproportionate suspensions, expulsions, and "voluntary" drop-out rates of minority group pupils. (Ross v. Klotz, a pending case brought by the Children's Defense Fund. See also, Children's Defense Fund, School Suspensions, 1975, and Children Out of School in America, 1974.)

CONCLUSION

The present Supreme Court does not see America as a land of pervasive racism. On the contrary, the Court seems to believe that legal developments since Brown and the passage of the Civil Rights Acts of the 1960s have eliminated most discrimination from American society. We are merely left with some residual effects of discrimination in the dim past. The burden of proof described in this paper is therefore onerous, requiring meticulous documentation of official acts by school officials, by non-school officials, by state governments that have caused residential and educational segregation of metropolitan areas and that have caused resegregation once desegregation has been accomplished.

One curiosity is the apparent change in Justice Burger's view of our society. In Swann he seemed to recognize that the imposition of a neighborhood school policy on segregated residential patterns might of itself be discriminatory, since the residential pattern was a "loaded game board." (1971:29) In 1976 (U. S. v. Texas) he joined Justice Powell in an opinion that seems to repudiate the long line of cases from Green (which declared that so-called freedom-of-choice plans and racially identifiable schools violate the Fourteenth Amendment), to Swann (1971) and Keyes (1973). Social scientists must therefore persevere in their efforts to educate the courts about the nature of our society and how it got that way.

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NOTES

1. The views expressed in this paper are those of the author and do not represent the views of the National Institute of Education.

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