IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-610, 78-627

COLUMBUS BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

GARY L. PENICK, *et al.*,

Respondents.

DAYTON BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

MARK BRINKMAN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS *AMICI CURIAE*

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Interest of the Amici*

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 200,000 members dedicated to defending the personal rights of the people guaranteed by the Constitution.

Central among the constitutional rights of the people is the fundamental right to equal treatment under law. No component of that right is more precious than the right of minority children to receive an education in school systems that are not segregated. The ACLU believes, as this Court recognized twenty-five years ago, that "[s]eparate educational facilities are inherently unequal" because they deprive minority children of "the benefits they would recieve in a racially integrated school system." Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

Because of our strong belief that separate educational facilities are in-

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* Letters from the parties consenting to the filing of this brief have been filed with this Court pursuant to Rule 42.2.

herently unequal, the ACLU has consistently pursued enforcement of the right to a non-segregated education. For example, in Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280 (1976), we successfully urged under the California Constitution that a current state of school segregation is unconstitutional regardless of its causes, and that it must be remedied through system-wide desegregation. In Evans v. Buchanan, 393 F.Supp. 428 (D.Del. 1975)(three-judge court), aff'd, 423 U.S. 973 (1975), reh. denied, 423 U.S. 1080 (1976), remedy imposed on remand, 416 F.Supp. 328 (D.Del. 1976), appeal dismissed, 429 U.S. 973 (1976), aff'd, 555 F.2d 373 (3d Cir. 1977), cert. denied, 434 U.S. 880 (1977), reh. denied, 434 U.S. 944 (1977), we successfully urged that urban vs. suburban school segregation resulting from state contributions to segregated housing is unconstitutional and that it must be remedied through inter-district school desegregation.

Our belief in effective school desegregation also has resulted in our frequent appearance before this Court in

school desegregation cases. For example, we represented the minority school children before this Court in Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976). And we have appeared amicus curiae, on behalf of the minority school children in such cases as Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), and Keyes v. School District No. 1, 413 U.S. 189 (1973).

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE) has over 285,000 members throughout the Nation, 100,000 of whom are women, and many of whom are members of disadvantaged minority groups. The IUE represents over 20,000 employees in the Dayton and Columbus, Ohio, areas.

The IUE is a leader among unions in championing the civil rights of its members. The IUE, as an affiliate of the AFL-CIO, fully supports the AFL-CIO policy, restated by President George Meany on March 19, 1979 "to support and share responsibility for the development of workable school desegregation programs." The IUE has instituted numerous suits

under federal and state fair employment laws, and has filed many charges of discrimination with administrative agencies. The IUE believes in full educational opportunities for all Americans, and supports the establishment of a single public school system that will make quality integrated education available to all children, regardless of race, color, creed, sex or national origin.

Because the ACLU and the IUE believe that the arguments raised by the school boards in the instant two cases, if adopted even in part by this Court, would severely undermine the rights established by Brown and its progeny, we urge in this brief that those arguments be rejected and that the right of minority children to a non segregated education be reaffirmed by this Court.

SUMMARY OF ARGUMENT

As Respondents have pointed out in their briefs, the Dayton and Columbus school districts operated racially segregated school systems at the time of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), and thereafter engaged in numerous segregative practices which maintained and increased the level of actual segregation. As Respondents have argued, on the basis of settled school desegregation law, the Dayton and Columbus school districts were properly found to have engaged in unconstitutional systemwide segregation and thus were constitutionally required to implement systemwide desegregation. The propriety of these findings and obligations with regard to Dayton, in No. 78-627, are required by Brown v. Board of Education of Teopka, 347 U.S. 483 (1954), Green v. County School Board of New Kent County, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The propriety of these findings and obligations with regard to Columbus, in No. 78-610, are similarly required by

Brown, Green, and Swann, and by Keyes v. School District No. 1, 413 U.S. 189 (1973).

Amici agree entirely with the arguments advanced in Respondents' briefs in this Court. Like Respondents, we believe that settled school desegregation law compels the conclusion that the Columbus and Dayton school districts were properly found to have engaged in unconstitutional system-wide segregation and thus were constitutionally required to implement system-wide desegregation.

While we agree with Respondents' arguments, we believe that the same conclusions must be reached under other evidentiary and legal approaches to these cases. It is these other approaches which form the focus of this brief.

First, we believe that, having been found to have operated an intentionally segregated school system at the time of Brown v. Board of Education, 347 U.S. 483 (1954), defendants were under an affirmative duty to root out racial segregation in the schools' "root and branch." Green v. County School Board of New Kent County, 391 U.S. 430 (1968). Having failed to do so, defendants should bear all eviden-

tiary burdens on facts necessary to establish an excuse for non-compliance.

Second, we believe that, even in the absence of the affirmative duty imposed by Green, defendants should bear the persuasion burden on the issue of culpable scienter in an equal protection case seeking prospective relief from racial segregation, so long as plaintiffs have produced sufficient evidence of culpable scienter to satisfy a traditional production burden. We also believe that the requirement of culpable scienter in an equal protection case seeking prospective relief from racial segregation may be satisfied by a showing of recklessness or deliberate indifference to the rights of racial minorities.

Finally, aside from the evidentiary matters that form the major portion of our argument, we believe that this Court must recognize as it did in Brown through Swann, that the Fourteenth Amendment imposes an affirmative constitutional obligation on school districts to operate racially integrated schools to the maximum extent feasible. In this context, racial segregation may be distinguished from racial discrimination. While discrimination is offensive, segregation especially offends the Fourteenth

Amendment. This Court has never held that the Fourteenth Amendment permits a state to be in the business of operating racially segregated facilities. To the contrary, if the Fourteenth Amendment prohibits anything, it prohibits the maintenance of racially segregated state facilities, including of course racially segregated public schools.

As Justice Powell pointed out in Keyes v. School District No. 1, 413 U.S. 189, 227 (1973)(concurring opinion), the genesis of segregation provides no grounds for the adoption of variable equal protection principles. Whether segregation is caused by state law, by the manipulation of a neighborhood school policy, or by imposition of a neighborhood school policy upon segregated neighborhoods, the relevant intent is the same: that intent is to operate racially segregated schools and to compel black children and white children to attend those separate schools. From a Fourteenth Amendment standpoint, such a condition unequivocally violates the Brown mandate that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495.

ARGUMENT

Recent decisions of this Court have placed a substantial premium on deciphering the mental states of defendants alleged to have violated a variety of legal norms. E.g., Castaneda v. Partida, 430 U.S. 482 (1977) (racial discrimination in the selection of juries); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 229 (1977) (racial discrimination in the construction of public housing); Washington v. Davis, 426 U.S. 252 (1976) (racial discrimination in employment); Keyes v. School District No. 1, 413 U.S. 189 (1973) (public school segregation); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (Rule 10b-5 violation); United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978) (criminal anti-trust violation); United States v. Grinnell Corporation, 384 U.S. 563 (1966) (violation of Section 2 of the Sherman Act); United States v. LaSalle National Bank, 437 U.S. 298 (1978) (IRS information demands); National Labor Relations Board v. Great Dane Trailers, 388 U.S. 26 (1967)

[unfair labor practices under Section 8 (a)(3)]. See also, Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

In requiring significant legal consequences to turn on the culpability of a defendant's mental state, this Court has launched courts and litigants alike on a frustrating, expensive and, often, fictive search for culpable scienter. Especially in the area of constitutional law, where defendants are generally public entities whose policies have evolved over time as the net product of many, often conflicting, individual views, the fictive search for scienter has resulted in a jurisprudence of equality which is unpredictable, enormously expensive to administer and arbitrary in result. However, whatever the wisdom of seeking to build a constitutional theory of equality on culpable scienter, this Court seems firmly bent upon an attempt. If such an attempt is to have an opportunity to succeed, two issues which are central to any scienter-based jurisprudence must be resolved. First, it is necessary to define with precision the

contours of those mental states which are deemed sufficiently culpable to warrant the issuance of prospective and/or retrospective relief. Second, it is necessary to formulate evidentiary rules governing proof of the required culpable mental state which are both fair and capable of uniform administration.

Amici will urge in Point IIA, infra, that this Court, in defining the requisite degree of culpable scienter necessary to trigger prospective relief in favor of racial minorities under the equal protection clause, should adopt a negligence, or, at most, a recklessness standard. This Court has explicitly reserved judgment on analogous issues in the area of securities regulation. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976).[1]

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1. See generally, Bucklo, The Supreme Court Attempts to Define Scienter Under Rule 10b-5: Ernst & Ernst v. Hochfelder, 29 Stan.L.Rev. 213 (1977); Note, Scienter's Scope and Application in Rule 10b-5 Actions: An Analysis in Light of Hochfelder, 52 Notre Dame Lawyer 925 (1977); Comment, Scienter and SEC Injunctive Suits, 90 Harv.L.Rev. 1018 (1977); Note, The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After Ernst & Ernst v. Hochfelder, 77 Col.L.Rev. 419

Amici will also urge in Point IIB, infra, that once a member of a racial minority has produced sufficient evidence from which a reasonable finder of fact may infer the existence of culpable scienter, the governmental defendant should bear all evidentiary burdens on the scienter issue.

As a pre-condition to a discussion of the appropriate burden of proof rules, a consistent terminology must be adopted. Understandably, attempts by the lower federal courts to formulate evidentiary

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(1977). Similar issues have arisen in the law of torts, Prosser, Law of Torts § 107 at pp.700-710; Keeton, Fraud: The Necessity of Intent to Deceive, 5 UCLA L.Rev. 585 (1958); and have been the subject of substantial comment in the criminal law area. E.g., United States v. Dixon, 419 F.2d 288 (D.C. Cir. 1969) (discussing authorities). See generally, H.L.A. Hart, Punishment and Responsibility (1968) at 136-157. For similar issues in the areas of labor and anti-trust law, see generally, Christensen and Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968); Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Law and Procedures (1979) (reproduced in B.N.A. Anti-Trust and Trade Regulation Reporter (Jan. 18, 1979).

ground rules in the wake of Washington v. Davis have resulted in substantial variations in terminology which impede careful analysis. For example, the term "presumption" has been variously used to mean permissible inference, compulsory inference, artificial inference, and shift in the burden of production. The concept of "prima facie case" has been loosely used to mean at least three things: a set of facts which, if unrebutted, would permit (but not compel) a finder of fact to find intentional racial discrimination; a set of facts which, if unrebutted, would compel a finder of fact to find intentional racial discrimination; and a set of facts from which racial discrimination must be inferred, regardless of rebuttal.

Orthodox evidentiary analysis divides the burden of proof into two parts: production burden and persuasion burden. E.g., James, Burdens of Proof, 47 Va.L.Rev. 51 (1961); 9 Wigmore, §§2485-2486 (3d ed. 1940). The production burden is that quantum of evidence needed to permit a reasonable finder of fact to infer the existence of the fact at issue--in this

case the presence or absence of culpable scienter. Most courts have followed an assumption that plaintiffs bear the inertial production burden on significant factual aspects of their case. Most courts have also recognized that a plaintiff may introduce highly persuasive evidence which, if unrebutted, would compel a reasonable finder of fact to infer the existence of the fact at issue. Under such circumstances, the production burden may be said to have shifted to the defendant. Thus, it is possible for a plaintiff saddled with an initial production burden on the issue of culpable scienter to (a) fail to meet it and suffer a directed verdict; (b) satisfy it and pass to a decision by the finder of fact under a defined persuasion burden; or (c) shift it and gain a directed verdict in the absence of rebuttal evidence. Once a plaintiff has satisfied an initial production burden, a defendant may (a) rest and take his chances that the finder of fact will rule in his favor; or (b) introduce evidence designed to persuade the finder of fact of the non-existence of the fact

at issue. If a plaintiff has shifted the production burden, a defendant must introduce evidence or suffer a directed verdict. Once such a defendant has rested, the court must determine whether the shifted production burden has been satisfied. If a judge finds that the production burden has been satisfied, he or she must remit the issue to the finder of fact under an appropriate persuasion burden. Production burdens, thus, are nothing more than judge-operated tools to determine when a factual issue is sufficiently in doubt to warrant remission to the formal fact-finding process.

Persuasion burdens exist because in law, as in baseball, no ties are possible. It is, therefore, necessary to decide how ties should be broken when the finder of fact is in doubt about the existence of the fact at issue. The degree of certainty which a finder of fact must experience in order to return a finding is called the persuasion burden. While the initial production burden has been routinely allocated to proponents of a given fact, courts have demonstrated considerably

greater flexibility in allocating the risk of a tie after an initial production burden has been satisfied.[2] The question of whether a member of a racial minority seeking prospective relief or the government should bear the risk of a tie on the issue of culpable scienter in a case in which the plaintiff has initially satisfied a production burden was resolved in favor of minority plaintiffs in Keyes v. School District No. 1, 413 U.S. 189 (1973), and Castaneda v. Partida, 430 U.S. 482 (1977).

Finally, once the persuasion burden has been allocated, its size must be selected from among three traditional alternatives: preponderance of the evi-

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2. Davis v. United States, 160 U.S. 469 (1895); Leland v. Oregon, 343 U.S. 790 (1952) (insanity defense); Patterson v. New York, 432 U.S. 197 (1977) (affirmative defense of extreme emotional disturbance); N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967) (employer has burden of persuasion on business justification for unfair labor practice); United States v. Grinnell Corp., 236 F.Supp. 244 (D.R.I. 1964), aff'd except as to decree, 384 U.S. 563 (1966) (monopoly). See also Speiser v. Randall, 357 U.S. 513, 525 (1958); Keyes v. School District No. 1, 413 U.S. 189 (1973); 9 Wigmore §§2485, 2486 (3d ed. 1940).

dence; clear and convincing evidence; or proof beyond a reasonable doubt. Thus, whatever the precise contours of culpable scienter, orthodox evidentiary analysis provides this Court with the tools to fine-tune the mechanism of proof in order to advance the policies of racial fairness which lie at the core of the equal protection clause without tumbling down the slippery slope described by Mr. Justice White in Washington v. Davis, 426 U.S. 229, 248 (1976). By careful definition of the quantum of evidence needed to satisfy an initial production burden on the issue of culpable scienter and sensitive allocation of the resulting persuasion burden, this Court may have both racial fairness and a jurisprudence of equality which is not uncontrollably overbroad. Moreover, such an analysis permits the Court to enunciate fair and efficient ground rules for proving scienter in equal protection cases without resorting to questionable concepts such as ill-defined prima facie cases and fictional presumptions.

Although amici believe that it would be desirable to begin the task of defining culpable scienter in an equal protection context and setting forth the ground rules for its proof as quickly as possible, this case may be resolved without considering the broader issues. This Court has long noted the existence of an affirmative duty to dismantle dual school systems which were operated on an intentionally segregated basis at any time on or after the date of this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I). E.g., Green v. Board of Ed., 391 U.S. 430 (1968). Whatever the definition of culpable scienter and whatever the allocation of burdens of proof as a general matter, in the narrow context of a failure to have carried out the affirmative duty to dismantle an intentionally maintained dual school system, all evidentiary burdens must be borne by the defendants. See Point I, infra.

I. DEFENDANTS HAVE BREACHED THEIR AFFIRMATIVE DUTY TO DISMANTLE SCHOOL SYSTEMS FOUND TO HAVE BEEN INTENTIONALLY OPERATED ON A SEGREGATED BASIS AT THE TIME OF THIS COURT'S DECISION IN BROWN V. BOARD OF EDUCATION. THE ISSUANCE OF SYSTEMWIDE RELIEF WAS BOTH NECESSARY AND APPROPRIATE TO COMPEL COMPLIANCE WITH DEFENDANTS' AFFIRMATIVE OBLIGATION TO DISMANTLE THEIR DUAL SYSTEMS OF PUBLIC EDUCATION.

In the years which followed Brown v. Board of Education, 347 U.S. 483 (1954), this Court confronted a series of issues raised by the attempt to make the promise of Brown a reality for black children. Initial response to Brown in many communities took the form of violence and defiance under the pretext of interposition. This Court responded with Cooper v. Aaron, 358 U.S. 1 (1958). More sophisticated opposition to Brown succeeded in closing certain public schools rather than desegregating them. This Court responded with Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). Yet more sophisticated opposition to Brown resulted in pupil transfer plans which permitted individual white parents to

frustrate school desegregation. This Court responded with Goss v. Board of Education, 373 U.S. 683 (1963). Finally, when freedom of choice plans hindered the full implementation of Brown, this Court responded with Green v. County School Board, 391 U.S. 430 (1968). With the enunciation in Green of an affirmative duty to dismantle pre-existing dual systems "root and branch," this Court provided the doctrinal basis for genuine implementation of Brown. See also, Raney v. Board of Education, 391 U.S. 443 (1968), and Monroe v. Board of Commissioners, 391 U.S. 450 (1968). As Mr. Justice Brennan noted for the Court in Keyes v. School District No. 1, 413 U.S. 189 (1973):

> " [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Education, the State automatically assumes an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system,' that is, to eliminate from the public

> schools within their school system 'all vestiges of state-imposed segregation.'" 413 U.S. at 200 [citations omitted].

In the instant cases, plaintiffs have proven that a dual system of education was intentionally imposed upon black children by defendants on or about the date on which Brown was decided.[3] Accordingly, under Green and its progeny, defendants automatically assumed an affirmative duty to eliminate racial segregation "root and branch" from the schools under their direction and control. Although defendants have labored under

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3. To be sure, the dual systems operating in both Dayton and Columbus in 1954 were not compelled by statute. Rather, they were imposed by the administrative decisions of school officials. No distinction of legal consequence may, however, be drawn between public school segregation mandated by statute and public school segregation mandated by administrative fiat. Nor is there any serious question as to the existence of the intentionally maintained dual systems in 1954. Assuming an allocation of the evidentiary burdens most favorable to the defendants, intentionally maintained dual systems have been clearly established. Pennick v. Columbus Board of Education, 583 F.2d 787, 798-99 (6th Cir. 1978); Brinkman v. Gilligan, 583 F.2d 243, 247-49 (6th Cir. 1978).

such an affirmative duty for a quarter of a century, the schools under their direction and control remain substantially segregated. This case raises the question of whether defendants' failure to have integrated the public schools in Dayton and Columbus constituted a breach of the affirmative duty to root out the vestiges of the dual systems which existed in 1954 and whether, once a breach of duty is found, federal courts possess power to grant relief compelling defendants to carry out their duty after twenty-five years of failure.

A. The Nature of the Affirmative Duty To Eliminate Dual Systems Imposed Upon Defendants by Green v. County School Board

Having been found guilty of operating an intentionally segregated school system in 1954, defendants are under an affirmative duty to integrate. Such an affirmative duty may take one of three forms.

First, defendants may be under an absolute duty to succeed in integrating the schools in question. Under such an "absolute" definition of the affirmative

duty imposed by Green, defendants only excuse for non-performance would be a showing of impossibility. Given the formulation of the successful desegregation plan which is in effect in Dayton this year and given the formulation of a plan which, but for this Court's stay, would have successfully desegregated the Columbus schools, no claim of impossibility may be seriously advanced.

Second, defendants may be under a duty to do nothing more than to refrain from intentionally hindering the desegregation of the schools in question. Such a limited definition of the affirmative duty imposed by Green would, however, add nothing to the already existing duty imposed by Brown I. Thus, while defendants' affirmative duty may not rise to the "absolute" level suggested by the Sixth Circuit,[4] neither does it sink to the level of

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4. The Sixth Circuit in Pennick suggested that the Columbus defendants' failure to have produced a unitary system was itself a violation of Green, without any necessity for additional proof. Pennick v. Columbus Board of Educ., supra at 800. However, the Sixth Circuit did not rest its decision on such a broad reading of Green. Rather, it considered defendants' conduct and found it both purposive and reckless in failing to carry out duties imposed by Green.

redundancy suggested by defendants.

Rather, a third possible definition of the affirmative duty exists which imposes meaningful obligations on the defendants short of imposing an absolute duty to succeed. Under such a definition, defendants would be obliged under Green to utilize due care in evolving and implementing plans to eliminate the vestiges of a dual system. Failure to conform to reasonable standards of competence in formulating desegregation remedies would constitute a breach of duty.[5] Measuring the conduct of defendants in perpetuating segregation against the standard of a hypothetical reasonable Board bent on eliminating segregation, it is clear beyond doubt that defendants' feeble gestures toward integration fell far below an acceptable level of competence and commitment.

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5. Cases in the lower federal courts which seek to apply the Green standard appear, at a minimum, to impose a duty of active care and minimum competence in formulating effective integration plans. E.g. Adams v. Matthews, 403 F.2d 181 (5th Cir. 1968); Hall v. St. Helena Parish School, 417 F.2d 801 (5th Cir.)(cert. denied, 396 U.S. 904 (1969).

B. The Procedural Ground Rules for Proving Breach of Defendants' Affirmative Duty To Eliminate Vestiges of Dual Systems of Public Education

If defendants' affirmative duty under Green is defined as a duty of due care in eliminating segregation, no substantial issue of proof would exist, since defendants' breach of such a duty of due care (whether defined as negligence or recklessness) is so flagrant that under any system of proof its existence must be found. However, if defendants' duty under Green is defined narrowly to encompass merely a duty to refrain from purposeful activity designed to frustrate the elimination of a dual system, serious issues of proof may arise.[6] As this Court noted in Green,

6. Given the record in both the Dayton and Columbus cases, even if one assumes (incorrectly, amici believe) that plaintiffs bear both the production and persuasion burdens on the issue of purposeful failure to dismantle pre-existing dual school systems, plaintiffs have clearly met their evidentiary burdens. By engaging in a series of actions, including site selection, attendance zone design, staff assignment and pupil transfers, defendants took action which they knew would perpetuate the very dual system they were under an affirmative duty to dismantle. Plaintiffs' proof of such

proof of the maintenance of a dual school system on or after the date of Brown I, coupled with proof of a continuing pattern of segregated schools, satisfies plaintiffs' production burden and shifts the production burden to the defendants. 391 U.S. at 439. Defendants in both the Dayton and Columbus cases have attempted to satisfy their shifted production burdens by arguing that the continuing pattern of segregated schooling in both cities is attributable to a combination of residentially segregated housing patterns and uniform adherence to a neighborhood school policy. In effect, defendants argue, first, that they acted in good faith in failing to desegregate the schools in question and, second, that the current segregation of the Columbus and Dayton schools has not been caused by their actions. Plaintiffs have countered by demonstrating a series of actions

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knowing activity taken in the teeth of an affirmative duty to erase all vestiges of the pre-existing dual system would compel any reasonable finder of fact to conclude that defendants had purposefully breached their duty under Green. Compare, United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978).

tending to perpetuate racial segregation which run counter to (or are not compelled by) a neighborhood school policy. In effect, plaintiffs argue that proof of a series of acts tending to perpetuate segregation which run counter to (or are not compelled by) a neighborhood school policy negates any inference that defendants were motivated by a neutral desire for neighborhood schools. Given plaintiffs' proof, defendants' attempt to satisfy their shifted production burden is perilously weak, even if one assumes the persuasion burden remains with the plaintiff. Cf., Castaneda v. Partida, 430 U.S. 482 (1977). Moreover, since defendants are attempting to explain their failure to have carried out the terms of an affirmative constitutional duty mandated by Green, they should bear the risk of non-persuasion as well. Whenever a party appears to have engaged in unconstitutional activity, but seeks to escape liability by establishing one or another excusing condition, this Court has uniformly placed both the production and persuasion burdens on the party seeking

to avoid the consequences of putatively unconstitutional behavior. E.g., Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Carey v. Piphus, 435 U.S. 247 (1978); see also, Wood v. Strickland, 420 U.S. 308 (1975).

Defendants' attempt to avoid liability for ignoring the mandate of Green by alleging lack of any purposeful intent to frustrate integration is precisely analogous to the good faith defense routinely recognized by this Court in constitutional cases. E.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975). It is, of course, clear that a defendant asserting such a good faith defense bears both the production and persuasion burdens on the issue of "subjective" scienter. Moreover, it is equally clear that an "objective" duty of due care is placed upon such a defendant. Wood v. Strickland, 420 U.S. 308, 321 (1975). Defendants in the instant case are unable to satisfy a persuasion burden on either the "subjective" or "objective" elements of their attempt to assert a good faith defense to a charge of having

breached their affirmative duty under Green. Subjectively, the proven commission of segregative acts running contrary to a neighborhood school policy precludes any reasonable finder of fact from determining that defendants have proved "good faith" by a preponderance of the evidence. Objectively, the failure to have evolved a plan to reduce segregation in the schools despite the passage of twenty-five years causes defendants' acts to fall well below the minimal level of competence discussed in Wood v. Strickland, supra. Thus, defendants' attempt to avoid Green by alleging good faith must fall.[7]

In addition, defendants attempt to avoid the entry of systemwide relief by

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7. Courts consistently have limited the use of the good faith defense to actions for retrospective relief. E.g., Wood v. Strickland, supra; Scheuer v. Rhodes, 416 U.S. 232 (1974). The good faith defense has never been recognized where the relief requested was solely injunctive. O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Since plaintiffs in this case request only prospective, equitable relief, serious doubt exists as to whether a good faith defense is available.

alleging that their acts did not actually cause the current segregation of the Dayton and Columbus schools. Rather, they argue, factors such as economics, residential segregation and individual choice have "caused" the schools in Dayton and Columbus to remain segregated. Such a defense is precisely analogous to a causation defense articulated by this Court in recent years. E.g., Mt. Healthy School District Board of Education v. Doyle, supra; Carey v. Piphus, supra; Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-271 n.21 (1977). See also, Chapman v. California, 386 U.S. 18 (1967). A defendant asserting such a causation defense bears both the production and persuasion burden with respect to its application. Thus, parties seeking to avoid the consequences of a constitutional flaw in a criminal case under the rubric of harmless error are required to prove beyond a reasonable doubt that the constitutional flaw did not affect the outcome of the case. Chapman v. California, 386 U.S. 18 (1968).

Parties seeking to avoid liability for a dismissal based partially on protected First Amendment activity are required to prove that the dismissal would have occurred even in the absence of the First Amendment activity. Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). Parties seeking to avoid liability for actions which failed to comply with standards of procedural due process are required to prove that a hearing could not have altered the outcome. Carey v. Piphus, supra. Finally, parties seeking to avoid liability after being found guilty of purposeful racial discrimination in violation of the equal protection clause are required to prove that the identical activity would have taken place in the absence of defendants' racially motivated conduct. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-271 n.21 (1977).

The legal status of the defendants in this case tracks the hypothetical defendant described by the Court in Arlington Heights. In Arlington Heights, the hypothetical defendant violated a constitutional norm, but sought to avoid liability by arguing that his violation did not cause plaintiff's

injury. This Court, quite properly, assigned both the production and persuasion burden to the defendant. In the instant cases, defendants violated a constitutional norm by maintaining dual school systems in violation of Brown I and Green. They seek to avoid liability by arguing that their violation did not cause plaintiffs' current injury. Rather, they argue, plaintiffs' injury was caused by demographic patterns beyond the defendants' control. In the instant cases, as in Arlington Heights, the burdens of production and persuasion on defendants' exculpatory theory should be borne by defendants. See also, Keyes v. School District No. 1, 413 U.S. 189 (1973); Evans v. Buchanan, 582 F.2d 750, 764-766 (3d Cir. 1978). Given defendants' numerous segregative acts demonstrated by plaintiffs, defendants have clearly failed to prove by a preponderance, much less by a clear and convincing evidence, that the continued segregation of the Dayton and Columbus schools is not attributable to a failure to carry out affirmative obligations under Green. Accordingly, the

issuance of systemwide relief designed to effectuate the dismantling of the dual system was entirely appropriate.

II. DEFENDANTS ARE GUILTY OF CULPABLE BEHAVIOR IN KNOWINGLY OPERATING RACIALLY SEGREGATED PUBLIC SCHOOLS. FEDERAL COURTS POSSESS UNQUESTIONED POWER TO ORDER SYSTEMWIDE RELIEF TO REDRESS THE CONSEQUENCES OF DEFENDANTS' CULPABLE BEHAVIOR.

In Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), this Court ruled that the disproportionate racial impact of a governmental act, standing alone, is not sufficient to constitute a violation of the equal protection clause. In addition to disparate racial impact, this Court ruled, a degree of mental culpability must accompany the challenged act in order to trigger a finding that the equal protection clause has been violated. However, in identifying a culpable mental state as an element of equal protection violation, this Court has taken merely the first step toward a scienter-based jurisprudence of equality. At least two additional issues remain for the Court's consideration:

(1) What is the precise degree of

mental culpability which will give rise to a violation of the equal protection clause? Does reckless or negligent activity which causes disproportionate injury to members of a racial minority violate the equal protection clause?

(2) How are the burdens of proof on the issue of mental culpability to be allocated?

A. The Nature of the Culpable Mental State Required To Justify Prospective Relief Under the Equal Protection Clause.

In Washington v. Davis and Arlington Heights this Court considered only two possible mental states: purposeful malice and inadvertent innocence. While such a bi-polar analysis is helpful in deciding whether a defendant's mental state is at all relevant to the decision of an equal protection case, it is far too rigid to serve as a guide for determining the precise point on a continuum of culpability which should justify a grant of relief. Since, ordinarily, mental states (especially the complex of attitudes which coalesce into the "mental state" of a

government entity-defendant) do not neatly divide into the extremes of the bi-polar model, it is necessary to identify and to consider intermediate or equivalent culpable mental states, such as recklessness and negligence, which encompass neither purposeful malice nor inadvertent innocence. In conducting such an inquiry into intermediate forms of mental culpability, this Court would not be engaged in a task unique to constitutional law. Indeed, wherever significant legal consequences turn on the culpable mental state of a defendant, it has proven necessary to explore the effect of a finding of an intermediate culpable mental state, such as recklessness or negligence.

In the area of the criminal law, courts, legislators and academics have grappled with the appropriate legal consequences which should flow from reckless or negligent, as opposed to purposive or knowing, behavior by a criminal defendant. E.g. United States v. United States Gypsum Co., 98 S. Ct.

2864 (1978); United States v. Dixon, 419 F.2d 288 (D.C. Cir. 1969); ALI Model Penal Code § 2.02 (Proposed Official Draft) (1962); H.L.A. Hart, Punishment and Responsibility, 136-157 (1968); Packer, Mens Rea in the Supreme Court, 1962 Sup. Ct. Rev. 109; Perkins, The Criminal Law 61 (1957); Michael and Wechsler, A Rationale of the Law of Homicide, 37 Col. L. Rev. 701 (1937); Wechsler, Codification of the Criminal Law in the United States: The Model Penal Code, 68 Col. L. Rev. 1425 (1968). Although substantial controversy continues over the role of negligence in the criminal law, a discernible tendency exists to uphold the imposition of criminal sanctions on individuals (especially government officials) whose conduct has recklessly or negligently caused harm of a constitutional dimension, without regard to the purely subjective state of mind of the actor. Compare, United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) with United States v. Barker, 546 F.2d 940

(D.C. Cir. 1976). See also, United States v. McLean, 528 F.2d 1250 (2d Cir. 1976). As H.L.A. Hart has argued, even in the context of the criminal law, negligent or reckless behavior by a defendant which inflicts unnecessary suffering on individuals may be a culpable mental state warranting the imposition of criminal sanctions. H.L.A. Hart, Negligence, Mens Rea and Criminal Responsibility in Punishment and Responsibility (1968) at pp. 136-157; see also, Gross, A Theory of Criminal Justice (1978) at pp. 419-423; Packer, Mens Rea in the Supreme Court, 1962 Sup. Ct. Rev. 109.

Similarly, in the area of securities regulation, this Court has explicitly reserved judgment on the related questions of whether reckless conduct constitutes sufficient "scienter" to give rise to a retrospective liability for violating Rule 10b-5 and whether negligent conduct can justify prospective injunctive relief. Ernst & Ernst v. Hochfelder, 425 U.S.

185, 194 n. 12 (1976). The lower federal courts have been virtually unanimous in finding recklessness to be a sufficiently culpable mental state to give rise to retrospective sanctions under Rule 10b-5. E.g., Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977); Coleco v. Berman, 567 F.2d 569 (3d Cir. 1977); Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38 (2d Cir. 1978); S.E.C. v. Commonwealth Chemical Securities, 574 F.2d 90 (2d Cir. 1978); Nelson v. Serwold, 576 F.2d 1332 (9th Cir. 1978); Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978); Berdahl v. S.E.C., 572 F.2d 643 (8tn Cir. 1978); see generally, S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 868 (2d Cir. 1968)(en banc) (Friendly, J. concurring). But see, S.E.C. v. American Realty Trust, 429 F.Supp. 1148, 1171 n. 8 (E.D.Va. 1977); Utah State University v. Bear Stearns & Co., 549 F.2d 164 (10th Cir. 1977). For perceptive discussions of the issue at the district court level, see,

Steinberg v. Carey, 439 F. Supp. 1233 (S.D.N.Y. 1977)(Weinfeld, J.); Valente v. Pepsico, Inc., 454 F. Supp. 1228 (D. Del. 1978). Moreover, the lower federal courts have also generally held that negligence constitutes a sufficiently culpable mental state to give rise to prospective injunctive relief under Rule 10b-5. S.E.C. v. Aaron, __F.2d__ (2d Cir. 1979); S.E.C. v. Arthur Young & Co., __F.2d__ (9th Cir. 1979); S.E.C. v. Universal Major Industries Corp., 546 F.2d 1044 (2d Cir. 1976); S.E.C. v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976); Nassar & Co. v. S.E.C., 566 F.2d 790, 794 (D.C. Cir. 1977)(Leventhal, J. concurring). But see, S.E.C. v. Blatt, 583 F.2d 1325 (5th Cir. 1978). Thus, in securities regulation, as in criminal law, our courts have recognized that a failure to exercise due care constitutes a sufficiently culpable mental state to warrant the imposition of scienter-based liability.

In the area of constitutional

litigation, in mapping the contours of the good faith defense available to government officials sued for retrospective damages, this Court has been careful to identify a mental state consistent with recklessness or negligence and to predicate liability upon it. E.g. Wood v. Strickland, 420 U.S. 308 (1975). See also, Estelle v. Gamble, 429 U.S. 97 (1976); Monroe v. Pape, 365 U.S. 167, 187 (1961).

In the labor law area, since this Court's decision in NLRB v. Great Dane Trailers, 388 U.S. 26 (1967), reckless or negligent employer conduct which is "inherently destructive" of employee rights exhibits a sufficiently culpable mental state to give rise to an unfair labor practice under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. E.g. Kaiser Engineering v. NLRB, 538 F.2d 1379 (9th Cir. 1976); Knuth Bros. Inc., 229 N.L.R.B. No. 176 (1977); W.R. Grace & Co., 230 N.L.R.B. No. 037 (1977). Both the courts and the NLRB have recognized that a negli-

gent or reckless failure to consider the foreseeable consequences of an employer's actions on employee rights constitutes a sufficiently culpable mental state to impose liability. For the history of this Court's treatment of culpable mental state in the labor law area see, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Radio Officers Union v. NLRB, 347 U.S. 17, 55 (1954) (Frankfurter, J. concurring); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) (Harlan and Stewart, JJ. concurring); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Burnup & Sims, Inc. 379 U.S. 21 (1964); American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

For similar issues in the anti-trust area, see, e.g. United States v. United States Gypsum Co., 98 S. Ct.

2864 (1978); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Grinnell Corporation, 384 U.S. 563 (1966), aff'g, except as to decree 236 F. Supp. 244 (D.R.I. 1964) (Wyzanski, J.). See generally, Hawk, Attempts to Monopolize - Specific Intent as Anti-Trust's Ghost in the Machine, 58 Cornell L. Rev. 1121 (1973); Smith, Attempt to Monopolize: Its Elements and Their Definition, 27 Geo. Wash. L. Rev. 227 (1958); Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Laws and Procedures (1979).

For similar issues in the general law of torts, see e.g. Ultra Mares Corp. v. Touch, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931); State Street Co. v. Ernst, 278 N.Y. 104, 112, 15 N.E.2d 416, 418-19 (1938). See also, Keeton, Fraud: The Necessity of an Intent to Deceive, 5 U.C.L.A. L. Rev. 585 (1958); Goodhart, Liability for Innocent but Negligent Misrepresentations, 74 Yale L.J. 286 (1964); see generally, Prosser, The Law

of Torts at pp. 700-10.

In each of the areas of the law in which scienter has been deemed a precondition to liability, our courts have held that prospective relief may be granted upon a showing of negligent or, at most, reckless behavior. Indeed, recklessness and negligence have often been deemed a sufficiently culpable mental state to warrant the imposition of retrospective (even criminal) sanctions. As the Chief Justice noted in United States v. United States Gypsum Company, 98 S. Ct. 2864 (1978), the decision to recognize a negligence-recklessness definition of scienter or to insist upon a purposive definition turns on the primary end of the law in question. Those legal norms which are principally designed to punish or to stigmatize persons for engaging in morally reprehensible conduct require a showing of evil purpose. Those legal norms which are principally designed to regulate rather than punish require merely a showing that a defendant

has dropped below an acceptable standard of behavior. 98 S. Ct. at 2875-76. Since attempts to obtain prospective relief will almost always involve "regulation" as opposed to "punishment", the consistent acceptance of negligence-recklessness as sufficiently culpable scienter to warrant prospective relief is hardly surprising. Especially in the context of a request for prospective relief under the equal protection clause, this Court's emphasis should be on stimulating an acceptable standard of official behavior, as opposed to imposing punishment. Accordingly, while strict adherence to a subjectively oriented requirement of purposive activity may be appropriate in cases seeking to impose retrospective sanctions for morally repugnant behavior, no jurisprudential basis exists to insist upon purposive - as opposed to reckless or negligent - conduct in cases seeking prospective relief in an Equal Protection context. No basis exists for tolerating the reckless or negligent

infliction of injury on vulnerable members of a racial minority by a government entity which, if not purposively malicious, is culpably indifferent. Moreover, given the records below, no reasonable finder of fact could fail to find that defendants acted with reckless disregard for and deliberate indifference toward black children confined to ghetto schools in Columbus and Dayton.

B. The Burdens of Proving Culpable Mental State.

If this Court properly determines that the equal protection clause is violated by negligent or reckless infliction of disproportionate harm on members of racial minorities, the task of evolving equitable and efficient ground rules for proving culpable scienter would be substantially eased. While difficult questions would, no doubt, arise in evolving and applying a standard of care designed to minimize the negligent or reckless infliction of harm on members of racial minorities,

the task of applying reasonableness in an Equal Protection context should prove no more difficult than similar tasks undertaken by this Court in other areas of the law. E.g. Continental T.V. Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36 (1977), overruling United States v. Arnold, Schwinn, & Co., 388 U.S. 365 (1967); Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 2-3, 37-38 (1978); Bucklo, The Supreme Court Attempts to Define Scienter Under Rule 10b-5, 29 Stan. L. Rev. 213 (1977). Indeed, in insisting upon an objective standard as a check on the "good faith" defense, this Court has already committed itself to defining the contours of a reasonable standard of care applicable to virtually all government officials. Estelle v. Gamble, 429 U.S. 97 (1976); Wood v. Strickland, 420 U.S. 308 (1975); see also, United States v. Ehrlichman, 546 F.2d 910 (D.C.Cir. 1976); United States v. Barker, 546 F.2d 940 (D.C.

Cir. 1976). The allocation of the production and persuasion burden would, under such circumstances, take on far less significance, since the parties would not be asked to prove the unprovable.

If, however, this Court insists upon adopting a purely subjective "purpose" test in Equal Protection cases, the size and placement of the burdens of proof become critical because it may well be all but impossible for any party to satisfy them.[8] In

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8. The inordinate importance of the burden of proof decision casts serious doubt on the wisdom of a purely subjective "purposive" standard. Whenever a fact is so difficult to prove that allocation of the burden of proof, in effect, decides the merits, the "factual" determination is in reality a legal fiction. Respect for law is hardly advanced by permitting something as important as equality under the law to turn on such a legal fiction.

criminal cases, the due process clause governs the allocation and size of the persuasion burden, leaving to the courts substantial latitude in allocating the production burden. E.g. Davis v. United States, 160 U.S. 469 (1895). See generally, In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977). In most civil contexts, on the other hand, courts retain the power and responsibility to define and allocate the production and the persuasion burdens. E.g. Castaneda v. Partida, 430 U.S. 482 (1977); Keyes v. School District No. 1, 413 U.S. 189 (1973); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). See generally, Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). Modern analysis has suggested that the allocation and definition of the burdens of proof are governed by three factors: (1) the degree of difficulty anticipated in proving the fact at issue; (2) the relative ease

of access to the evidence; and (3) the direction of error displacement which the legal system wishes to affix to a given fact-finding process. See, e.g., Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242 (1944); 9 J. Wigmore §§ 2485-2486 (3d Ed. 1940). Whether one approaches the burden of proof issue in this case from the perspective of difficulty of proof, relative ease of access to the evidence or displacement of error, the burdens of proof should be borne by the defendants.

As this Court has repeatedly noted, proving the presence or absence of purposeful racial animus is an extraordinarily difficult task. E.g. Village of Arlington Heights v. Metropolitan Housing Development Corp., supra; Keyes v. School District No. 1, supra. The subjective motivation of actors in our legal system has consistently proven an elusive and baffling quarry.

Moreover, when the subjective motivation at issue is not that of an individual, but encompasses the collective motivation of a public body which consists over time of numerous individuals with varying motives, the search for a unified subjective purpose takes on an artificial cast. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 319 (1978)(Stewart, Burger, Rehnquist and Stevens, JJ. dissenting); United States v. O'Brien, 391 U.S. 367 (1968); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95. See also, Hawk, Attempts to Monopolize - Specific Intent as Anti Trust's Ghost in the Machine, 58 Cornell L. Rev. 1121 (1973). Finally, the difficulty of establishing purposive racial animus by an individual (to say nothing of a government body) is exacerbated by the happy fact that racial animus is currently perceived

as socially unacceptable. Put bluntly, subjective bigotry - especially in government officials - is uniquely difficult to prove precisely because bigots are not encouraged to advertise their true feelings. Indeed, many persons whose actions are affected by racial prejudice are not even conscious of the racially tinged roots of their behavior.

If this Court insists that the right of racial minorities to equal protection of the law turns on a search for such an elusive phenomenon, no doubt exists that defendants enjoy a decided advantage in access to the relevant evidence. Defendants will routinely have access to the raw material of decision-making. Moreover, proof concerning the existence of neutral explanations for racially disproportionate practices will rarely, if ever, be available to a plaintiff, but will be routinely available to a defendant.

Even more importantly, to the extent our fact-finding process errs

in the area of racial animus, it should err on the side of the prospective dis-establishment of government policies which gratuitously inflict harm on vulnerable racial minorities.[9] Thus, if error is to be displaced, it should be displaced in the direction of ending the segregation of black children in racially identified schools. Traditionally, our legal system has effected such a displacement of error by a sensitive allocation of the persuasion burden to favor deeply felt social goals.

Given the powerful arguments in favor of imposing both burdens of proof on a government defendant in an equal protection case, it would be reasonable

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9. No question of retrospective sanctions is raised in this case. Whether the burden of proof in a retrospective sanction case should differ from the burden in a prospective case may be left to another day. Compare, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) with S.E.C. v. Aaron, __F.2d__(2d Cir. 1979).

to impose both the initial production burden and the ultimate persuasion burden on the issue of scienter on the defendants. However, amicus believes that an equitable and easily administered allocation of burdens is illustrated by the less drastic approach suggested by this Court in Castaneda v. Partida, 430 U.S. 482 (1977) and Keyes v. School District No. 1, 413 U.S. 189 (1973). Under such an allocation, plaintiffs would bear an initial production burden on the issue of purposeful discrimination. Once such an initial production burden were satisfied, both a shifted production burden and the persuasion burden would be borne by the defendants. See generally, Davis v. United States, 160 U.S. 469 (1895).

1. The Nature of Plaintiffs' Initial Production Burden

Orthodox evidentiary analysis defines plaintiffs' initial production burden as the obligation to produce evidence from which a reasonable finder of fact may determine that it is more

likely than not that the contested fact (scienter) exists.[10] Where plaintiffs in a Northern school desegregation case demonstrate (1) the existence of racially segregated schools; and (2) the fact that defendants knew that the consequences of their policies would be the maintenance of a segregated school

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10. Such a definition assumes that the initial persuasion burden rests with the plaintiff as well. Since the production burden is not, strictly speaking, a fixed quantum of evidence, but rather varies as a function of the persuasion burden, a change in the size or allocation of the persuasion burden exerts an automatic effect upon the quantum of evidence required to satisfy a production burden. E.g. McNaughton, Burden of Production of Evidence: A Function of the Burden of Persuasion, 68 Harv. L. Rev. 1382 (1955). See generally, United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y. 1967). Thus, were the persuasion burden placed on the defendant as an initial matter, plaintiffs' initial production burden would be lower. Plaintiffs' initial production burden should, however, be measured as if the persuasion burden were on the plaintiff, since, under the model suggested by amici, no persuasion burden shift occurs until an initial production burden has been satisfied.

system, a reasonable finder of fact may infer the existence of culpable scienter by a preponderance of the evidence. Thus, proof that an existing condition of racial segregation was the foreseeable consequence of defendants' past actions satisfies plaintiffs' production burden on the issue of culpable scienter. Precisely such a "foreseeable consequences" test has been approved by this Court in a variety of contexts as sufficient to satisfy a production burden on the issue of scienter. E.g. United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978) (criminal anti-trust); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967)(unfair labor practice). See also, Arthur v. Nyquist, 573 F.2d 174 (2d Cir. 1978); United States v. Texas Educational Agency, 564 F.2d 162 (5th Cir. 1977); Hart v. Community School Board of Educ., 512 F.2d 37 (2d Cir. 1975). See generally, Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,

86 Yale L. J. 317 (1976); Schwemm, From Washington v. Davis to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. of Ill. Law Forum 961, See generally, Washington v. Davis, supra, at 253 (Stevens, J. concurring). In the instant case, plaintiffs not only proved the two elements minimally necessary to satisfy their production burden, they introduced substantial direct evidence of racial animus by proving a pattern of activity explainable only in terms of racial animus.[11] Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). With the clear satisfaction of plaintiffs' production burden, the definition and allocation of the persuasion burden becomes critical.

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11. Brinkman v. Gilligan, 583 F.2d 243, 254, 256 (6th Cir. 1978); Pennick v. Columbus Board of Education, 583 F.2d 787, 805, 809 (6th Cir. 1978).

2. The Nature of Defendants' Persuasion Burden

The persuasion burden instructs the finder of fact as to the proper disposition of doubtful cases. Where, as here, plaintiffs seeking prospective relief have satisfied an initial production burden by introducing evidence which would permit a reasonable finder of fact to infer culpable scienter, doubts should be resolved in favor of disestablishing conduct which is gratuitously harmful to racial minorities. See, supra at 53. Keyes v. School District No. 1, 413 U.S. 189 (1973); Castaneda v. Partida, 430 U.S. 482 (1977); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); United States v. Grinnell Corp., 384 U.S. 563 (1966), aff'g except as to decree, 236 F. Supp. 288 (D.R.I. 1964). Thus, once an initial production burden on the scienter issue has been satisfied, a defendant seeking to avoid prospective relief must persuade the finder of fact that it is more likely than not that cul-

pable scienter did not exist.[12]

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12. Similar concerns for error displacement in the fact finding process and allocation of the risk of uncertainty have resulted in placing persuasion burden on defendants in many environmental cases. E.G. In Re Con. Edison of New York (Indian Point 2) 6 A.E.C. 751 (Sept. 25, 1973); see generally Trubeck, Allocating the Burden of Environmental Uncertainty: The NRC Interpretation of NEPA's Substantive Mandate, 1977 Wisc. L. Rev. 747. Proof of potential environmental harm is either non-existent or uncertain, or if in existence, is frequently unavailable to plaintiffs. Without the shifted burdens plaintiffs would be required to persuade a fact finder that some quantity of damage to health or the environment will occur unless enjoined. Under properly allocated burdens, however (e.g. In Re Con Edison Indian Point 2) when plaintiff satisfies an initial production burden by presenting sufficient evidence to raise a serious question as to potential environmental harm, the production and persuasion burdens are placed on the proponent of the environmental risk to prove that it is more likely than not either that no environmental harm will occur or that there is some excusing condition, i.e. necessity and no feasible alternative.

3. The Shift of the Production Burden to Defendants

The combination of a plaintiff's evidence and the shift in the persuasion burden to the defendant creates the possibility of a shift in the production burden to the defendant in an appropriate case. Where plaintiffs' initial evidence makes it impossible for a defendant to satisfy his persuasion burden on the issue of culpable scienter in the absence of rebuttal, defendants are saddled with a classically shifted production burden. E.g. Castaneda v. Partida, supra; Keyes v. School District No. 1, supra.

Defendants' attempt to satisfy such a shifted production burden will generally take the form of demonstrating that factors unrelated to racial animus motivated the acts in question. Plaintiffs will generally seek to weaken such an inference of benign scienter by demonstrating segregative acts which do not fit within defendants' neutral explanation. At the close of the evidence, the Court must determine whether

defendants have satisfied their shifted production burden by introducing evidence from which a reasonable finder of fact could infer that it is more likely than not that benign, as opposed to culpable, scienter existed. To the extent the Court finds that a defendant has satisfied a shifted production burden, the issue must then be decided by the finder of fact under the appropriate persuasion burden.[13]

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13. In the Columbus case, the District Court found that each party had satisfied its production burden and then found that defendant had failed to satisfy its shifted persuasion burden. Pennick v. Columbus Bd. of Educ., 583 F.2d 787, 801 (6th Cir. 1978). In the Dayton case, the District Court found that plaintiff had satisfied a production burden, but erred in continuing to place the persuasion burden on the plaintiff. When the Sixth Circuit correctly placed the persuasion burden on the defendant, it properly ruled that no reasonable finder of fact could deem defendants' persuasion burden satisfied. Brinkman v. Gilligan, 583 F.2d 243, 252, 258 (6th Cir. 1978).

4. Castaneda v. Partida and Keyes v. School District No. 1 as Evidentiary Models.

Amici has argued that satisfaction of a production burden by a plaintiff alleging purposeful racial discrimination should act to shift the persuasion burden (as well as the production burden in many cases) on the issue of culpable scienter in an equal protection case to the defendant. This Court has never comprehensively considered the appropriate allocation of the burdens of proof in cases alleging unconstitutional racial discrimination. However, in two recent cases the Court has appeared to apply the evidentiary analysis urged by amici.

In Castaneda v. Partida, supra, a habeas corpus petitioner challenged the constitutionality of the Grand Jury selection process in Hidalgo County, Texas, alleging that Mexican-Americans were substantially underrepresented on the panels. As the decisions of this Court made clear, in order to prevail, the petitioner was obliged to demonstrate the intentional exclusion of racial

minorities from the Grand Jury process. Thus, the issue of scienter was squarely posed.

In support of his contention, the petitioner in Castaneda produced statistical evidence demonstrating that while Hidalgo County was 79 percent Mexican-American, minority representation on Grand Jury panels approximated only 40 percent. Both the district court and this Court found that such evidence of disproportionate racial impact satisfied petitioner's production burden on the issue of scienter. In other words, a reasonable finder of fact could infer from the pattern of underrepresentation that it was more likely than not the result of purposeful exclusion of Mexican-Americans.

Respondents in Castaneda produced virtually no evidence tending to rebut the inference of scienter which flowed from petitioner's statistics. Under such circumstances, this Court reversed a finding of fact by the trial court that scienter did not exist. Although

this Court did not explicitly describe its allocation of the persuasion burden in Castaneda, its action in reversing the trial court's finding of fact reveals that the persuasion burden was allocated to the government. If the persuasion burden were deemed to rest with petitioner in Castaneda, this Court's reversal of the district court's finding of fact could be explained only by a finding that, based on petitioner's raw statistics, no reasonable finder of fact could fail to find that it was more probable than not that culpable scienter existed. While such a reading of Castaneda is possible, it is a highly strained one.[14] If, however, the persuasion burden is deemed to rest with the respondents in Castaneda, this

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14. Unless, of course, the culpable scienter at stake in Castaneda was negligent or reckless behavior rather than purposive exclusion.

Court's reversal is explained by a finding that, given respondents' failure to present persuasive rebuttal evidence, no reasonable finder of fact could find that it was more probable than not that purposive discrimination did not exist. Thus, this Court appears to have ruled in Castaneda, that once an initial production burden on the issue of purposive discrimination has been satisfied, ties should be broken in favor of disestablishing practices which inflict gratuitous harm on racial minorities.

In Keyes v. School District No. 1, supra, plaintiffs alleged systemwide racial segregation in the Denver public schools. Not surprisingly, the Keyes proof pattern is similar to the records in both the Dayton and Columbus cases. In each, plaintiffs demonstrated widespread racial segregation, coupled with a showing that defendants' policies in the areas of site selection, attendance zones, pupil transfers and staff assignments had had the foreseeable consequences of maintaining a segregated

system. In addition, in each, plaintiffs presented direct evidence of purposeful racial segregation in a significant segment (but not the entire) system. In Keyes, although the terminology is not precise, this Court clearly ruled that plaintiffs had satisfied their production burden on the issue of scienter. In other words, plaintiffs' evidence was sufficient to permit a reasonable finder of fact to infer that it was more likely than not that the systemwide segregation in the Denver schools was the result of purposive activity. Once the threshold production burden was satisfied, this Court explicitly shifted the persuasion burden on the scienter issue to the defendants. In Keyes, this Court used the phrases "presumption" and "prima facie case" to describe its shift of the persuasion burden. As the briefs of the parties reveal, the ambiguity inherent in such phrases renders their use questionable.[15]

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15. The impact of true presumptions on the persuasion burden has been the subject of substantial debate. However, the inferential

Rather, it would be preferable to announce explicitly that once a production burden on systemwide scienter has been satisfied, the defendants bear the risk of a tie.

5. Application of the Evidentiary Model to the Dayton and Columbus Cases

(a) Satisfaction of Plaintiffs' Initial Production Burden

Plaintiffs in both the Dayton and Columbus cases offered three types of evidence in satisfaction of their initial production burden. First, they demonstrated the current racial segregation of the school systems in both cities. Brinkman v. Gilligan, 583 F.2d 243, 254 (6th Cir. 1978); Pennick v.

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15. cont'd.
process described in Keyes is not a presumption in the accepted sense of the term. Where an inference from a basic fact to an inferred fact is compelling, the artificial stimulus of a presumption is unnecessary to allow it. The process described in Keyes is closer to a permissible inference, with the persuasion burden resting on the defendant. Moreover, "prima facie case" has been used to mean so many things as to be virtually meaningless.

Columbus Bd. of Education, 583 F.2d 787, 800-01 (6th Cir. 1978). Second, they demonstrated a series of acts taken by the defendants which had the inevitable and foreseeable consequences of increasing or perpetuating racial segregation in the schools. Brinkman v. Gilligan, supra, at 252, 254, 257; Pennick v. Columbus Bd. of Educ., supra at 802, 804, 808. Finally, they demonstrated acts having a substantial segregative effect which could not logically be explained by adherence to a racially neutral policy. Brinkman v. Gilligan, supra, at 254, 256; Pennick v. Columbus Bd. of Educ., supra, at 805, 809. Such evidence, especially when coupled with proof that an intentionally maintained dual system of segregated schools had existed as of this Court's decision in Brown I, unquestionably satisfied a production burden on the issue of culpable scienter. Indeed, similar evidence was deemed sufficient by this Court in United States v. United States Gypsum Co.,

98 S. Ct. 2864 (1978) to satisfy the more formidable production burden borne by the prosecution in a criminal case.

(b) Defendants' Attempt to Satisfy a Shifted Production Burden

Defendants, faced with plaintiffs' initial showing, sought to rebut the inference of culpable scienter by arguing that their actions were motivated by adherence to a racially neutral neighborhood schools policy. However, their attempt to rebut the inference of scienter was severely weakened by plaintiffs' demonstration that a number of the segregative acts at issue ran counter to (or were not compelled by) a neighborhood school policy. Since the quantum of evidence needed to satisfy a production burden is a function of the persuasion burden, the allocation of the persuasion burden was the critical factor.

(c) Allocation and Attempted Satisfaction of the Persuasion Burden

In Pennick, the district court apparently allocated the persuasion burden to the defendants.[16] In Brinkman, the district court allocated it to the plaintiffs. Predictably, each court found that the party saddled with the persuasion burden had failed to satisfy it. Equally predictably, when the Sixth Circuit in Brinkman correctly allocated the persuasion burden to the defendants, it ruled that, given the Brinkman plaintiffs' evidence and the weakness of defendants' rebuttal, no reasonable finder of fact could deem it satisfied. Accordingly, it treated the Brinkman defendants as having failed to satisfy a shifted production

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16. In Pennick, the district court appears to have made alternative findings of scienter in the event the persuasion burden is found to rest with the plaintiffs.

burden,[17] in much the same manner as this Court treated the respondents in Castaneda v. Partida, supra. In allocating the persuasion burden to the defendants and in ruling that their rebuttal evidence was clearly insufficient to meet it, the Sixth Circuit in Brinkman correctly applied the teachings of this Court. As amici have argued,

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17. Since the district court in Pennick ruled that defendants failed to carry their persuasion burden, no necessity exists to decide whether the Columbus defendants satisfied their shifted production burden. Alternatively, the district court in Pennick ruled that plaintiffs had satisfied a persuasion burden on culpable scienter on a systemwide basis. Thus, regardless of the allocation of the evidentiary burdens, the Columbus case must be affirmed, unless this Court wishes to overturn the careful factual findings of a lengthy trial.

where the factual issue of scienter is so elusive--and close--that neither party can satisfy a persuasion burden with respect to it - this Court has directed that ties be broken in favor of the granting of prospective relief aimed at making the promise of racial equality a reality.

III. THE FOURTEENTH AMENDMENT IMPOSES AN AFFIRMATIVE OBLIGATION UPON ALL SCHOOL DISTRICTS TO OPERATE RACIALLY INTEGRATED SCHOOLS WITHIN THEIR DISTRICTS TO THE MAXIMUM EXTENT FEASIBLE.

In addition to the evidentiary matters discussed herein, Amici believe that it also is necessary to address squarely the substantive rights at issue in these cases. In our view, it is the very condition of segregation which offends the Fourteenth Amendment.

This Court has never held that the Fourteenth Amendment permits a state to be in the business of operating racially segregated facilities. Amici submit, quite to the contrary, that the Fourteenth Amendment prohibits the maintenance of racially segregated state facilities, including of course racially segregated public schools within a school district. To the extent that racially segregative intent (as opposed to racially discriminatory intent) is necessary for segregation to offend the Fourteenth Amendment, that intent is supplied by the intent to operate racially segregated schools and to compel children to attend those segregated

schools. There must not be "black" schools and "white" schools; rather, to the maximum extent feasible, there must be just schools attended by children of all races. Green v. County School Board of New Kent County, 391 U.S. 430, 442 (1968).

A racially segregated school is a school that is racially identifiable with respect to student composition, that is, a school in which the student enrollment of one race is so disproportionate as realistically to isolate those students from students of the other race in the school system and thus to deprive them of a racially integrated educational experience. Racially segregated schools, as so defined, are something very different from racially imbalanced schools, i.e., schools in which the black-white ratio departs from the black-white racial composition of the district as a whole. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23-24 (1971). The Fourteenth Amendment, of course, does not require racially balanced schools. Id.; Milliken v. Bradley, 418 U.S. 717, 746

(1974). But it does require that there be racially integrated schools within a school district, to the maximum extent feasible. In both Dayton and Columbus, the overwhelming majority of the schools are racially identifiable schools. It is this condition of segregation that offends the Fourteenth Amendment.

The present cases, like all others that have come before this Court since Brown v. Board of Education, 347 U.S. 483 (1954), have been predicated on a showing of de jure segregation, that is, on a showing that the racially segregated character of the school system was the result of intentional segregatory action. In Brown and the other cases coming from states where segregation was required by state law, the racially segregated character of the school system was, of course, attributable to those laws and could be conveniently referred to as de jure. This Court has required that school districts eliminate dual school systems mandated by state law by achieving the "greatest possible degree of actual desegregation, taking into account the practicalities of

the situation." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).

The existence of school segregation in those states where segregation was not required by state law has been no less extensive than in the states where it was so required. See generally, U.S. Comm. Civil Rights, Racial Isolation in the Public Schools (1967). Legal challenges to such segregation, however, were frequently framed with reference to the situation existing in states where segregation was required by state law, and when they were first made, the lower federal courts developed a distinction between de jure and de facto segregation. Under this distinction, intentional segregative acts on the part of the school board were analogized to state laws mandating racially segregated schools, and unless it could be shown that the existing school segregation was produced by such acts, that segregation was characterized as de facto rather than de jure and was held to be constitutionally permissible. See, e.g., Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S.

847 (1967); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964). As a result, plaintiffs seeking school desegregation in school districts located in states where school segregation had not been required by state law, attempted to show the commission of intentionally segregative acts on the part of the school board, so as to bring the resulting segregation within the framework of the de jure-de facto distinction. In the first such case to reach this Court, Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), the plaintiffs thought and thus conceded that they had to prove that the segregated schooling was "brought about or maintained by intentional state action." 413 U.S. at 198. As this Court there stated:

> "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have

> committed acts constituting de jure segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." 413 U.S. at 212.

Insofar as this Court alluded to the so-called de jure-de facto distinction in Keyes, it did so in relation to the plaintiff's theory of the case, and in the context of holding that once intentional segregation had been proved with respect to a substantial portion of the school system, the school board had the burden of showing that its actions as to the other segregated schools in the system were not also motivated by segregative intent. 413 U.S. at 208-209. This Court did not hold in Keyes, therefore, that segregation resulting from the "neutral" application of the "neighborhood school policy" without a showing of "segregative intent" was constitutional.

Although this Court has subsequently cited Keyes for the proposition that the existence of racially segregated schools within a school district is not unconstitutional absent a showing of segregative intent, see Washington v. Davis, 426 U.S. 229, 240 (1976), Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977), and has stated that the existence of predominantly black and predominantly white schools, without more, does not offend the Fourteenth Amendment, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971), it has never so held in a case where the question was squarely presented. It has never upheld the constitutionality of so-called de facto segregation and has never addressed the question left open in Keyes, of whether a neighborhood school policy of itself can justify the existence of racially segregated schools in the absence of intentionally segregative acts. More significantly, it has never considered the fundamental question of whether the Fourteenth Amendment requires a school district to operate racially integrated schools within its

boundaries, to the maximum extent feasible.

The Fourteenth Amendment's requirement obliging a school district to operate racially integrated schools within its boundaries, to the maximum extent feasible, provided the rationale for the original school segregation decisions in Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954). The rationale of those decisions, carried over to segregation existing in school districts located in states where it was not required by state law, renders the maintenance of racially segregated schools unconstitutional without regard to whether their racially segregate character was produced by "segregative intent." The gravemen of the Fourteenth Amendment violation is the maintenance of racially segregated schools. The relevant "intent" is the "intent" to operate racially segregated schools and to compel children to attend these schools. What very often has "caused" these schools to become racially segregated schools is the action of a school board, an agency of the state, in using assignment practices--including

an alleged neighborhood school policy--with the knowledge that because of existing patterns of residential racial segregation, the board will produce racially segregated schools.[18] This intent is every bit as onerous as a state law achieving the same result. As Justice Powell has stated: "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." Keyes v. School District No. 1, 413 U.S. 189, 227 (1973) (Powell, J., concurring). The existence of racially segregated schools, therefore, results from "intentional" school board action, and the question is whether the Fourteenth Amendment permits a school board to operate racially segregated schools, or whether it requires that

18. The amici do not address the question of whether governmental responsibility for existing patterns of residential racial segregation renders the resulting school segregation unconstitutional and subject to redress. See Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), aff'd mem., 423 U.S. 963 (1975); United States v. Board of School Commissioners of the City of Indianapolis, 573 F.2d 400 (7th Cir. 1978).

it operate racially integrated schools within its boundaries, to the maximum extent feasible. Amici submit that the Fourteenth Amendment makes the choice in favor of racial integration.

First, the strong value of racial equality embodied in the Fourteenth Amendment's Equal Protection Clause, see the discussion in Regents of the University of California v. Bakke, 98 S.Ct. 2733, 2747-2750 (1978), precludes a state from being in the business of racial segregation and from operating any of its facilities on a racially segregated basis, absent the most compelling and cogent justification for so doing. The teaching of Brown, Bolling and their progeny is precisely that the state cannot be in the business of racial segregation, and in fact cannot be involved in any way in the operation of racially segregated facilities. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Evans v. Newton, 382 U.S. 296 (1966). As this Court stated in Bolling: "Segregation in public education is not reasonably related to any proper governmental objective." 347 U.S. at 500.

The only difference between the school segregation involved in Brown and Bolling and the school segregation involved in some northern and western school districts is that the former was mandated by state law while the latter exists in part because of an alleged application of a neighborhood school policy. This difference is without constitutional significance. At best a neighborhood school policy advances a school board's interest in "administrative convenience," but, as this Court has noted, equal protection principles recognize higher values than "speed and efficiency." Frontiero v. Richardson, 411 U.S. 677, 690 (1973). If "administrative convenience" does not justify the use of gender-based classifications, a fortiori it does not furnish a compelling and cogent justification for the maintenance of racially segregated schools.

The question left open in Keyes, therefore, must be answered in the negative" "A 'neighborhood school policy' [will not] of itself justify racial or ethnic concentrations [even] in the

absence of a finding that school authorities have committed acts constituting de jure segregation." 413 U.S. at 212. A school board, as an agency of the state, cannot be in the business of racial segregation without compelling and cogent justification; the administrative convenience, if any, served by a neighborhood school policy, is not a compelling and cogent justification for the operation of racially segregated schools.

Second, and perhaps even more importantly, the maintenance of racially segregated schools is a denial of equal educational opportunity on grounds of race to the children, black and white, who are required to attend them, because it deprives them "of the benefits that they would receive in a racially integrated school system." Brown v. Board of Education of Topeka, 347 U.S. 483, 494 (1954). In Brown, this Court focused on the harm caused to black children by required attendance at racially segregated schools. It emphasized the necessity for interracial associations in the educational

process,[19] and the importance of those "intangible qualities which are incapable of objective measurement." 347 U.S. at 493. The necessity for interracial associations in the educational process and the importance of "intangible qualities which are incapable of objective measurement" has consistently been recognized by this Court, from Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurnin v. Oklahoma State Regents, 339 U.S. 637 (1950), through Brown to Bakke. In addition, in Brown, this Court made clear that racial segregation in the schools was not simply the mutual separation of the races but the segregation of the racial minority by and from the dominant white majority, thus denoting the inferiority of the racial minority. This official declaration of racial inferiority and stigmatization had adverse psychological consequences for black children, which affected their

19. White children similarly suffer the loss of interracial associations by being compelled to attend racially segregated white schools. See the discussion in Hart v. Community School Board, 383 F.Supp. 699, 740 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975).

motivation to learn in the school setting. As the Court concluded: "Separate educational facilities are inherently unequal," and deprive minority children "of the benefits they would receive in a racially integrated school system." 347 U.S. at 495.

While this Court in Brown was dealing with school segregation required by state law, it did not indicate that the harm to minority students caused by attendance at racially segregated schools would be any less if the segregation resulted from a school board's segregated neighborhood school policy. And, of course, it is not. The intangible qualities of racially integrated education and the benefits of interracial associations during the educational process are lost at any segregated school, regardless of how its segregated character came into being. Similarly, feelings of inferiority and the resulting impairment of motivation to learn exist whenever black children are assigned to segregated black schools. School children do not understand what even to the courts is the sometimes elusive distinction

between de jure and de facto segregation. Black children know that they are attending a school where most or all of the other children are black and they know that they are required by the state to attend that school.[20] They know that they are segregated from white children who attend different schools in the same district, sometimes in fairly close proximity to the schools that black children are attending. As the United States Commission on Civil Rights has observed, following a detailed and comprehensive study of the effects of racial isolation in the public schools:

> "The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of

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20. In Brown, this Court noted the harmful effects of "segregation [that] has the sanction of law." 347 U.S. at 494. To the black child, segregation has the "sanction of the law" when that child is required to attend a black school, regardless of whether state law requires that school to be racially segregated.

such segregation may be..." U.S. Comm. Civil Rights, Racial Isolation in the Public Schools, 193 (1967).

Where official governmental action causes specific and identifiable injury to children because of their race, the genesis of that injury must be irrelevant. It is constitutionally irrelevant whether the segregated schools came into being because a school board intended them to be segregated by manipulating a neighborhood school policy or because it knew they would be segregated as a result of its adoption of such a policy. Either way, the school board is fully aware of the specific and identifiable injury that it is inflicting on children required to attend racially segregated schools.[21]

21. As the California Supreme Court has observed: "[a]lthough a school board's establishment of and adherence to a 'neighborhood school policy' may on its face represent the implementation of a 'neutral,' constitutionally permissible classification scheme, the effect of such state action has invariably been to inflict a 'racially specific' harm on minority students when such a policy actually results in segregated education." Crawford v. Board of Education of City of Los Angeles, 17 Cal.3d 280, 295 (1976). The California Supreme Court has interpreted the equal protection clause of the California Constitution in substantially the same manner as amici contend that this Court should interpret the Equal Protection Clause of the federal Constitution.

Either way, the children are being denied equal educational educational opportunity. Either way, the children are being denied the benefits they would receive in a racially integrated school system. Either way, they are being denied equal protection of the laws.

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

As this Court held in Brown, education is not "made available to all on equal terms," when it is racially segregated. The Fourteenth Amendment, it is submitted, requires school boards to make education available on equal terms by operating racially integrated schools to the maximum extent feasible.

Conclusion

For the reasons stated herein the judgments of the United States Court of Appeals for the Sixth Circuit in N . 78-610 and No. 78-627 should be affirmed.

Respectfully submitted,

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