SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-627

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF PETITIONERS

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Additional Respondents:

Jesse Montague, Jr. and Debbora Montague,
by their Mother and Next Friend, Arva Montague;

Debbora Mitchell,
by her Father and Next Friend, John Mitchell;

Robbin J. Kent, Michael J. Kent and Leslie A. Kent,
by their Father and Next Friend Henry K. Kent;

Claudius R. Walker, Frericea M. Walker and Bernice L.
Walker, by their Father and Next Friend, C. R. Walker, Jr.;

Rubin Atitis Jackson and Lahmarie Jackson,
by their Mother and Next Friend, Winona Jackson;

National Association for the Advancement of Colored People;

John J. Gilligan, Governor of the State of Ohio, etc.;

William J. Brown,
Attorney General of the State of Ohio;

Ohio State Board of Education;

Martin W. Essex, Superintendent of Public Instruction,
Ohio Department of Education;

Terry Lawson;

Leo A. Lucas;

Jane Sterzer;

Wayne M. Carle,
Superintendent of Dayton School District.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF PETITIONERS

I. OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, entered on July 27, 1978, is reported at 583 F.2d 243 (*Dayton IV*).

The other three opinions of the Sixth Circuit in *Brinkman v. Gilligan* are reported at 539 F.2d 1084 (1976) (*Dayton III*), *vacated and remanded sub nom., Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton*); 518 F.2d 853 (1975) (*Dayton II*), *cert. denied*, 423 U.S. 1000 (1975); and 503 F.2d 684 (1974) (*Dayton I*).

The decision of the Supreme Court in *Dayton*, the decisions of the Sixth Circuit in *Dayton I-IV* and the unreported opinions of the District Court are reproduced in the appendix to the petition for a writ of certiorari.[1]

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals in *Dayton IV* was entered of record on July 27, 1978. The Dayton Board's petition for a writ of certiorari was granted on January 8, 1979.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To the United States Constitution, Section 1:

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

[1] References to the appendix contained in the petition for a writ of certiorari are indicated by a capital "A" and the page number which is followed by a small letter "a". References to the exhibit appendix are indicated by a capital "A" and the page number which is followed by an "Ex". Any references in this brief to the record consisting of the twenty volumes transcribed during the violation hearing held in November and December of 1972 consist of the designation R.I., followed by the page and volume number; references to the record of the remedial hearings held in February of 1975 consist of the designation R. II.; references to the record of the remedial hearing held in December, 1975 and March, 1976 consist of the designation R. III.; and references to the record of the remand hearing held in November of 1977 consist of the designation R. IV.

B. United States Code, Title 20:

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

C. United States Code, Title 28:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

D. United States Code, Title 42:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

E. Ohio Revised Code, Chapter 33:

§ 3313.48. Free Education To Be Provided; Minimum School Year

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof.

IV. QUESTIONS PRESENTED

A. In A School Desegregation Case, Is A Finding Of A Systemwide Violation Justified By Postulating A 1954 Duty To Diffuse Black And White Students Throughout A School System And Creating Therefrom A Presumption Of Systemwide And Continuing Segregative Intent As The Cause Of Racially Imbalanced School Populations At The Time of Suit?

B. Is The Effect Of Board Actions, Viewed Under A Natural and Foreseeable Result Test, Sufficient To Establish Segregative Intent In A School Desegregation Case?

C. Once Constitutional Violations Have Been Established In A School Desegregation Case, Is The Imposition Of A Systemwide Racial Balance Plan Justified In The Absence Of Proof That Such A Plan Reasonably Approximates The Racial Distribution Of School Populations That Would Have Occurred In The Absence Of Such Violations?

D. Is The Imposition Of Any Remedy In A School Desegregation Case Justified In The Absence Of Proof That Any Of The Plaintiffs Bringing The Action Had Been Injured Or That The Action Is Maintainable As A Class Action?

V. STATEMENT OF THE CASE

The history of this litigation during the period from its inception on April 17, 1972, until the decision rendered by this Court on June 27, 1977, is set forth in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977) (*Dayton*).[2] On

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[2] "This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio on February 1, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. (A. 1a). On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan,* 503 F.2d 684 (CA6 1974).

"The District Court then ordered the submission of new plans by the Board and by any other interested parties. (A. 70a). On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. (A. 73a). On appeal, the Court of Appeals again reversed as to remedy and directed remand, pursuant to this Court's directive, the District Court conducted evidentiary hearings which commenced on November 1, 1977. Considering all of the evidence presented at the various trials and hearings of this action in the light of the principles established by this Court, the District Court concluded that the plaintiffs had failed to establish a right to relief. On December 15, 1977, it accordingly entered an order dismissing the plaintiffs' complaint (A. 188a).

The District Court based its order on a detailed series of findings of fact and conclusions of law (A. 142-188a). In considering historical isolated incidents of constitutional violations, it found that there was no proof that such actions had any incremental segregative effect (A. 147-149a). Existing racial imbalance was found not to be a result of any intentional segregative act or acts on the part of the Dayton Board, but rather the simple reflection of residential living patterns in the geographic area served by the school system (A. 149-150a).

The one adverse finding made in the previous decision of the District Court – the maintenance of optional attendance zones between contiguous schools throughout the district – was re-examined in the light of additional evidence presented at the hearings following the remand. The evidence demonstrated neither segregative intent nor segregative effect in the establishment and maintenance of optional zones (A. 162-169a).

After the dismissal of their complaint, the plaintiffs filed a notice of appeal to the Sixth Circuit Court of Appeals. On January 16, 1978, the Sixth Circuit issued a stay order holding in effect, pending appeal, the systemwide racial balance plan

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that the District Court 'adopt a system-wide plan for the 1976-1977 school year.' . . . *Brinkman* v. *Gilligan*, 518 F.2d 853 (CA6 1975).

"Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. (A. 99a). On March 25, 1976, the details of the plan were approved by the District Court. (A. 110a). In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (CA6 1976)." *Dayton Board of Education* v. *Brinkman, Ibid.*

which had been imposed prior to this Court's decision in *Dayton*. On June 27, 1978, the Sixth Circuit reversed the District Court's dismissal of the case and entered a final order reinstating the systemwide racial balance plan (A. 217a). Applications for a stay were denied by the Sixth Circuit and by this Court. Students in the Dayton system are still being transported to distant school buildings under a plan that cannot stand under the facts presented and the constitutional principles applicable to those facts.

VI. SUMMARY OF ARGUMENT

The lower courts were presented with two basic questions for determination:

(1) Did the Dayton School Board take actions with segregative intent?

(2) If so, what incremental segregative effect did those actions have on the racial distribution of the school population as presently constituted?

If the answers to these questions required remedial action, the lower courts were then required to construct a remedy that would serve to eliminate the incremental segregative effect of the Board's actions.

The Sixth Circuit misconstrued the nature of the judicial task imposed by these questions. Instead of undertaking a factual analysis of the direct and circumstantial evidence of the Board's intent, it employed a technique of reasoning from presumptions to reach a result dictated by the theoretical premise for those presumptions.

On the issue of segregative intent, the Court began by looking at the past instead of the present. It reasoned that the existence of segregatory acts or practices in 1954 placed the Board under an affirmative duty to diffuse black and white students throughout the school system. From this false premise it then turned to the present condition of racial imbalance in the Dayton school population and created a presumption that such imbalance was a result of systemwide and continuing segregative intent on the part of the Dayton Board. By arbitrarily excluding all other factors, such as residential housing patterns, the Court's presumption permits a finding of a constitutional violation from a condition of racial imbalance without the necessity of a factual exploration of the evidence of actual intent. As such, it is an erroneous departure from the standards for decision-making which this Court has established.

The Sixth Circuit compounded its error in dealing with the question of intent by creating another presumption. In adopting a natural and foreseeable result test for determining intent, it simply devised a rationale for equating effect with intent. If conditions of racial imbalance resulted from Board actions, those actions – in the Court's view – were acts of intentional segregation. By arbitrarily excluding all other factors, such as a lack of feasible alternative actions, the Court's presumption once again permits the finding of a constitutional violation from a condition of racial imbalance without the necessity of a factual exploration of the evidence of actual intent.

When the distorting lenses of the presumptions created by the Sixth Circuit are withdrawn and the evidence is scrutinized in the light of the specific factors outlined in prior decisions of this Court, the conclusion is inexorable that for at least the past twenty years none of the actions of the Dayton School Board has been tainted with segregative intent.

In its determination of the second question, the Sixth Circuit completely misconstrued this Court's concept of incremental segregative effect. Instead of defining that concept from a remedial perspective as the difference between the distribution of a school population as it is and as it would have been in the absence of constitutional violations, the Sixth Circuit simply used the term as a description of a systemwide violation composed of gradual increments of isolated acts and practices. In relegating the concept to the violation stage of judicial consideration, the Sixth Circuit infused the concept with the same presumptive reasoning that misguided its handling of the first question. If a condition of racial imbalance is presumed to be the result of intentional Board action, a condition of racial balance may be presumed as the natural condition that would have existed in the absence of such action. From this false reasoning flows a conclusion that a systemwide racial balance remedy is the proper resolution of any desegregation dispute.

Once the concept of incremental segregative effect is applied in the remedial sense in which it was originally defined by this Court, the evidence compels the conclusion that the distribution of the Dayton school population at the time this suit was filed was essentially what it would have been in the absence of any of the alleged violations by the Dayton Board. The distribution was in fact a product of residential housing patterns. The changing racial compositions of the schools in the Dayton system over the past twenty years have, without any manipulation by the Board, simply reflected those patterns. In the absence of any incremental segregative effect from Board action, the proper remedy was a dismissal of the plaintiffs' complaint.

Dismissal of the complaint was proper for jurisdictional as well as substantive reasons. Despite the fact that the issue of standing has been persistently and repeatedly raised by the defendants from the outset of this litigation, no evidence has been presented to establish that any of the plaintiffs have sustained any injury or that any of them are members of a class that has sustained any injury.

VII. ARGUMENT

On June 27, 1977, this Court in plain and unequivocal language defined the task facing the trial and appellate courts in this litigation.

> "The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977).

In accordance with this mandate, the District Judge held supplementary hearings, examined and weighed all of the evidence, issued detailed findings of fact and dismissed the plaintiffs' complaint. The Sixth Circuit reversed this decision and reinstated a desegregation plan involving forced busing to create a balance of races in each school throughout the Dayton system which reflects the ratio between the races in the system as a whole.

How can two inferior courts faced with the same set of straightforward instructions reach such diametrically opposed results? The answer, we respectfully submit, lies in the refusal of the appellate court to accept the mandate of this Court and in its dedication to a goal of securing a uniform result in northern desegregation cases that mirrors the uniform result achieved in southern desegregation cases. It is hardly a tactical accident that the N.A.A.C.P. chose the only judicial circuit that encompasses two northern as well as two southern states for the forum in which to forge the principles applicable to school desegregation cases where no statutory dual system existed. It is equally unsurprising that this case has the dubious distinction of arriving twice before this Court on the same issues.

If these appear to be strong statements, there may yet be some virtue in plain speaking. The decisions of the Sixth Circuit in this case and its companion case from Columbus place the statements in a foundation of fact. *Penick* v. *Columbus Board of Education,* 583 F.2d 787 (1978) (*Columbus I*), *cert. granted,* — U.S. — (1979). While the technique employed by the Sixth Circuit to abandon the result required by this Court's mandate is cast in the garb of factual analysis and sophisticated legal presumptions, the force guiding that technique was first revealed in a concurring opinion issued by the author of the Columbus decision following a remand of the Detroit case in 1975:

> "I join my colleagues in the drafting and issuance of today's order because any final decision of the United States Supreme Court is the law of the land. But conscience compels me to record how deeply I disagree with the decision which we are enforcing." *Bradley* v. *Milliken,* 519 F.2d 679, 680 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975).

In a remarkable opinion, he went on to declare that any distinction between northern cases and southern cases was "a formula for American apartheid" and this Court's decision in the *Bradley* case was more "fraught with disaster for this country" than any Supreme Court decision since the *Dred Scott* case. *Id.* at 680-681.

In *Dayton IV* and *Columbus I,* this shout of resistance has taken the more subtle, though still rebellious form of reworking constitutional doctrines to assure that federal courts achieve the same sociologic result in states which had no statutory or constitutional mandate for segregated schools as occurred in southern states where such mandates existed. It is the responsibility of this brief to trace the error that has been created. It is the duty of this Court to correct that error.

A. THE SIXTH CIRCUIT HAS INVENTED AND ADOPTED ERRONEOUS STANDARDS FOR DETERMINING THE PRESENCE OR ABSENCE OF SEGREGATIVE INTENT IN SCHOOL DESEGREGATION CASES.

The first task of the inferior courts in this case was to "make new findings and conclusions as to violations" in the light of this Court's opinions in *Dayton Board of Education, Washington* v. *Davis* and *Village of Arlington Heights. Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). Instead, the Sixth Circuit attempted to determine this case in the light of novel standards which it created without reference to principles established by this Court.

1. There Is No Basis In The Constitution, In Prior Decisions Of This Court Or In Logic For The Sixth Circuit's Creation Of A Legal Presumption of Systemwide And Continuing Segregative Intent And Effect By Juxtaposing Pre-1954 Actions With A Current Condition Of Racially Imbalanced School Populations.

The primary approach of the Sixth Circuit consisted of posing and answering three questions. First, had the Dayton Board engaged in intentional segregative acts prior to this Court's 1954 decision in *Brown I*? If so, could the school system in 1954 be characterized as a dual system because of those acts. Such a characterization, according to the logic of the Sixth Circuit, creates an affirmative duty on a school board to remove all traces of segregation from the system by diffusing the races throughout the system. The third question is therefore whether at the time of suit students were diffused throughout the system in a racially balanced pattern. If so, the system is "desegregated" and no judicial remedy is required. If not, the Board is presumed to have failed to satisfy its affirmative constitutional duty, and a federal court is compelled to intervene and bring about "desegregation".

This approach is reiterated at various points in the Sixth Circuit's opinion:

> "The record demonstrates conclusively that at the time of *Brown I*, defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the system-wide effects of their prior acts of segregation." *Brinkman v. Gilligan*, 583 F.2d 243, 247 (1978); A. 194a.

> ". . . [W]e now expressly hold that at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment." *Ibid.*

> ". . . [T]he relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment." *Id.* at 251; A. 201-202a.

> "A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts." *Id.* at 252; A. 204a.

> "The district court's error in failing to find the defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by

their efficacy in eliminating the continuing effects of past discrimination." *Id.* at 253; A. 205a.

"... [F]or 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools." *Ibid.*

"Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices." *Id.* at 256; A. 212a.

". . . [D]efendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools. . . ." *Id* at 256-57; A. 213a.

The technique of triggering presumptions and burden-shifting principles from conditions existing in 1954 is clearly at the core of the Sixth Circuit's decision.

What is wrong with this approach? At least four separate criticisms, we submit, expose it as a product of false reasoning.

(a) The Dayton school system cannot fairly be characterized as a "dual system" in 1954 or in any other year.

(b) The year 1954 has no talismanic significance in law or in logic; the focus of judicial inquiry should be on conditions existing at the time of suit.

(c) "Desegregation" is not synonymous with "racial balance" or with "diffusion of black and white students throughout the system"; a presumption of segregative intent based on an erroneous definition of desegregation is an erroneous presumption.

(d) The Sixth Circuit's approach is a departure from the standards already established by this Court for determining the existence of constitutional violations in school desegregation cases.

For each of these separate reasons the approach adopted by the Sixth Circuit should be rejected.

The first criticism relates not to the approach itself, but to the relevance of the approach to the facts of this case. In answering its first self-imposed question, the Sixth Circuit found pre-1954 segregative practices to have existed in the Dayton school system. It then leaped to the non sequitur that an affirmative answer to this question requires an affirmative answer to the second question. In characterizing the 1954 school system as a dual system because of actions of the Dayton Board, the Court noted that in the 1951-52 school year 54.3% of the black students in the system attended four schools that were 100% black. 583 F.2d at 248-249; A. 197a. It put aside the fact that such attendance was either voluntary or a reflection of the racial composition of the neighborhoods served by the schools in question. It also conveniently ignored the fact that the other half of the black student population was attending racially mixed schools (A. 216-Ex.; *see* A. 177-Ex.).

If a dual system is one in which separate schools are maintained for black students and for white students, how can a system in which almost half of the black students attend schools in the company of white students – regardless of the percentage mix in each school – be characterized as a dual system? (*Ibid*). Even if the questions posed by the Sixth Circuit were the right questions, the answer which it gave to the second question was clearly the wrong answer. As an official of the plaintiff N.A.A.C.P. admitted in testimony given on the remand from this Court, the worst thing that can be said in retrospect about the Dayton schools is that they reflect the racial imbalance of the geographic neighborhoods they serve. (A. 526-528). Such a condition does not offend the Constitution. *See, e.g., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 413, 417 (1977); *Washington* v. *Davis,* 426 U.S. 229, 240 (1976).

The second criticism of the Sixth Circuit's approach is that even if the Sixth Circuit was correct in finding a dual system as of 1954, its finding should neither determine the outcome of this litigation nor trigger adverse presumptions about the intent of the Dayton Board at the time of suit. The year 1954 may have historical significance as the year in which this Court decided the landmark case of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*). That decision did not, however, create a new constitutional principle that was valid for the post-1954 era and inapplicable to the years before 1954. It interpreted the Constitution as that document had existed since the ratification of the fourteenth amendment in 1868.

It is therefore just as logical — or, we submit, illogical — for a court to focus on conditions as they existed at the time of the 1913 Dayton flood or as they existed in 1868 as it is for a court to focus on conditions as they existed twenty-five years ago in 1954. If there is some special constitutional significance to the year 1954, that significance should not diminish with the passage of time. Presumably, the decision-making process in a desegregation case filed in the year 2064 would start with an analysis of practices and patterns in existence one hundred ten years earlier. It is difficult to believe that any court would be persuaded to adopt this line of reasoning, although the constitutional logic of the Sixth Circuit's position suggests that even today a court should fix the bench mark for triggering presumptions one hundred ten years ago when the constitutional provision in question was adopted.

The issue is not what happened eight generations of high school students ago in 1954 or thirty-six generations of high school students ago in 1868. The issue is what constitutional violations existed and affected student distribution in the system at the time of suit. While examination of historical practices may be helpful in exploring these current conditions, such an examination is entirely different from seizing upon some arbitrary date in the past and drawing adverse evidentiary presumptions as a means of forcing a predetermined outcome to the litigation. The novel approach adopted by the Sixth Circuit was first suggested in the amicus brief filed by the Department of Justice when this litigation came before this Court in 1977. It was picked up by the plaintiffs in the oral arguments presented on that appeal, and it was tacitly rejected by this Court in the opinion which remanded this case to the District Court and the Sixth Circuit. Since the approach has nothing in law or logic to recommend it, the rejection was appropriate.

The third criticism of the Sixth Circuit's approach relates to the creation of artificial and erroneous presumptions as a procedural technique for compelling predetermined results. After finding that the District Court erred "in failing to accord the proper legal significance to the facts extant at the time of *Brown I*", the Sixth Circuit found a second source of error in the District Court's alleged failure "to apply the appropriate presumption and burden-shifting principles of law." 583 F.2d at 251; A. 202a. These "principles" were created by the Sixth Circuit as a corollary to its erroneous view that the existence of segregative practices in a school system in 1954 gives rise to an affirmative duty on the part of a school board to achieve a racial balance of students throughout the system. Presumptions of systemwide and continuing intent and effect were applied to place upon the Dayton Board a burden of proof that can only be satisfied by a showing that it had achieved such a racial balance at the time suit was filed.

A legal presumption may be defined as an inference as to the truth of a proposition based on probable reasoning in the absence of actual proof or disproof. It serves no legitimate purpose in litigation other than to assist in determining true facts, and if it is not based on probable reasoning it does not deserve to be adopted as a presumption. The "presumptions" of systemwide and continuing intent and effect employed by the Sixth Circuit are not "presumptions" in the legal sense of that term; they are simply artificial tools employed to achieve a desired result. They are grounded not in probable reasoning but in an erroneous definition of desegregation.

Segregation is the separation of the races by intentional state action. In contrast, desegregation should be defined as the complete removal of such state-imposed barriers. When the Sixth Circuit speaks in terms of an "affirmative duty . . . to diffuse black and white students throughout the Dayton school system," it is creating a constitutional duty to maintain a state-imposed racial balance regardless of whatever private forces may be at work in determining the natural demographics of population distribution. 583 F.2d at 256; A. 212a. It is not necessary to debate the philosophical or social virtues or vices of a system which subjects individual freedom to state-imposed patterns of racial balance. It is sufficient to confirm that the Constitution does not require any particular diffusion of black and white students in a school system; it simply requires that no student be denied access to any school in the system on the basis of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). A presumption of segregative intent based on a failure to diffuse the races has no constitutional foundation.

Such a presumption also has no foundation in facts or in common sense. To conclude that every isolated segregative act has a systemwide and continuing effect does not accord with probable reasoning; much of the historical evidence in this case was buried beyond the reach of memory until dredged up by the plaintiffs for forensic purposes. To conclude that in the absence of constitutional violations black and white students would be diffused throughout the Dayton school system does not accord with probable reasoning. Indeed, the evidence indicates that the distribution of students that existed in the system when suit was filed would have been the same even if every action of the Board in the last seventy-nine years had been racially neutral by 1979 standards.

By creating a set of presumptions and a burden of proof without recourse to constitutional requirements or factual considerations the Sixth Circuit has simply devised a technique for assuring a uniform result in any school desegregation case. The presumptions are for all practical purposes irrebuttable since the burden of demonstrating diffusion cannot be met. Neither the Dayton School Board nor any other school board in the country can satisfy the burden allegedly thrust upon it by the dead hand of the past because the demographics of population distribution will simply not produce such a diffusion in a free society.

The final criticism of the Sixth Circuit's approach lies in the fact that it is simply a frolic and detour from constitutional principles that have been firmly established by this Court. In order to prove *de jure* segregation, the plaintiffs in this case or any other case are required to demonstrate a current condition of segregation resulting from intentional state action. *Washington* v. *Davis,* 426 U.S. 229, 240 (1976); *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 205 (1973). Historical background is relevant only to the extent it sheds light on the question whether a current condition of state-imposed segregation exists. 413 U.S. at 211. The proper approach is to focus on the present, not to ignore the present and extrapolate constitutional violations from the past with the leverage of unsupportable presumptions.

2. The Sixth Circuit's Adoption Of A Natural And Foreseeable Result Test To Determine Segregative Intent Conflicts With Prior Decisions Of This Court.

While the Sixth Circuit's consideration of the question whether the Dayton school system was segregated by intentional actions of the Dayton Board was guided in large part by the set of presumptions drawn from focusing on pre-1954 practices, it was also influenced by the adoption of a natural and foreseeable result test to determine segregative intent. The authority for adopting this test was a prior opinion of the Sixth Circuit.

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

By equating "effect" with "intent" this test thrusts upon a school board the task of proving the negative proposition that its actions were free of segregative intent. All of the neutral evidence before the court becomes colored by the presumption, and the Sixth Circuit simply reaches the conclusion dictated by its premise.

> "The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system." 583 F.2d at 252; A. 204a.

Like the presumptions based on the Sixth Circuit's 1954 focus, the presumption based on a natural and foreseeable result test is without legal or factual foundation. Two reasons require its rejection:

(a) since natural, probable and foreseeable results are not necessarily intended results, there is no basis in probable reasoning for a presumption of intent from such results;

(b) the factors to be considered in determining the presence or absence of segregative intent have been delineated in prior opinions of this Court, and the adoption of a result-oriented presumption of intent is an abandonment of the judicial duty to consider those factors.

Without basis in logic or law the presumption holds no justification for continued existence.

The chief reason for rejecting the presumption is the fact that it is not in accord with probable reasoning and therefore exists as little more than an artificial tool to rationalize a desired result. If the University of Dayton gets involved in a football game with the University of Alabama, the natural, probable and foreseeable result may be another Alabama victory. Does this mean that the University of Dayton intended to lose the game? If a surgeon undertakes an operation with a high risk of mortality and the patient dies on the table, did the surgeon intend to kill his patient? If a novice author attempts to write the great American novel and the natural, probable and foreseeable result of such effort is failure, is it reasonable to presume that he intended to achieve such a result?

In the context of this school desegregation case, the Sixth Circuit's presumption of intent has a particularly troubling ring of artifice. The use of the presumption is primarily directed to assignment practices, school construction and site selection. 583 F.2d at 253-257; A. 206-212a. In a community like Dayton where there is marked racial imbalance in residential housing patterns, an absolutely neutral enforcement of the statutory policy contained in section 3313.-48 of the Ohio Revised Code – a policy of providing education "at such places as will be most convenient for the attendance of the largest number" of students – will inevitably result in racially imbalanced schools.

Viewed from the Sixth Circuit's presumption of intent from effect, the same neutral practice becomes a breach of the Constitution. The natural effect of building a school where the black population is concentrated is a school predominantly attended by black students. The natural effect of building a school where the white population is concentrated is a school predominantly attended by white students. Since "effect" and "intent" are synonymous under the Sixth Circuit's presumption, a school board is guilty of intentionally segregating the races when it follows the state statute.

The outcome of any desegregation case is foredoomed in any neighborhood school system in a community that does not display residential racial balance. Since communities reflecting residential racial balance are virtually unknown in this country, it is not difficult to predict the outcome of any desegregation case to which the Sixth Circuit presumptions are applied. There is a double-barreled effect at the point where the presumption of intent from effect overlaps with the presumption of a continuing affirmative duty to diffuse the races throughout a school system when segregative practices have been found to have existed at some point in the history of the system.

The plaintiffs' chief expert carried the foreseeability argument to the point that any act of a school board which achieves anything less than a racial balancing of students throughout the system is an intentional act of segregation. (A. 474-475) This argument rests on the concept that it is foreseeable that white students will migrate or leave a school system unless they have no means of escaping a racially-mixed school situation. Not only is the building of a school or school addition in a black residential area or in a white residential area an act of intentional segregation; building a school in a racially-mixed area is an intentional segregative act since the existence of such a mix will encourage white students to leave the area. Under a presumption of intent from foreseeable effect, any act on the part of a school board which falls short of attaining systemwide racial balance thus becomes an intentional segregative act.

The Sixth Circuit, in applying its artificial presumption, neglected to examine the evidence that there were no reasonably feasible alternatives to the actions taken by the Board. If the Board was faced with simple choices between school sites or expansion that would mix the races and school sites or expansion that would result in racial separation, a consistent following of the latter choice could justify the drawing of an adverse inference of segregative intent. It was apparent, however, from the evidence that because of the residential racial imbalance in the system the only alternative to the Board's consistent policy of building schools "where the children are or where they are expected to be" was the adoption of a systemwide busing plan (A. 292-294).

Wherever the Board had a feasible option of reducing racial imbalance — as in the opening of Roth High School in 1959 with a mix of black and white students that approximated the systemwide ratio (A. 208-209, 311-312, 389) or in the alteration of the Willard, Garfield and Wogaman attendance boundaries in 1952 for the purpose of placing more black students in integrated school environments (A. 340, 388-389; A. 323-324-Ex.; R. I. 1181, Vol. 11). — its actions in following the integrative options were ironically seized upon by the plaintiffs as proof that anything short of a systemwide racial balance is inadequate (*see* A. 303-304). The immediate integrative effect of the 1952 boundary alterations was ultimately frustrated by shifting populations (A. 324-Ex.) and the same forces ultimately rendered Roth an all-black high school (A. 312).

Whatever their implications for a social policy of systemwide racial balance may be, these examples and others graphically demonstrate that intent and effect are not in reality synonymous. A legal presumption of intent from effect has no more basis in probable reasoning than a presumption based on Robert Burns' observations concerning the best-laid plans of mice and men.

The Sixth Circuit is not alone in attempting to bypass the standards established by this Court for determining segregative intent. A foreseeable effect test has also been adopted in the Second Circuit, the Fifth Circuit and the Eighth Circuit. *See, e. g., Hart* v. *Community School Board of Education, New York School District,* 512 F.2d 37 (2nd Cir. 1975); *United States* v. *Texas Education Agency,* 564 F.2d 162 (5th Cir. 1977); and *United States* v. *School District of Omaha,* 565 F.2d 127 (8th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978). The Ninth Circuit, on the other hand, appears to have honored the rejection of such a test by prior decisions of this Court. *See, e. g., Johnson* v. *San Francisco Unified School District*, 500 F.2d 349, 351-52 (9th Cir. 1974); *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264, 1266 n. 3 (9th Cir. 1974).

The Sixth Circuit's foreseeable result test is nothing more than the return under a new name of the impact test which was rejected by this Court in *Washington* v. *Davis*.

> "The school desegregation cases have also 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. 229, 240 (1976).

Any doubt that may have unjustifiably lingered in the mind of any jurist subsequent to this decision should have been laid to rest by the decision of this Court in *Village of Arlington Heights*.

> "Our decision last Term in *Washington* v. *Davis* . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977).

Whether the presumptive shortcut to the desired result be phrased in terms of impact, result or effect, it has been properly rejected by this Court in favor of a straightforward analysis of the evidence presented on the determinative issue of intent.

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266.

The architecture of artificial presumptions created by the Sixth Circuit should be dismantled. The District Court's sensitive handling of the "difficult task" of making "complex factual determinations" should be reinstated according to the tests established by this Court.

> ". . . [T]hat is what the Constitution and our cases call for, and that is what must be done in this case." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977).

3. Application Of The Standards Established By This Court For Determining The Presence Or Absence Of Segregative Intent To The Facts Of This Case Justifies The Findings Of The Trial Court.

In holding squarely that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" this Court in *Arlington Heights* spent three pages outlining the kinds of factors to be considered in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977). Intent is not racially disproportionate effect warmed over. It involves "state contrivance to segregate" and "a purposeful device to discriminate." *Washington* v. *Davis*, 426 U.S. 229, 240, 246 (1976).

The Dayton Board contends that its intent has been to pursue a racially neutral policy of placing schools where the children are or where they are expected to be in accordance with the directive of section 3313.48 of the Ohio Revised Code. The location of schools on the basis of such a criterion has been upheld, and it is certainly a rational criterion. *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). Indeed, if any presumption is to be indulged in this area, it should be a presumption that the Dayton Board is complying with the state law.

> ". . . [T]he state of Ohio requires that the Board of Education shall provide free education 'at such places as will be most convenient for the attendance of the largest number thereof.' R. C. Section 3313.48. The presumption that the Board has safely adhered to the Ohio statutes will control until rebutted." *Craggett* v. *Board of Education of Cleveland City School District, Cuyahoga County, Ohio*, 234 F. Supp. 381, 386 (N.D. Ohio, *aff'd*, 338 F.2d 941 (1964).

The plaintiffs on the other hand contend that it was the intent of the Dayton Board to secure wherever possible a forced separation of the races in the Dayton school system. Their argument rests largely upon the application of a racial balance theory under which any action short of the achievement of systemwide ratios between black and white students in each school is perceived as having a segregative effect and on the invocation of adverse presumptions drawn from that theory. When the erroneous standards created by the Sixth Circuit are replaced by the factors set forth in *Arlington Heights*, the plaintiffs' contentions as to segregative intent collapse.

Is there "proof that a discriminatory purpose has been a motivating factor" in the actions of the Dayton Board? Whenever any purpose other than convenience of access emerges unequivocally from the evidence, the purpose is one of improving racial balance. The examples of the alteration of attendance boundaries at Willard, Garfield and Wogaman schools in 1952 and the building of Roth High School in

1959 have already been cited. Had the Board been acting with a motivation of keeping blacks confined to black schools, the natural choice in 1952 would have been the selection of a proposed plan for placing additions onto Willard and Garfield schools. Such an action would have had the effect of locking in the blacks at Willard and Garfield, and it certainly would have been classified by the plaintiffs as "segregatory" in nature (*see* A. 339). Had segregative purpose or intent been behind the construction of Roth, the Dayton Board could have built a small high school and placed an addition onto Roosevelt, thereby providing a "white Roth" and locking in the blacks at Roosevelt (A. 315). Instead Roth opened with a student population which was 75% white and 25% black – the approximate systemwide ratio of black and white students at the time (A. 208-209).

Likewise, the Board in 1967, when presented with a conscious choice between alternatives, chose the alternative designed to prevent rather than promote racial separation by locating Jefferson Primary on the site of Jefferson Elementary School, rather than in Lower Dayton View (A. 373-374). Had the new school been located in the Lower Dayton View area, the result would have been a "whitening up" of Jefferson Elementary with the concomitant probability of the opening of a new all-black school (*see* A. 373-374). The same intent to improve racial mix while preserving the concept of neighborhood schools is reflected in the Board's 1969 revision of attendance boundaries for Stivers High School in order to achieve a greater degree of integration at that school (A. 99-100, 219, 310-311).

The plaintiffs can only respond to these and other actions by arguing that they fell short of achieving a systemwide racial balance or that their immediate effect was frustrated by shifting populations. Such arguments do not alter the actions as unequivocal evidence of the Board's non-segregative intent. Even Dr. Carle, the plaintiffs' chief witness at both the original trial and at the 1977 rehearings, admits that the 1952 "West Side Reorganization" was a result of an intent not to segregate but to improve the racial mix of students in as many schools as possible (A. 340, 468, 481). Typically, he then uses this example of the Dayton Board's non-segregative intent as support for his contention that racial imbalance has to be approached on a systemwide basis. In his view, the presence of white areas elsewhere in the system permitted frustration of the Board's intent through population movements (A. 467-469). Yet he concedes that there have been no significant changes in school boundaries and attendance zones for some twenty years (A. 472). It necessarily follows that the changing populations of the schools came about in spite of rather than because of Board action.

Application of the other tests verbalized in *Arlington Heights* leads to the same conclusion that the Dayton Board's actions have been free from segregative intent. Is there evidence that the impact of the Board's official actions "bears more heavily on one race than another"? The plaintiffs did not demonstrate any inequality of facilities, instruction and curricula opportunities in the system (A. 30a). The policies of the Board with respect to site selection, construction and attendance zones were applied impartially across the system (A. 307, 368, 391). The evidence thus eliminates this factor from consideration.

There is also a total absence of "a clear pattern, unexplainable on grounds other than race." The Board simply followed a neutral policy of putting the schools where children were or where they were expected to be (A. 368-369). It refrained from manipulating or gerrymandering attendance boundaries as the population in the district grew from 19% black in 1951-52 to 44.6% black in 1972-73 (A. 309; *see* A. 326-Ex.). The inescapable fact that school attendance boundaries had remained essentially stable in the school system for twenty years before the filing of this suit while residential and school populations shifted and changed is overwhelming evidence against any claim that the Board's actions were motivated by segregative intent. If such were the case, the Board would have changed attendance boundaries to eliminate the mixed schools that invariably marked the frontiers of Dayton's expanding black residential population. It did not so act. The record thus demonstrates a clear pattern, unexplainable on grounds other than neutrality.

Does the evidence reveal "a series of official actions taken for invidious purposes"? As the District Court found, the only Board actions that could be characterized as segregative were isolated acts or practices that dated back to periods ranging from twenty to sixty years before the filing of suit. This finding was confirmed by the testimony of a distinguished black witness who was presented by the plaintiffs at the 1977 remand hearings, not as an advocate from the ramparts, but as an impartial historian who had made a thorough study of the facts relevant to this litigation.

> "Q. . . . Would you relate such instances of segregation in the Dayton Public School System since 1954?
> "A. Well, there really isn't that much since 1954." (A. 519).

For more than twenty years before the filing of this suit the schools simply reflected the racial composition of the neighborhoods they served. Except for isolated acts, the significance of which has long since been dissipated by the passage of time, the Dayton Board has never taken any actions for purposes that could by current standards be deemed "invidious".

Were there "departures from the normal procedural sequence" that "might afford evidence that improper purposes are playing a role"? No evidence is offered to refute the Trial Court's findings of fact that attendance zones in the Dayton system are not irregular, that they have remained essentially stable, that boundaries have not been changed or altered to channel blacks or whites into specific schools or to restrict blacks from attending any schools or for purposes of creating a white or a black school, and that boundary lines have not been gerrymandered notwithstanding the fact that student body compositions in many schools have changed from predominantly white to predominantly black (A. 5-6a). Optional zones were scattered throughout the system in a pattern that refutes any claim that any racial significance any of them may have had was anything other than coincidental (*see* A. 310, 321). There simply were no significant departures from the racially neutral policies of the Board except as a result of efforts to improve racial balance.

What light does "legislative or administrative history" shed on the question whether racially discriminatory intent directed the actions of the Dayton Board? We have already noted that in every instance where it was presented with conscious alternatives that fell within its neighborhood school policy the Board opted for the alternative that would improve racial balance. While the plaintiffs from the sophisticated vantage point of the 1970's may attempt to make light of the administrative history expressing the Board's intent in 1952 to provide through boundary changes an increased opportunity for interracial learning experiences or the policy of "dynamic gradualism" expressed in the same period with respect to assignment of white teachers to schools in black areas and black teachers to schools having white or mixed populations, these items of administrative history are clear indicia of the Board's long-standing concern over problems of racial isolation and its intent to overcome such problems wherever feasible without sacrificing its neighborhood school system.

When we turn from an examination of the evidence under the *Arlington Heights* tests to the basis offered by the Sixth Circuit for its findings in *Dayton IV* of "post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*," it is apparent that the findings are simply an example of using presumptions as self-fulfilling prophesies. The findings are organized by the Sixth Circuit in three categories — faculty and student assignment practices, school construction and site selection, grade structure and reorganization. 583 F.2d at 253-256; A. 205-214a.

The Sixth Circuit's discussion of faculty and student assignment practices is largely a blending of artificial presumptions of segregative intent with the fact of racial imbalance in the schools. When the erroneous presumptions are removed from this analysis, all that remains is racial imbalance – a condition that even the Sixth Circuit grudgingly recognizes as "not in itself a constitutional violation." 583 F.2d at 249; A. 197a.

The only specific facts to which the Court refers in this section of its discussion, aside from statistics showing racial imbalance, involve the closing of Willard and Garfield elementary schools in 1962 at the time of the conversion of the old Dunbar high school building into MacFarlane Elementary School and the opening of the new Dunbar High School. This situation is not offered as evidence of segregative intent, but simply as an opportunity for applying an adverse presumption. In fact, as the Trial Court had noted, the entire population in the area of these schools was black at the time in question and there was no occasion for the Board to achieve a racial mix by any actions short of adopting some form of cross-town busing (A. 170a).

With regard to faculty assignment the Sixth Circuit's analysis of post-*Brown* "violations" is largely silent. This silence stems from a recognition of the fact that three years before *Brown I* the Board had expressly replaced its practice of assigning black teachers to black schools with a policy of "dynamic gradualism" under which black teachers began to receive teaching assignments in white and mixed schools (A. 176-Ex., 187-189-Ex.). This unequivocal expression of non-segregatory intent was substantially implemented in the twenty-year period between its adoption as Board policy and the filing of this lawsuit. In a curious footnote, unsupported by any reference to the record, the Sixth Circuit states that "[e]ven at the time this action was instituted, it was possible to identify a 'black school' in the Dayton school system without reference to the racial composition of the students." 583 F.2d at 253, n. 49; A. 207a. In fact, at the time this suit was filed faculty assignments were made in such a manner that each school reflected the racial balance of the district as a whole (A. 226). [3]

Without reference to any specific facts in the record, the Sixth Circuit concluded that the Dayton Board had used "optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause". 583 F.2d at 255; A. 210a. Once again the Sixth Circuit's erroneous presumptions point in one direction and the actual evidence points in the opposite direction. While the District Court in its decision following the original trial found that a few of the optional zones could have had a cumulative effect on conditions of racial imbalance, this Court raised a question as to whether even those zones reflected the presence of discriminatory intent.

> "The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, *assuming that it was a violation under the standards of Washington* v. *Davis, supra*, appears to be so only with respect to high school districting." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977) (emphasis supplied).

The only factual evidence presented at the post-remand hearings which was truly supplementary to the evidence already before the District Court was the testimony of Dr. Treacy. By utilizing block census data Dr. Treacy was able to gather detailed information relating to the optional zones in question (A. 497-513). This evidence narrowed the inquiry to the Roosevelt-Colonel White optional zone. While the zone in its early period may have permitted some whites

[3] The Trial Court's findings on the subject of faculty and staff assignments together with supporting references to the record are found at A. 4a and 151-154a. *See* A. 278-289-Ex.

to attend predominantly white Colonel White instead of Roosevelt, its ultimate effect was to permit blacks to attend Colonel White and provide a significant racial mix in the student population at that school (A. 507).

If the reason for establishing the zone was segregative instead of the assigned reasons of access, safety and convenience, the Board would have modified or abolished the zone when it began serving an integrative rather than a segregative purpose. Its failure to do so is demonstration of the fact that this zone, like the similar zones that uniformly appeared at midpoints between schools throughout the system, was not adopted with any intent to segregate the races (A. 514). Indeed, the undisputed evidence is that racial considerations never played a role in the establishment of optional zone attendance boundaries in the Dayton system (A. 391).

The Sixth Circuit's comments on the second category of post-*Brown* "violations" – school construction and site selection – also turn on presumption and effect rather than on evidence of segregative intent. 583 F.2d at 255-56; A. 210-212a. In emphasizing the number of new schools and additions which opened with a predominantly one-race racial composition, the Court simply pointed out that such openings maintained racial isolation in the system and attempted to reinforce its presumptive conclusion of segregative intent by referring to the pre-1951 practice of assigning black teachers to teach only in black schools. It ignored the abandonment of that practice in 1951, and, even more significantly, it ignored the absence of any feasible alternative to the pattern of school construction and site selection which it observed.

The fact that their student compositions reflected the racial composition of the neighborhoods they served does not offset the fact that schools were built accordingly to racially neutral criteria. The Dayton Board of Education has consistently, uniformly and impartially located school buildings in areas where students and potential students resided so that the buildings would be most convenient for the attendance of the largest possible number of students (A. 368-369). In addition to selecting sites in the areas of the heaviest concentrations of students and potential concentrations of students, the Dayton Board has properly taken into account such factors as safety of access, proximity of city parks and economics of land acquisition (*Ibid*). Likewise, construction of additions to existing school buildings has been accomplished without regard to the race of students affected. Such construction has occurred wherever and whenever increased population density required more classroom space and the building of a new school could not be justified (A. 376).

When comparing construction and site selection practices in Dayton to those utilized in other systems, it is readily apparent why the District Court found that school construction and site selection were not motivated by segregative intent (A. 7a). For example, in the Pontiac case, the evidence disclosed that the criteria verbally espoused by the Board resulted in inconsistent applications when applied to the various schools. *Davis* v. *School District of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). In the Denver case, an elementary school was built with conscious knowledge that it would be segregated. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 201-02 (1973). In the Detroit case, the Board admitted that in one instance "it purposefully and intentionally built and maintained a school and its attendance zones to contain black students." *Bradley* v. *Milliken*, 484 F.2d 215, 222 (6th Cir. 1973).

The testimony of the witnesses Lucas and Harewood, who appeared as impassioned advocates for the plaintiffs at the hearings following this Court's remand, ironically confirmed the Trial Court's conclusion that the Dayton School Board was innocent of any intent to segregate in its policies of school construction and site selection. While both witnesses were quick to see racial implications in every action taken by the Board, both conceded that given the population pattern of the City of Dayton there were only two conceivable alternatives to the building and attendance policies which the Board followed consistently for twenty years before the filing of this suit. One alternative was to scrap all of the school buildings in the district in favor of a single downtown campus; the second alternative was to employ some technique of cross-town busing to achieve an artifical mix of the races in each school (A. 540-541, 545-547). There was no evidence that either of these alternatives was ever economically or logistically feasible, or that either was ever presented for consideration at any relevant time.

In fact, the witness Lucas — who as president of the Dayton School Board had confirmed by vote as late as January of 1971 that he saw no alternative to the neighborhood school — admitted that he did not consider either of these alternatives feasible until he got into the planning stages of this litigation (A. 538-541).

> "If you will recognize the events that took place from January '71 until August of '71, my belief about, say, a concept of neighborhood schools was not really solidified until these events finally came in, but all of us at that time agreed that we saw no other alternative, and we publicized that on a unanimous basis." (A. 540).

To brand as a "segregative act" the failure of the Dayton Board to adopt extreme and expensive "alternatives" that were never suggested to it, considered by it or adopted elsewhere in the country as viable policies during the relevant time period is neither realistic nor fair.

Mr. Lucas ultimately had to admit that his claim of segregative intent was no more than the view of neutral actions he obtained through Emerald City spectacles. Early in his testimony he conceded that "being a black person sees this, in my judgment, from a different point of view" (A. 535). On his deposition a week prior to the December, 1977 remand hearing, he candidly stated that "[w]hen I said the

Board made certain decisions that were just automatic, it was never intended by a single Board member to be doing it to separate the races" (A. 548). Coming from the lips of one of the plaintiffs' most committed advocates in a case which turns not on the perceived effect but on the purposeful intent of actions, this statement is — we respectfully submit — a telling admission.

The testimony of the Executive Secretary of the Dayton branch of the N.A.A.C.P. was equally damaging to any argument of purposeful segregative intent (A. 522-530). This executive admitted that during her thirty year tenure she was a watchdog of the Dayton school system on behalf of the plaintiff N.A.A.C.P. and that she has been deeply involved on its behalf in this litigation (A. 527). Yet she could only cite three occasions in thirty years on which the N.A.A.C.P. had objected to practices or proposals of the Dayton Board (A. 523-524). The most recent of these objections came more than twelve years before this suit was filed (A. 525-526). The Board responded quickly and favorably to the N.A.A.C.P.'s objections on two out of the three occasions; on the third occasion the N.A.A.C.P. withdrew its objection (A. 524-527). Except for this withdrawn objection, there was no evidence that the N.A.A.C.P. had ever objected to sites selected by the Board for placing schools or additions, and even in this one instance there was no evidence that any alternative was presented to the Board.[4]

The final category of post-*Brown* "violations" cited by the Sixth Circuit — grade structure and reorganization — relates to the establishment of a middle school system in the 1971-72 school year. 583 F.2d at 256; A. 212-213a. Again, the Court has simply substituted effect for intent through the application of erroneous presumptions. As the Trial Court pointed out, and as the plaintiffs conceded, there was evi-

[4] The Trial Court's findings on the subject of school construction and site selection together with supporting references to the record are found at A. 7a and 173-180a. *See* A. 368-369, 376.

dence that the effect of the middle schools was in some areas integrative and in some areas segregative (A. 236-237). There was, however, no evidence of any segregative intent with respect to the establishment of those schools. The Sixth Circuit's finding of such intent is the artificial product of a purported duty of the Dayton Board to diffuse the races throughout the school system.[5]

When the erroneous legal concepts which guided the Sixth Circuit's consideration of this case are replaced by the factors for determining segregative intent enunciated by this Court in *Arlington Heights*, the Trial Court's findings on that subject emerge as compelled by the weight of the evidence presented. To consider them as failing to satisfy applicable standards for appellate review is to reallocate the role of the trier of facts to reviewing courts and to replace facts with theories.

Rule 52(a) of the Federal Rules of Civil Procedure is clear, concise and free from ambiguity:

> "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Application of the "clearly erroneous" standard requires appellate courts to "constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Appellate authority in reviewing the findings of a trial court "is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Ibid.* Under Rule 52 (a) the question for appellate review is not whether the reviewing court "would have made the findings the trial

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[5] The Trial Court's findings with respect to the middle schools appear at A. 6a and 157-158a. *See* defendants' exhibit AW; A. 236-237.

court did." *Ibid.* Rather, the question is whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ibid; United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

This Rule 52(a) standard applies to factual inferences drawn from documents or undisputed facts as well as to those cases in which the District Judge heard no live testimony during the course of the trial. *United States* v. *United States Gypsum Co., supra* at 394; *Ingram Corp.* v. *Ohio River Co.,* 505 F.2d 1364, 1369 (6th Cir. 1974); *United States Steel Corp.* v. *Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970). In this case, in addition to the documentary evidence, approximately forty-one live witnesses testified during the November 1972 and 1977 hearings. This testimony accounts for a verbatim record in excess of 2,500 pages. Much of the testimony was raw opinion testimony of witnesses who had obvious ideological motivations to secure a specific result. The role of the Trial Court in evaluating such testimony should not be understated, and it should not be subordinated to the desire of an appellate court to secure a preordained result.

The Trial Court's findings cannot be cast aside as "clearly erroneous". They were in fact grounded in substantial evidence revealing a system in which "the 'neighborhood school' concept . . . has been maintained free of manipulation." *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 212 (1972). The plaintiffs have failed to demonstrate any segregative intent under the tests set forth in *Arlington Heights.* Their case accordingly fails.

B. THE SIXTH CIRCUIT HAS INVENTED AND ADOPTED ERRONEOUS STANDARDS FOR DETERMINING THE SCOPE OF THE REMEDY IN SCHOOL DESEGREGATION CASES.

If an application of appropriate standards to the evidence justified a finding of any constitutional violations by the Dayton Board, the lower courts were faced with a very specific and clearly defined task.

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there by a systemwide remedy." 433 U.S. at 420.

As at the violation stage of its deliberations, the Sixth Circuit elected at the remedy stage to evade rather than apply the standard established by this Court.

1. The Sixth Circuit's Misconstruction Of The Concept Of Incremental Segregative Effect Is A Clear Departure From The Holding Of This Court In Dayton.

Whatever the complexities of performing the remedial task set forth by this Court may be in any given case, the nature of the task itself is easily understood. On one side of the scales of justice a court must place the racial distribution of the school population as it exists; on the other side of the scales the court must place the racial distribution as it would have existed in the absence of constitutional violations by the Board; the function of the constitutional remedy is to bring the scales into balance so that the "incremental segregative effect" of the Board's actions is removed and "what would have been" becomes "what is."

This approach to remedy is so easily understandable and so clearly in accord with traditional equitable principles that the complete misconstruction of the approach by the Sixth Circuit is difficult to fathom. Instead of accepting a definition of "incremental segregative effect" as the difference between conditions existing in the presence of constitutional violations and conditions which would have existed if those violations had not occured, it redefined the concept in terms of a process leading to existing conditions.

> "The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution." 583 F.2d at 257; A. 214-215a.

Little can be said about this redefinition except that it has absolutely no relationship to the concept of "incremental segregative effect" expressed by this Court.

The interpretation of the concept by the District Court — an approach flatly and emphatically rejected by the Sixth Circuit as invalid — is, we submit, the only rational interpretation which the language of this Court's mandate is capable of yielding.

> "As explained by the Supreme Court, it stands as a more precise formulation of the principle that 'the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation.' . . .

> We read this language as imposing a burden upon the plaintiffs to prove the effect of any purposeful segregative act, not merely on a theoretical basis but on a factual basis." (A. 146a).

Just as a plaintiff in any civil case must in the first instance carry the burden of establishing both a civil wrong and a causal connection between that wrong and some damage to the plaintiff, the plaintiff in a case of this nature must in the first instance carry the burden of establishing both constitutional violations and the incremental segregative effect of those violations.

This Court's phrasing of the issue is in terms of an affirmative plaintiff's burden – a showing of the effect of the violations on the racial distribution of the school population as presently constituted. If a negative defendant's burden were intended, the task would have been phrased in terms of demonstrating that the racial distribution would not have been significantly different in the absence of the violations. The burden-shifting principles established in *Keyes* apply only to the violation stage of a case. The question of incremental segregative effect is not reached until that stage has been passed and a constitutional violation has been found to exist. If this Court intended to place the burden of proof on causation and remedy in some manner other than in accord with the traditional principles governing non-desegregation cases, it would have said so.

There is nothing novel in this interpretation; it follows from the precise language used by this Court and reflects elementary and long-established principles of jurisprudence. In redefining "incremental segregative effect" and finding that the District Court erred in allocating the burden of proof on that issue, the Sixth Circuit has confused the issue of remedy with the issue of violation. It uses the term not to describe the existing conditions to be addressed by an equity court – the correct remedial perspective – but simply to describe a snowballing process in which isolated segregative acts or practices are rolled together into an ultimate cumulative violation.

This conceptual fusion of the violation and remedy stages of the case leads the Sixth Circuit to infuse the remedial issues with the same presumptions and burden-shifting concepts that distorted its analysis of the question of segregative intent. As a result, it finds itself rationalizing a sweeping remedy that transforms "what is" not into "what would have been" in the absence of constitutional violations, but rather into "what should have been" in an ideal system of racial balance.

In discussing the allocation of the burden of proof on the issue of incremental segregative effect, the Sixth Circuit reasserts its view that once segregative practices are found to have existed in 1954 there is a "presumption that the current racial composition of the school population reflects the systemwide impact of those violations." 583 F.2d at 258; A. 216a. If this presumption makes any sense, its unspoken corollary becomes a presumption that but for the systemwide impact of constitutional violations there would have been a homogenous distribution of black and white students throughout the system. Unfortunately, the Sixth Circuit's presumptions with respect to the causes of the current racial composition of schools are as divorced from an underpinning in probable reasoning as its presumptions of segregative intent derived from its creation of an affirmative duty to diffuse black and white students throughout the system.

Where evidentiary analysis is replaced by a technique of reasoning from presumptions, the premises for the presumptions rather than true facts will inevitably dictate the outcome of the decision-maker's efforts unless the presumptions are grounded in probable reasoning. Any set of facts in this racially unbalanced world when viewed in light of the Sixth Circuit's artificial presumptions will for this reason, we submit, result in a finding of constitutional violations and the justification for a systemwide racial balance remedy. Under the pattern of those presumptions, the placement of the burden of proof becomes outcome-determinative and a uniform result in all desegregation cases is assured.

The key feature of all of the presumptions by which the Sixth Circuit would have such litigation judicially determined is a comparison between a school system as it exists and a school system in which a systemwide racial balance of students has been accomplished. Such, however, is not the comparison made by *Dayton* and prior decisions of this Court. The bench mark is the racial distribution of students that would in fact have existed in the absence of constitutional violations by a board of education, not the racial distribution that would exist in some ideal model for a racially balanced school system.

The imposition of a systemwide racial balance plan in the absence of any evidence to suggest that black and white students would have been diffused throughout the school system if no constitutional violations had ever occurred is in direct opposition to the reasoning expressed in *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976). As stated in *Austin*, which was cited with approval in *Dayton*, there must be evidence "in the record available to us to suggest that, absent those constitutional violations, the . . . school system would have been integrated to the extent contemplated by the plan." 429 U.S. at 994.

Man may indeed be the only animal that laughs or cries because he is the only animal that knows the difference between what is and what ought to be. We respectfully submit, however, that the judicial function cannot be viewed as a means of establishing an ideal system any more than it should be viewed as a means for eliminating human laughter and tears. The competence of courts lies in their ability to redress specific violations of specific laws or constitutional provisions in specific cases. Attempts to achieve more than this can produce little more than frustration, confusion and an unstable legal system that reflects little more than society's changing views of whatever the ideal may be.

2. Application Of This Court's Standard Of Incremental Segregative Effect To The Facts Of This Case Justifies The Findings Of The Trial Court And Requires A Dismissal Of The Plaintiffs' Complaint.

Whatever may be the explanation for the Sixth Circuit's failure to grasp this Court's concept of incremental segregative effect, the concept as expressed by this Court remains the standard to be applied at the remedial stage of this litigation. Likewise, while the issue whether the burden at the remedial stage is a plaintiff's burden of proving incremental segregative effect or a defendant's burden of proving an absence of incremental segregative effect may be a significant issue for guidance of lower courts in other cases, it is not an issue on which the outcome of this litigation should be deemed to turn. This is not a case where whoever bears the burden of proof is condemned to lose. The evidence presented leaves no room for legitimate dispute concerning what the racial distribution of the Dayton school population would have been at the time of suit in the absence of alleged constitutional violations by the Board. *See Bradley* v. *Milliken*, 460 F.Supp. 299, 300 (E.D. Mich. 1978).

Two basic aspects of the evidence demonstrate that the present racial distribution of the Dayton school population is a result of residential patterns and that the distribution has not been affected by any actions of the Dayton Board:

(a) during the last sixty years the main concentration of the black residential population of Dayton has expanded geographically in a clearly defined and natural manner;

(b) actions of the Dayton Board have not created a barrier to this expansion, and changing school populations have in fact reflected the changing racial compositions of the neighborhoods served by those schools.

There is no difference — no incremental segregative effect — between the distribution which exists and the distribution which would have existed in the absence of Board action. There is therefore no basis for a systemwide remedy or for any other remedy.

Analysis must start with a map of Dayton (A. 341-Ex.). The Great Miami River is a natural barrier dividing the downtown area of the city from the residential areas to the north and to the west of that commercial center. The area west of the river is in turn separated from the north by the natural barrier of Wolf Creek which flows in a southeasterly direction to join the Miami at the northern edge of the downtown area (R. I. 501, Vol. 5). In addition to the Great Miami River, the downtown area itself separates the west Dayton residential area from the residential area on the east side of the city.

The residential pattern on this map has historically been anything but a patchwork quilt. After the great Dayton flood of 1913, the black population moved out of the inner city and went to the west side of the river where there was higher ground (A. 139). Since that time, the black residential population of Dayton has been concentrated on the west side of the Great Miami River and the white residential population of Dayton has been concentrated on the east side of the downtown area. The area to the north of the downtown area has been an area where the residential patterns have at an accelerating pace changed from predominantly white to predominantly black in a movement northward from the historical concentration of the black population on the West Side (*See* A. 306-309-Ex.). The area to the south of downtown Dayton is an area of commercial development between the river and Main Street which bisects the city.

The pattern of black residential expansion in Dayton over the past sixty years has thus been a natural radiation from a center of concentration into the only adjacent residential areas, the areas west, northwest and north of the Great Miami River and the center of the city. This pattern, given the geographic grid of the city, is — we submit — a perfectly natural pattern of growth and expansion. There is nothing to indicate that there has been any gerrymandering or carving out of islands of white population as the black population of the city increased and expanded geographically from its historic center of concentration. Nor is there anything to indicate that this pattern of racial distribution would have been any different if any action of the Dayton Board which could conceivably be labeled an act of intentional segregation had not taken place.

When analysis passes from the geography of the system and historical residential patterns within the system to attendance patterns at the Dayton schools, it becomes clear that the flow of effect has always been from neighborhood to school rather than from school to neighborhood. This conclusion is graphically demonstrated by a comparison of the exhibits showing black enrollment by schools with a map showing the geographic locations of those schools within the Dayton school system and with maps showing racial percentages by census tract within the city (*Compare* A. 275-276-Ex., 290-Ex., 321-322-Ex. *with* A. 306-309-Ex.).

Willard, Wogaman and Garfield elementary schools were located in the original center of the black residential population in 1950-1951, and they predictably had an all-black student population in those years (A. 215-Ex.). As the black residential area expanded from this center, the surrounding schools reflected the changing neighborhood. The percentage of black students at Edison expanded from 43% in the early 1950's to 80% in the early 1960's and over 95% by the end of that decade (A. 275-276-Ex., 290-Ex.). Defendants' exhibits AI(b) and

AR show the same pattern in the other schools located in this changing area. Jane Adams went from 30% black in the early 1950's to 41.6% black by the early 1960's and close to 80% black by the end of that decade (*Ibid*).

During the decade from 1952 to 1963, other schools in the path of the black residential expansion – Miami Chapel, Louise Troy, Highview, Carlson, Jackson, Weaver, Irving, Grace A. Greene, McNary, Westwood, Residence Park – became predominantly black schools. At the start of that decade, Weaver was 69.9% black; Irving was 27.3% black; Jackson was 26.2% black. Of the schools in the next geographic tier from the core of the black residential population in 1952, Grace A. Greene had been only 7.8% black; Westwood had been only 0.1% black; and Residence Park had an entirely white student population (*Il 'd*). The pattern is obvious. The expansion of the black residential community is simply reflected in the changing composition of the Dayton schools.

During the next decade, the same pattern continued as the black residential area continued to expand to the north. The schools located north of the band composed of Grace A. Greene, McNary, Westwood and Residence Park are Gardendale and the twin Jefferson schools. In 1963, Gardendale opened with a 7.0% black student composition and the Jefferson schools opened with a 1.2% black student composition; by 1967 as the northward expansion of black residential population continued, these figures changed to 25.6% for Gardendale and approximately 50% for each of the Jefferson schools; by 1969 the Gardendale figure was 43.3% and the Jefferson figures were 60.1% and 57.1%; by 1972 the figures had continued their gradual expansion to 78.9% at Gardendale and approximately 94% for each of the Jefferson schools (*Ibid*). If Board actions were having an incremental segregative effect on racial imbalance, how can any court account for the graphic demonstration of these statistics that the schools did nothing more than provide a mirror image of the racial compositions of the neighborhoods they served?

The next tier of schools to the north — Hickorydale, Gettysburg, Fairport and Fairview — demonstrate the same pattern. In 1967 two of these schools had no black students and the other two were 1.1% and .3% black, respectively. Five years later, as a combined result of the Board's freedom of enrollment policy and further gradual northward expansion of the city's black residential population, the black student compositions of the four schools were 32.5%, 22.7%, 59.1% and 14.6%, respectively (*Ibid*).

The fact that there was no difference between the racial distribution of the Dayton school population as constituted at the time of suit and what that distribution would have been in the absence of any alleged constitutional violations by the Dayton Board is further demonstrated by two exceptions to the general pattern of racial distribution in the residential population served by the school district.

At the far western edge of the Dayton school district is located a residential area that has remained predominantly white for many years. Part of that area is within the school system and is served by Drexel Elementary School. Looking at the same statistical sources, we find that in the 1950-51 school year Drexel was 25.5% black in its student composition. The expansion of the black residential population of West Dayton in the next decade bypassed this area, and we find that from 1963 through 1973 the student composition of the school has remained remarkably stable at a black percentage ranging from 3.5% to 8.2% (*Ibid*).

Likewise, on the predominantly white East Side of Dayton, there has for many years been a small black residential area along Springfield Street (R. I. 1198-1199, Vol. 11). This area has been served by Washington Elementary School. Did the Dayton Board separate the black students living in this area from the white students living in surrounding areas? Or did the school in question — like the schools in predominantly white areas, in predominantly black areas and in changing areas — simply mirror the composition of the student population served? The statistics again provide an irrefutable answer. In 1951 Washington had a 19% black student body. During the years from 1963 through 1973 the percentage varied from 14.5% to 23% — a natural variation reflecting the number of black and white school children living in the area (A. 275-276-Ex., 290-Ex.).

Even the witnesses called by the plaintiffs at the hearing which followed this Court's remand confirmed the basic and undeniable fact that arises from the evidence in this case — the racial composition of the Dayton school population is nothing more and nothing less than a reflection of residential patterns (A. 520-522, 527-528). Ironically, both of the black graduates of the Dayton school system who testified on behalf of the plaintiffs in the November 1977 hearings had attended predominantly white schools because they lived in geographic proximity to such schools (A. 522, 527).

It is in the factual context of these statistics and this testimony — not through a maze of judicially created presumptions — that a reviewing court must determine whether the District Judge's rulings on the issue of incremental segregative effect were clearly erroneous. The District Court found that constitutional violations by the Dayton Board had occurred in three historic areas — faculty assignment prior to 1951, the opening of the first Dunbar High School in 1933 and a series of isolated practices that occurred at varying times before 1954. In a carefully reasoned analysis of the evidence before it, the Court concluded that none of these violations had any effect on the racial distribution of the Dayton school population as presently constituted.

In 1951, the Dayton Board expressly replaced a practice of hiring black teachers only to teach in black schools with a policy of "dynamic gradualism" under which black teachers began to receive teaching assignments in white and mixed schools (A. 176-Ex., 187-Ex.). The new policy was implemented by the Board. All traces of faculty segregation were ultimately eliminated from the system. At the initiation of this action — in fact, since 1969 — the teaching and administrative staff of the Dayton school system was substantially integrated (A. 153a, A. 226, A. 285-286-Ex.). In the absence of any "current condition" argument, the plaintiffs were relegated to the argument that the ghost of past assignment practices had identified schools as black or white. That argument was refuted both by statistical evidence and by the testimony of the very expert produced by the plaintiffs on the subject.

An examination of the evidence related to the staffing of schools during the period from 1947 through 1952 indicates that schools designated as "mixed schools" had black increases despite the fact that the teaching staffs remained unchanged (A. 212-216-Ex.). Of particular interest is the situation that occurred at the elementary schools of Weaver and Irving. In the 1947-48 school year, Weaver had a black population of 59.4% and at the end of the 1950-51 school term this population had increased to 69.9% (A. 212-Ex., 215-Ex.). Yet, for the 1951-52 school year, when four black teachers were added to the staff at Weaver, the black population decreased by 2.3% (A. 216-Ex.). Similarly, the black population at Irving jumped from 25.6% in 1947 to 46.6% in 1951, notwithstanding the fact that the staff remained all white. The only conclusion that can be drawn from this kind of evidence is that teaching assignments had nothing whatsoever to do with the changing racial compositions of the schools. *See Alexander* v. *Youngstown Board of Education*, 454 F. Supp. 985, 1072 (N.D. Ohio 1978).

Dr. Robert L. Green, called by the plaintiffs as a witness on the effect of faculty assignment practices, confirmed this conclusion when he answered "not at all" to the question whether assignment of black teachers to schools with the larger number of black students affected the perception of whether such schools were intended as black schools (A. 113). Regardless of what conclusion another trier of the facts might reach, there was abundant evidence to support the Trial

Court's conclusions on this subject, and they cannot be set aside as "clearly erroneous."[6]

As with the pre-1951 practices of faculty assignment, the opening of the first Dunbar High School in 1933 had no effect on the racial distribution of the Dayton school population as constituted at the time of suit. Dunbar was located on the West Side of Dayton, and had it been assigned a neighborhood attendance zone instead of a city-wide zone it would still have been an all-black high school thirty to forty years ago (*See* A. 306-307-Ex., A. 169-171a). Any effect of the city-wide attendance boundaries assigned to Dunbar during its existence from 1933 to 1962 was limited to the high school level. It is apparent from the distribution of the black residential population in Dayton during this period that the only high school conceivably affected was Roosevelt which was located in the pathway of the expanding black population of Dayton.

If the only incremental segregative effect of old Dunbar was the potential of drawing black high school students from the Roosevelt area to Dunbar, what trace of that effect remained in the system at the time suit was filed? In 1951 Roosevelt was 31.5% black (A. 216-Ex.). By 1963 it had become 94.5% black, and after 1967 it was virtually all black (A. 290-Ex.). It is thus apparent that any trace of the effects of old Dunbar had disappeared from the school system long before the institution of this litigation. The pattern of residential expansion from the center established at the time of the 1913 flood simply proceeded along its natural course. The reflection of the residential patterns which we have observed in the elementary schools is equally observable in the high schools. As the population moved northward from the Roosevelt area into the area of Colonel White High School, we find the black composition of the latter school changing from 8.4% in 1967 to 19.3% in 1968, 38.9% in 1969 and 42.1% in 1970 (*Ibid*). The Trial

[6] See footnote 3 *supra* at 33. *See* A. 84, 101, 108-112.

Court's conclusion that any segregative intent in the opening of old Dunbar in 1933 had no incremental segregative effect on the distribution of the Dayton school population at the time of suit was grounded in substantial evidence.[7]

The last category in which the Trial Court found historic instances of segregative intent without any present incremental segregative effect consists of a series of unrelated and isolated practices. Once the weight of the Sixth Circuit's erroneous presumptions is removed from the scales of justice, the Trial Court's findings in this category likewise satisfy any formulation of the appropriate standards of appellate review.

The only instance in the record of this case which can be considered the denial of access to any school in the Dayton system on account of race is the situation at Garfield school between 1910 and 1920 when black elementary children were taught in separate and inadequate facilities (A. 137-139). The weakness of the plaintiffs' case is perhaps best illustrated by its repeated emphasis on a situation which has existed only as a page from a book of local history for almost sixty years. Segregatory practices involving high school swimming pools in the 1930's and pre-1950 athletic programs have left no discernable traces on the present distribution of the Dayton school population. Likewise, the transportation of black orphans to a black elementary school for well-meaning but constitutionally misguided reasons before 1950 can hardly be considered as having an incremental segregative effect on the system at the time suit was filed where such orphans had been attending predominantly white elementary schools for more than twenty years before that date (A. 184-Ex.; R. I. 1236-1237, Vol. 12). Since no trace of any of these historic practices exists in the present school system, there is nothing

[7] The Trial Court's findings with respect to Dunbar High School together with supporting references to the record are found at A. 4a, and 169-171a.

for equity to remove in order to transform "what is" into "what would have been."[8]

With respect to the remaining claims asserted by the plaintiffs, the Trial Court found neither segregative intent nor incremental effect. The lengthy and well reasoned findings of fact entered by the Trial Court should require no further gloss. When viewed without the distorting lenses of the Sixth Circuit's erroneous legal presumptions, the evidence shows a situation where the present distribution of the Dayton school population has been dictated by residential patterns, not by Board actions. Since actions of the Dayton Board had no incremental effect on the racial imbalance of the school population produced by those patterns, it was entirely appropriate for the Trial Court to dismiss the plaintiffs' complaint.

C. THE SIXTH CIRCUIT'S ABANDONMENT OF THE REQUIREMENT OF PROVING STANDING AS A CONDITION PRECEDENT TO SECURING EQUITABLE RELIEF IS CONTRARY TO ESTABLISHED JUDICIAL PRECEDENT.

From the outset of this litigation and through the numerous appeals and remands that have marked its history in the courts, the defendants have maintained that the record is void of any evidence that any of the plaintiffs sustained any injury, that any of them was deprived of any constitutional right, that any of them is a member of the class they purportedly represent and that this action is properly maintainable as a class action. None of the plaintiffs ever testified at any of the hearings held below. None of the evidentiary exhibits establish that any of them was ever

[8] The Trial Court's findings with respect to various historic incidents determined to involve segregative intent together with supporting references to the record are found at A. 147-149a.

excluded from attending any school in the Dayton system. Not only did they fail to establish the minimal requirement of injury or deprivation of a constitutional right; they failed even to establish that any one of them was a school child or a parent of a school child or that any of them ever attended or sought to attend school in the Dayton system.

Proof of standing is an essential element in a case of this nature:

> "[t]he essence of the standing question, in its constitutional dimension 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' . . . The plaintiff must show that he himself is injured by the challenged action of the defendant." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 260-261 (1977).

This Court's remand of this action for the purpose of supplementing the record gave the plaintiffs an opportunity to fill the jurisdictional void if it lay within their power to do so. The opportunity was ignored.

Courts deal with particular rights of particular people. The plaintiffs cannot prevail on the merits in the absence of proof of a violation of their rights under the jurisdictional provisions which they have invoked. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946). Thus, the plaintiffs in this case had the burden of establishing that one of them, or at least some member of the N.A.A.C.P. was excluded from a school in the Dayton system on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). In order to maintain this suit as a class action under Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs were required to prove that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). They were further required to obtain certification from the District Court that the suit is maintainable as a class action. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

None of these requirements was met. While the District Judge was correct in dismissing the plaintiffs' complaint on the substantive grounds which formed the basis for his findings and conclusions, he did not have to reach those substantive issues. The complaint should have been dismissed on jurisdictional grounds. While desegregation cases raise significant social issues, the significance of those issues should not change basic concepts of standing and burden federal courts with the responsibility of rendering far-reaching decisions at the request of curious bystanders.

VIII. CONCLUSION

The conceptual crossroads where this Court and the Sixth Circuit have taken different paths is manifest from an analysis of the facts of this case and the reasoning of the opinion under review. The Sixth Circuit's approach — a theoretical exercise of presumptive reasoning — is guided by an underlying comparison between the distribution of the student population as it exists and an ideal diffusion of black and white students throughout the system. This Court's approach — a pragmatic analysis of factual evidence — demands actual proof of constitutional violations and of the conditions that would exist in the absence of such violations.

The lure of the Sixth Circuit's approach is a uniformity of result in all desegregation cases, northern or southern. If the ultimate measure is to be systemwide racial balance, any school system may be required to satisfy that measure either voluntarily or pursuant to a federal court order. While such a result may satisfy an ideologic desire, it goes far beyond the dictates of the Constitution and the concepts of equity. Conduct unmotivated by segregative intent does not violate the Constitution. Where such intent has existed the Constitution is satisfied by elimination of its effects The constitutional duty is not a duty to balance or diffuse the races; it is rather a duty to treat all races in the same manner and to deny no right for racial reasons.

The path taken by the Sixth Circuit is a maze of tangled presumptions and procedural snares. It should be closed, and cases of this nature should be directed along the path already established by prior decisions of this Court. When the appropriate guideposts for determining segregative intent and incremental segregative effect are applied to the evidence in this case, the conclusion is compelled that the plaintiffs have failed to establish a right to relief. The Trial Court was correct in dismissing their complaint and its order should be reinstated by this Court.

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