MODELS FOR PROVING LIABILITY OF SCHOOL AND HOUSING OFFICIALS IN SCHOOL DESEGREGATION CASES

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Scholars[1] have recognized and courts[2] have acknowledged the in-

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1. *See* Farley, *Residential Segregation and Its Implications for Integration*, 39 LAW AND CONTEMP. PROBS. 164, 165, 167 (1975) (levels of racial residential segregation in the largest metropolitan areas are very high; thus, schools organized on a neighborhood basis will remain racially segregated indefinitely); Taeuber, *Demographic Perspectives on Housing and School Segregation*, 21 WAYNE L. REV. 833, 842-43 (1975) (the changing racial composition of a school's pupils and staff serves as signal to realtors and homeseekers; buyers consider attendance lines in housing decisions). *See generally* F. WILSON & K. TAEUBER, RESIDENTIAL AND SCHOOL SEGREGATION: SOME TESTS OF THEIR ASSOCIATION (1978); Orfield, If Wishes Were Houses Then Busing Could Stop 21 (March, 1977) (Paper prepared for Conference on School Desegregation in Metropolitan Areas, N.I.E.) (school and housing policies are intimately related both in building and dismantling ghettoes). *But see* Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 66 (1977) (evidence flimsy that racial composition of schools has corresponding effect on residential patterns).

2. *See, e.g.*, Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 202 (1973) (earmarking schools according to race may have profound reciprocal effect on racial composition of residential neighborhoods within metropolitan area); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971) (discriminatory siting or closing of schools may promote segregated residential patterns that further lock the school system into mold of racial separation); Adams v. United States (St. Louis), 620 F.2d 1277, 1291 (8th Cir.) (public perception of racial identity of a school a powerful factor in shaping neighborhood residential patterns), *cert. denied*, 449 U.S. 826 (1980);

terplay between residential and school segregation. Until recently, however, courts have only held school officials accountable for the direct effects in the schools of their constitutional violations.[3] Furthermore, in the past, school plaintiffs have not charged housing officials with contributing to segregated schools.[4] Consequently, school

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United States v. Board of School Comm'rs (Indianapolis), 573 F.2d 400, 408 (7th Cir. 1978) (racial composition of residential neighborhoods directly affects composition of neighborhood schools; conversely, racial composition of schools can affect residential patterns); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 259 (S.D. Ohio 1977) (interaction of housing and schools operates to promote segregation in each), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979); Reed v. Rhodes (Cleveland), 422 F. Supp. 708, 789 (N.D. Ohio 1976) (interrelation of housing and school patterns an accepted fact of life), *remanded for reconsideration*, 559 F.2d 1220 (6th Cir. 1977); Hart v. Community School Bd. (Brooklyn), 383 F. Supp. 699, 709 (E.D. N.Y.) (housing and school patterns feed each other; segregated schools discourage middle class whites from moving in), *modified*, 383 F. Supp. 769 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (recommended dismissal of housing defendants because no liability determined); Morgan v. Hennigan (Boston), 379 F. Supp. 410, 420 (D. Mass.) (schools and neighborhoods have a reciprocal effect on one another; a school will cause racial composition of neighborhood to shift and *vice versa*), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Crow v. Brown (Atlanta), 332 F. Supp. 382, 391 (N.D. Ga. 1971) (one consequence of discriminatory public housing is inability to achieve school desegregation), *aff'd*, 457 F.2d 788 (5th Cir. 1972), *disapproved on other grounds* in Washington v. Davis, 426 U.S. 229, 244-45 n.12 (1976).

3. *See, e.g.*, Reed v. Rhodes (Cleveland), 455 F. Supp. 546, 550, 554, 557 (N.D. Ohio), 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd in part and remanded*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980) (systemwide school remedy ordered because school board intentionally segregated a substantial portion of students, teachers, and facilities; by racially identifying schools, defendants substantially caused residential segregation); Morgan v. Hennigan (Boston), 379 F. Supp. at 470, 481 (systemwide school remedy ordered for school board's discriminatory faculty assignments, school siting and expansion, feeder patterns, and transfer policy; court acknowledged such acts may have contributed to population shifts); Bradley v. Milliken (Detroit), 338 F. Supp. 582, 587, 592 (E.D. Mich. 1971) (school board's intentional acts caused city school segregation; these acts also linked to those of other governmental units in causing residential segregation), 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in part, vacated and remanded in part on other grounds*, 484 F.2d 215 (6th Cir. 1973), *rev'd and remanded on other grounds*, 418 U.S. 717 (1974).

4. *See, e.g.*, Adams v. United States (St. Louis), 620 F.2d at 1291 (extensive evidence of governmental housing discrimination shown although no housing defendants were before the court); Bradley v. Milliken (Detroit), 338 F. Supp. at 582, 592 (judge concluded that federal, state, and local housing actions established pattern of residential segregation throughout metropolitan area that led to segregated schools; no government housing defendants in the case); Crow v. Brown (Atlanta), 332 F. Supp. at 391 (housing defendant only charged with housing discrimination although acts prevented school desegregation).

and housing desegregation law evolved along separate lines.[5]

More recently, evidence of housing discrimination has begun to play a major role in school cases.[6] School defendants asserted, often unsuccessfully, that residential segregation beyond their control caused segregated neighborhood schools.[7] Plaintiffs then began to show that such segregation was not merely *de facto*,[8] but rather resulted from intentional racial discrimination by governmental housing actors.[9] Justice Stewart added further impetus to the growing

5. *See* notes 89-94 and accompanying text *infra*.

6. *See, e.g.*, United States v. Board of School Comm'rs (Indianapolis), 637 F.2d 1101, 1108-11 (7th Cir.) (discriminatory siting of public housing helped justify interdistrict school remedy), *cert. denied*, 449 U.S. 838 (1980); Evans v. Buchanan (Wilmington), 555 F.2d 373, 389-90 (3rd Cir. 1977) (interdistrict school remedy supported in part by segregative state and local housing policies), *cert. denied*, 434 U.S. 800 (1977); United States v. Yonkers Bd. of Educ., 518 F. Supp. 191, 193 (S.D.N.Y. 1981) (plaintiffs alleged school segregation a consequence of housing agency discrimination); Bell v. Board of Educ. (Akron), 491 F. Supp. 916, 918 (N.D. Ohio 1980) (plaintiffs alleged city-wide discrimination in housing caused school segregation).

7. *See, e.g.*, Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304, 1326 (E.D. Mo. 1979), *rev'd and remanded sub nom.* Adams v. United States (St. Louis), 620 F.2d 1277 (8th Cir. 1980); Penick v. Columbus Bd. of Educ., 429 F. Supp. at 259; Reed v. Rhodes (Cleveland), 422 F. Supp. at 789-90; Arthur v. Nyquist (Buffalo), 415 F. Supp. 904, 968 (N.D. N.Y. 1976), *aff'd*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978); Morgan v. Hennigan (Boston), 379 F. Supp. at 470. *See* note 162 and accompanying text *infra*.

8. In Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 208, the Supreme Court recognized two forms of segregation: "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." *Id.* Thus, nonstatutory segregation will be considered *de facto* unless plaintiffs can show that it resulted from the intentionally discriminatory acts of public officials. Only intentional (*de jure*) discrimination violates the Constitution and warrants a remedy. Recent Developments, *Constitutional Law—Equal Protection and the Neighborhood School Concept: The Demise of the De Jure-De Facto Distinction*, 55 WASH. L. REV. 735, 737-38 (1980).

9. *See* Evans v. Buchanan (Wilmington), 393 F. Supp. at 436-38 (plaintiffs alleged and court found that government housing policies assisted, encouraged, and authorized public and private discrimination in housing, causing interdistrict school segregation, justifying an interdistrict school remedy).

One author stated that plaintiffs in *Milliken* attempted to reduce the distinctions between *de facto* and *de jure* to meaninglessness. Beer, *The Nature of the Violation and the Scope of the Remedy: An Analysis of* Milliken v. Bradley *in Terms of the Evaluation of the Theory of the Violation*, 21 WAYNE L. REV. 903, 904-07 (1975). Beer noted that plaintiffs decided to introduce large amounts of evidence to show that school officials had carried patterns of segregation in housing into the schools. *Id.* at 904. The district judge did find that segregative actions by housing officials as well as school officials played a substantial role in promoting segregation. 338 F. Supp. at 592. Thus the plaintiffs won the trial court's acceptance of the novel theory that gov-

importance of housing evidence in school cases through his concurrence in *Milliken v. Bradley* (Detroit).[10] He suggested that intentional government housing acts may justify a school desegregation remedy.[11]

Justice Stewart's dictum implied that intentional housing violations may have dual effects: they can cause segregated housing and segregated schools. Subsequent cases utilized Justice Stewart's dictum to find that housing violations justified a school remedy.[12] Courts have also recognized that intentional school violations may cause housing and school effects.[13] Further, courts affirmed and litigants proposed hybrid models of liability. These hybrid models reflect the dual housing and school effects of intentional school or housing violations.[14] Because the hybrid models attempt to merge

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ernmental housing discrimination and the failure of school officials to respond to it could provide a basis for school desegregation. Beer at 905. However, plaintiffs dropped the theory at the appellate level. *Id.* at 907. The Sixth Circuit affirmed the defendant's liability based on traditional *de jure* school board actions. 484 F.2d at 242; Beer at 907.

10. 418 U.S. at 755 (Stewart, J., concurring).

11. *Id.* "Were it to be shown . . . that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws, . . . then transfer of pupils across district lines or . . . restructuring of district lines might well be appropriate." *Id.*

12. *See* United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1108-09 (four-part test for determining when housing discrimination will support interdistrict school remedy under Justice Stewart's principle); Evans v. Buchanan (Wilmington), 393 F. Supp. at 438 (governmental conduct causing racial disparity of residential and school population between Wilmington and suburbs conforms to Justice Stewart's *Milliken* concurrence). The Supreme Court has never considered whether governmental housing discrimination, absent intentional school segregation, may justify a school desegregation remedy. The Court let stand two interdistrict school remedies based, in part, on housing discrimination. Because school violations also supported these remedies, Supreme Court acceptance of the housing liability base remains uncertain. *See* United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1114, *cert. denied*, 449 U.S. 838 (1980); Evans v. Buchanan (Wilmington), 393 F. Supp. at 438, 445, *aff'd mem.*, 423 U.S. 963 (1975), 416 F. Supp. at 339, 343 (interdistrict remedy), *aff'd*, 555 F.2d at 376, *cert. denied*, 434 U.S. 800 (1977).

13. *See, e.g.*, Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 202 (school board actions that earmark schools according to race may have profound reciprocal effect on racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within schools); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 21 (discriminatory siting or closing of schools may promote segregated residential patterns that further lock the school system into racial separation); Reed v. Rhodes (Cleveland), 455 F. Supp. at 567 (school board defendants helped to create racially segregated neighborhoods).

14. The authors use "hybrid" to describe more complex theories of liability that

the separate standards of school and housing cases, which include some elements not clearly defined, they pose new difficulties for litigants and judges.[15] Nevertheless, the new models also provide expanded opportunities to reach the segregative effects of constitutional violations. Consequently, they afford new flexibility in remedying school segregation through housing programs.[16]

The following section will analyze the five liability models that appear in school cases. It will present a pure school model, a pure housing model, and three hybrid models derived from the pure models. The last section will apply these five models to allegations filed in *Liddell v. Board of Education*,[17] a St. Louis, Missouri metropolitan school desegregation case. In applying these models, this note will illustrate how the inclusion of all five forms of liability can broaden the range of school and housing remedies.

LIABILITY MODELS

I. PURE SCHOOL MODEL

School desegregation cases traditionally have focused on the inten-

include the dual school and housing effects of intentional violations. These include housing acts causing school effects; school acts causing housing effects that cause school effects; and school acts causing housing effects. *See, e.g.*, United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1114, 1116 (Indianapolis housing authority's discriminatory siting of public housing caused segregative housing and school effects throughout area of authority; court based interdistrict school remedy in part upon this ground); United States v. Texas Educ. Agency (Lubbock), 600 F.2d 518, 527 (5th Cir. 1979) (if school board's segregative acts in some schools helped establish housing patterns that caused segregation in other schools, the status of the other schools violates constitution); Andrews v. City of Monroe, 513 F. Supp. 375, 392 (W.D. La. 1980) (if intentional acts of local school officials helped establish the residential patterns of a metropolitan area, then the segregated status of the schools violates the Constitution), *aff'd sub nom.* Taylor v. Ouachita Parish School Bd., 648 F.2d 959 (5th Cir. 1981).

In *Indianapolis*, plaintiffs proposed a theory that the city school board's intradistrict violations caused interdistrict housing and school effects, warranting an interdistrict school remedy. They failed to offer persuasive proof, however. 637 F.2d at 1111-12. *See also* United States v. Yonkers Bd. of Educ., 518 F. Supp. at 193 (plaintiffs alleged that discriminatory housing acts caused city school segregation).

15. *See* notes 167-99 and accompanying text *infra*.

16. *See* notes 155-61, 200-06, 261-63, 279-83 and accompanying text *infra*.

17. 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom.* Adams v. United States (St. Louis), 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826, *remanded*, 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, No. 80-1458, slip op. (8th Cir. Feb. 13, 1981), *cert. denied*, 50 U.S.L.W. 3447 (U.S. Dec. 1, 1981).

tional actions of state and local school officials that cause racial imbalance in schools.[18] Although school cases originated in states segregated by statute,[19] attention later shifted to proving intentional segregation in non-statutory states.[20] Thus, analysis of systemwide liability begins with different considerations, depending on whether plaintiffs bring suit in statutory or non-statutory states.

In statutorily-segregated states, *Brown v. Board of Education*[21] fixed the initial liability of state and local officials, making it unnecessary for plaintiffs to show any discriminatory intent of such officials.[22] In non-statutory states, plaintiffs have the initial burden of proving that school boards or the state intentionally segregated a school system.[23] In either case, the Court imposes an affirmative duty on school boards to desegregate the resulting segregated or "dual" systems.[24] In both statutory and non-statutory states, interdistrict

18. *See, e.g.*, Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 192 (1973) (Denver school board built schools, gerrymandered attendance zones, and used "optional" zones and mobile class units to deliberately segregate certain schools); Penick v. Columbus Bd. of Educ., 583 F.2d 787, 795 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979) (school board's segregative acts included opening one-race schools, gerrymandering attendance zones, allowing permissive transfer of white students, and segregating faculties), Morgan v. Hennigan (Boston), 379 F. Supp. 410, 470, 481 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (school board discriminated in school siting, faculty assignments, transfer policies, and feeder patterns).

For a general overview of school desegregation cases see D. BELL, RACE, RACISM AND AMERICAN LAW (1980) and R. BROWNING, FROM BROWN TO BRADLEY: SCHOOL DESEGREGATION: 1954-1974 (1975).

19. In Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I), the Supreme Court held that state-mandated dual school systems which prohibited black students from attending white schools violated the equal protection clause of the fourteenth amendment. Governmental separation by race denoted black inferiority, detrimental to the education of black children. Thus, separate educational facilities are inherently unequal. *Id.* at 494-95. Until the 1970's, school desegregation cases were largely limited to southern, statutorily segregated states. Penick v. Columbus Bd. of Educ., 583 F.2d at 793.

20. Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 189, concerning school segregation in Denver, Colorado, was the first case from a northern state, not segregated by statute, brought before the Supreme Court.

21. 347 U.S. 483 (1954).

22. *Id.* at 495. Courts infer racial intent from the overt racial classification of the statute. Note, *Interdistrict Desegregation: The Remaining Options*, 28 STAN. L. REV. 521, 523 n.15 (1976).

23. Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 208. *See* notes 28-35 *infra*.

24. In Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (Brown II), the court stated that the duty of the school board was to effectuate a transition to a racially

remedies depend upon plaintiffs proving interdistrict violations or effects.[25]

The first subsection will focus on the test for proving intentional, systemwide school segregation in non-statutory states. The second subsection will analyze the Supreme Court principles for interdistrict liability applicable to statutory and non-statutory states. Then it will apply these principles to single district segregation with multidistrict effects.

A. *Single District School Case*

1. School Board Liability for Systemwide Segregation

In most non-statutory single district cases, the local board's liability depends upon a finding that it intentionally caused system-wide segregation.[26] When statistics demonstrate racial imbalance, the principal issue is whether the school board intentionally segregated a "meaningful portion" of the district.[27] Courts have failed to clearly define the meaning of "intent" or the measure of "meaningful."

Because many school officials do not openly express their purpose

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nondiscriminatory school system. The district courts were to exercise their equitable powers in considering the adequacy of desegregation plans. *Id.* Later, the court made clear that school boards operating dual systems at the time of *Brown I* were charged with the affirmative duty to take whatever steps were necessary to convert to a unitary system in which racial discrimination would be eliminated "root and branch." The test of a plan would be its effectiveness. Green v. County School Bd. (New Kent County), 391 U.S. 430, 437-38 (1968).

Recently, the court re-emphasized that the equal protection clause aims at all official actions, not just those of state legislatures. Thus, there is no constitutional difference between statutory dual systems and dual systems that result from the intentionally segregative acts of local school officials. Columbus Bd. of Educ. v. Penick, 443 U.S. at 457 n.5. In either case, the existence of a dual system in 1954 places an affirmative duty upon school boards to desegregate. Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the fourteenth amendment. *Id.* at 458-59. *See* van Geel, *Racial Discrimination from Little Rock to Harvard*, CIN. L. REV. 49, 68 (1980) (boards that once maintained dual systems must undo the damage they should have been undoing since 1954; "bygones are not bygones").

25. *See* notes 50-55 and accompanying text *infra*.

26. *See* notes 27-40 and accompanying text *infra*.

27. Keyes v. School Dist. No. 1 (Denver) 413 U.S. at 208 (where a meaningful portion of the system is found to be intentionally segregated, subsequent or other segregation in the system justifies imposing burden on school officials to prove that this is not also the result of their intentional acts).

to segregate, judges must infer intent from other sources.[28] In the past, courts have accepted evidence that the foreseeably segregative effects of school siting or drawing of school attendance zones satisfied equal protection intent standards.[29] Recently, the Supreme Court held that more than foreseeability is required.[30] Plaintiffs must prove that school boards made decisions partly because of, not merely with knowledge of, the foreseeable segregative effects.[31] In *Village of Ar-*

28. *See* Washington v. Davis, 426 U.S. 229, 242, (1976) (often necessary to infer discriminatory purpose from totality of the facts, including disproportionate impact); Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 227 (Powell, J., concurring) ("murky, subjective judgments inherent in courts' search for segregative intent").

29. *See, e.g.*, United States v. Texas Educ. Agency (Austin), 532 F.2d 380, 388 (5th Cir. 1976), *vacated and remanded*, 429 U.S. 990 (1976); Hart v. Community School Bd., 512 F.2d 37, 49 (2d Cir. 1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Cisneros v. Corpus Christi School Dist., 467 F.2d 142, 148 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973).

30. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979) (Dayton II). The Court stated,

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

Id.

31. In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), a sex discrimination case, the Court rejected as insufficient the tort standard of holding an actor responsible for the foreseeable consequences of his act. *Id.* at 278. Foreseeability is a "working tool, not a synonym for proof." *Id.* at 279 n.25. To show intent, the proponent must demonstrate that official action was taken partly "because of," not just "in spite of" the adverse consequences. *Id.* at 279. Not much more than foreseeability is required, however. *Id.* at 279 n.25. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. at 464-65 (foreseeability and disparate impact alone are insufficient, but may be relevant evidence of the ultimate fact of intent).

Obviously, if judges inferred intent from foreseeable consequences alone, the *de facto/de jure* distinction would collapse. In school settings, racial imbalance is usually foreseeable when neighborhood attendance zones are drawn in segregated residential areas. In fact, any act that does not reduce known segregation foreseeably perpetuates it. *See* Recent Developments, *supra* note 8, at 744 n.59. For further analysis of the appropriateness of the foreseeability test see Note, *supra* note 22, at 523 n.21. *See also* Gates, *The Supreme Court and The Debate Over Discriminatory Purpose and Disproportionate Impact*, 26 LOY. L. REV. 567, 621 (1980) (ambiguities remain regarding proper approach for establishing discriminatory intent; disproportionate impact given weighty consideration only in school cases).

Maintaining the fault principle in constitutional adjudication allows judges to distinguish sharply between racial discrimination and general economic inequality.

lington Heights v. Metropolitan Housing Development Corp.,[32] the Supreme Court presented a series of factors for courts to consider in determining equal protection racial intent.[33] Among the circumstances that courts may examine to infer discriminatory intent are: racial impact, the sequence of events leading to decisions, departures from normal procedures, and legislative or administrative history.[34] These factors leave a great deal to the discretion of the judge.[35]

Courts also have not established definite guidelines for determining whether school defendants intentionally segregated a "meaningful portion" of the school system.[36] Such a quantification is important to determine the extent of liability and remedy. Discrimination shown in less than a meaningful portion of the system subjects

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Courts then can assert that they are not attempting to redress the inequalities of our society, a legislative responsibility. Rather, they are only redressing the inequities produced by racially biased acts. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. CIV. R. CIV. L. REV. 599, 611 (1979).

32. 429 U.S. 252 (1977).

33. *Id.* at 267-68. The Court required a sensitive inquiry into whatever circumstantial and direct evidence of intent is available. Disproportionate impact of official action provides the starting point. It will be determinative only in the rare case of a clear pattern unexplainable on grounds other than race. Thus, a court must look to other evidence. *Id.* at 266.

Courts have applied the *Arlington Heights* factors in several school cases. For example, in United States v. Board of School Comm'rs (Indianapolis), 637 F.2d 1101, 1108 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980), the Indiana state legislature passed legislation extending the civil boundaries of Indianapolis to encompass several suburbs. Shortly before it had repealed its former legislation that provided that school district boundaries would expand along with city boundaries. Thus, the significantly black city system could not consolidate with the suburbs. Considering the timing of the decision, the history of state sanctioned discrimination, the foreseeable impact of the decision on the black population, and the political reason for the decision, the district judge concluded the legislature redrew the boundaries for a discriminatory purpose. *Id.*

34. 429 U.S. at 267-68.

35. *See* Reed v. Rhodes (Cleveland), 455 F. Supp. 546, 553-54 (N.D. Ohio 1978), *aff'd in part, remanded in part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980) (clear pattern of actions unexplainable on grounds other than race under *Arlington Heights*).

36. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. at 535 (board was purposely operating segregated schools in a substantial part of district where 54% of black students were assigned to four schools that were 100% black in early 1950's); Columbus Bd. of Educ. v. Penick, 443 U.S. at 458 (board maintenance of an enclave of separate black schools constituted substantial portion); Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 199 (school board deliberately segregated eight schools attended by 38% of Denver's black students).

school officials to liability solely for the "incremental effects" of their intentional acts.[37] Intentional segregation shown in a meaningful portion raises the presumption that school officials intended the segregative effects throughout the entire system.[38] The presumption is almost impossible to disprove.[39] School officials must disprove their intent to segregate the remainder of the school system. Failing that, they must prove that segregation in the rest of the system did not in any way result from their intentional acts.[40] Thus courts have created vague tests both to establish racial intent and to quantify the

37. In Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406 (1977), the Supreme Court stated that when a court finds a violation it must determine how much incremental segregative effect these violations had on the racial distribution of present school population compared to what it would have been without the violations. The remedy should redress that difference. A court should only fashion a systemwide remedy if the violation had a systemwide impact. *Id.* at 420. Later, in *Dayton II*, 443 U.S. at 531, 535-36, the Court made clear that the incremental effects test applied only to isolated violations, too few to trigger the *Keyes* presumption of systemwide segregation. *See* note 38 and accompanying text *infra*.

38. The Supreme Court established the presumption in Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 211. The court cited several evidentiary principles to support its burden-shifting presumption as both fair and reasonable. It viewed a finding of intentional segregation in one part of the school system as highly relevant to the issue of the board's intent regarding other segregated schools. *Id.* at 207. The presumption has both space and time dimensions. Intentional segregation in a substantial portion of the district allows a presumption of intentional segregation in other segregated schools. Courts presume that intentionally discriminatory acts in the past cause current segregation. Defendants may rebut the presumption by showing that (1) segregative intent was not one of the reasons for their action, or failing that, (2) their past segregative acts did not create or contribute to the current segregated condition of the other segregated schools. *Id.* at 211.

Since these presumptions are difficult to rebut, plaintiff's burden of proof is lessened. The defendants' better access to evidence regarding these decisions helps justify the burden-shift. So, too, does the probability that defendants committed other violations, or that their proven acts have either lingering or spillover effects. Note, *supra* note 22, at 525-26.

39. Justice Rehnquist has suggested that the *Keyes* presumption is irrebuttable. He noted that a school board in rebuttal will almost invariably rely on its neighborhood school policy and on residential segregation to show that it is not responsible for the existence of segregated schools elsewhere in a system. Yet that in itself may support an inference of a constitutional violation. Columbus Bd. of Educ. v. Penick, 443 U.S. at 522. *See also* Arthur v. Nyquist (Buffalo), 415 F. Supp. 904, 913, 969 (W.D.N.Y. 1976) (defendants' burden in rebutting *Keyes* presumption is considerable; residential segregation defense as well as neutral neighborhood school defense rejected as "essentially a smokescreen"); note 254 and accompanying text *infra*.

40. Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 210-11.

extent of segregation required to subject school boards to liability for systemwide segregation.

2. State Liability for Systemwide Segregation

Once a school plaintiff has proven systemwide liability, the costs of desegregating may prove too onerous for local districts to bear without taking needed funds from education expenses.[41] It is therefore in plaintiff's best interests to involve the state in the litigation by proving the state directly liable or indirectly responsible.[42]

In a non-statutory state, unlike a statutory state,[43] plaintiffs must prove state liability. The primary issue is whether the state continued to provide funding and support to liable local districts.[44] Although local school boards exert a great degree of control over their own

41. For example, the Detroit School Board expressed the concern that financing desegregation measures could destroy the existing educational program. Since its operating budget was already inadequate, redistribution of resources would further deteriorate ongoing programs. Milliken v. Bradley (Milliken II), 433 U.S. 267, 297 n.3 (1977) (Marshall, J., concurring). The Supreme Court ruled that the school desegregation order requiring the state of Michigan to pay one-half the additional cost for remedial and compensatory programs did not violate the tenth or eleventh amendments. *Id.* at 290-91. *See also* Liddell v. Board of Educ. (St. Louis), 491 F. Supp. 351, 357, (E.D. Mo. 1980) (in light of financial position of St. Louis school district, it is appropriate that liable defendant State of Missouri pay one-half of desegregation cost of $22 million), *aff'd*, No. 80-1458, slip op. (8th Cir. Feb. 13, 1981), *cert. denied*, 50 U.S.L.W. 3447 (U.S. Dec. 1, 1981).

42. *See* notes 44-49 and accompanying text *infra*.

43. *See, e.g.*, Liddell v. Board of Educ. (St. Louis), 491 F. Supp. at 369-70, in which the court found the State of Missouri liable with the St. Louis Board of Education for the segregation of city schools. It asserted that state officials had to take necessary steps to eliminate all vestiges of former state-imposed public school segregation. Furthermore, the state cannot compartmentalize responsibilty among its various instrumentalities. It cannot claim that no single instrumentality is wholly responsible for or has power to correct unlawful segregation. *Id.*

44. In Penick v. Columbus Bd. of Educ., 583 F.2d 787, 818 (6th Cir. 1978), 519 F. Supp. 925 (S.D. Ohio), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *aff'd sub nom.* Ohio State Bd. of Educ. v. Reed, 50 U.S.L.W. 3765 (U.S. March 23, 1982), the Sixth Circuit outlined a factual inquiry for ascertaining state liability for local school district segregation. Utilizing this approach, the district court held the State of Ohio liable for segregation in the Columbus school system. 519 F. Supp. at 925. In affirming this decision, the Sixth Circuit noted the state board of education had direct knowledge of the local board's intentional segregative practices. It had never discharged its legal responsibility to determine whether the local district had not conformed with state law. Furthermore, the state board continued to finance the locally-segregated schools and staffs. The motivation and effect of the state board's actions and inactions were to perpetuate racial segregation. 663 F.2d at 30.

programs, the state usually provides funding, controls system boundaries, and sets minimum educational standards.[45] Plaintiffs must prove the state provided support with the knowledge of the local board's segregative policies and the intent to further them.[46] As in local school board liability, state intent is difficult to prove because state officials do not openly express segregative purposes and officials have many non-segregative reasons for their decisions.[47] Alternatively, courts have held the state indirectly responsible and subject to participate in the remedy. One court held the state liable for the actions of its agent school boards on a theory of vicarious liability.[48] Another court required the state to participate in the remedy despite its freedom from liability because of its general responsibility for the welfare of state school children.[49]

Plaintiffs may therefore gain state participation in the single district remedy by proving the state failed to dismantle a statutory dual system or intentionally contributed to local segregation. Alternatively, plaintiffs may prove a state defendant indirectly responsible due to its vicarious liability or its responsibility for those harmed by local violations.

B. *State or Local Liability for Interdistrict Segregation Under* Milliken v. Bradley[50]

Single district school desegregation cases have several advantages

45. In Ohio, for example, the primary responsibility for distributing state and federal funds rested with the state board of education. 663 F.2d at 29.

46. *See, e.g.*, 583 F.2d at 818.

47. *See, e.g.*, United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1108 (proper under *Arlington Heights* to infer racial intent from timing of legislative decision that abandoned past policy allowing school district boundaries to expand with city boundaries.); Penick v. Columbus Bd. of Educ. 519 F. Supp. at 928 (court applied *Arlington Heights* evidentiary factors to find state liable for intentional support of Columbus school segregation). *See* note 28 and accompanying text *supra*.

48. *See* Hart v. Community School Bd. (Brooklyn), 383 F. Supp. 699, 748 (E.D.N.Y. 1974) (if a school board is found liable for racial segregation, then the state as its principal is also necessarily liable), *aff'd*, 512 F.2d 37 (2d Cir. 1975). *But see* Milliken v. Bradley (Detroit), 418 U.S. at 746 (Court accepted agency approach only *arguendo*; rejected lower court's order that state could use other instrumentalities to cure violation shown in only one district).

49. Morgan v. Hennigan (Boston), 379 F. Supp. at 477 (although state defendants had not contributed to racial segregation in Boston schools, their continued presence was necessary to effectuate remedy due to their ultimate responsibility for education of Boston public school pupils).

50. 418 U.S. 717 (1974).

over interdistrict cases. Plaintiffs need only prove intentional violations within the boundaries of one school district. Also, the courts may be more receptive to a remedy that does not force the court into a more intrusive, quasi-legislative role of disrupting school district lines.[51]

Nevertheless, due to the magnitude of segregated patterns in many metropolitan areas, litigants or courts may determine that only interdistrict remedies can feasibly remove the vestiges of dual systems.[52] The district court in *Milliken* took that position and ordered an interdistrict remedy that consolidated the predominately black Detroit district and its surrounding white suburbs.[53] In denying this interdistrict remedy, the Supreme Court in *Milliken* set forth general principles for determining when courts may allow an interdistrict remedy:

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51. In *Milliken*, for example, the Supreme Court discussed the possible ramifications of consolidating 54 independent school districts into a vast new super district. The complex questions arising from such a remedy would cause the district court to become a *de facto* legislative authority and perhaps the "school superintendent" for the entire area. Few judges would be qualified for such a role. Furthermore, extensive judicial intrusion would deprive residents of local control of their schools. *Id.* at 743-44.

For a discussion of judicial intrusion into other branches of government to secure constitutional rights see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315 (1976) (democratic theory doesn't require deference to majoritarian outcomes whose victims are ghetto dwellers); Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981) (when officials succumb to political pressures and shirk constitutional responsibilities, judges must take an active role; responsible leadership would make such activism unnecessary); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664, 616, (1978) (judicial intrusion into local government sacrifices fundamental democratic values to vindicate particular rights; courts have been effective, however, in achieving policy objectives for politically powerless groups).

52. *See, e.g.*, Adams v. United States (St. Louis), 620 F.2d 1277 at 1296 (appellate court stated that city-only remedy would leave many schools all black; therefore, cooperative interdistrict transfers should be sought); Bradley v. Milliken (Detroit), 484 F.2d 215, 249 (6th Cir. 1973) (court believed that multi-district remedy essential since Detroit-only plan could not correct constitutional violations), *rev'd and remanded*, 418 U.S. 717 (1974); United States v. Board of School Comm'rs (Indianapolis), 541 F.2d 1211, 1212 (7th Cir. 1976) (plaintiffs sought interdistrict remedy at suggestion of judge), *vacated and remanded mem. sub nom.* Board of School Comm'rs v. Buckley, 429 U.S. 1068 (1977) (to determine intent in light of Washington v. Davis).

53. Bradley v. Milliken (Detroit), 345 F. Supp. 914, 916, 922, (E.D. Mich. 1972) (plaintiffs and defendants, as well as court, favored metropolitan remedy), *aff'd in part, vacated and remanded in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd and remanded*, 418 U.S. 717 (1974).

> (I)t must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.[54]

This formulation appears to permit plaintiffs to show that intentional state acts caused significant multidistrict effects, or that one or more local school boards intentionally discriminated within their districts causing extradistrict effects.[55]

The *Milliken* principle raises two critical questions. First, how can local school districts or the state cause interdistrict effects? Second, how should a court measure the significance of effects? The next two parts will analyze how these issues affect the determination of interdistrict liability of local and state school officials.

1. Single District School Segregation with Extra District Effects

In *Milliken* the court emphasized that each local school district is a relatively autonomous body.[56] Absent a finding of an intentional vi-

54. 418 U.S. at 745. The court gave two examples of circumstances justifying interdistrict remedy: (1) discriminatory acts of one or more districts that cause racial segregation in an adjacent district, and (2) discriminatory district line drawing. "(W)ithout an interdistrict violation and interdistrict effect, there can be no interdistrict remedy." *Id.*

The latter phrase has caused confusion. In a later housing case, Justice Stewart explained that an interdistrict remedy required an interdistrict violation *or* effect. He explained that an interdistrict remedy would have been proper in *Milliken* if violations by school officials in the operation of the Detroit system had caused any significant effects in the suburbs. Hills v. Gautreaux (Chicago), 425 U.S. 284, 294-296 & n.12 (1976).

The Fifth Circuit recently gave the principle another reading. It read *Milliken* to require that defendants intend to cause the interdistrict segregative effects. The court observed that should effect alone transform an otherwise intradistrict action into an interdistrict violation, the phrase "interdistrict violation" is redundant. Taylor v. Ouachita Parish School Bd., 648 F.2d 959, 969 (5th Cir. 1981). This interpretation, however, seems contradictory to another Fifth Circuit opinion wherein the court held that even inadvertent effects of a constitutional violation must be remedied. United States v. Texas Educ. Agency (Lubbock), 600 F.2d 518, 527 (5th Cir. 1979).

55. For discussions of possible interpretations of these principles see Kanner, *Interdistrict Remedies for School Segregation After* Milliken v. Bradley *and* Hills v. Gautreaux, 48 Miss. L. J. 33 (1977) and Note, *supra* note 22, at 521.

56. 418 U.S. at 741. The Court emphasized the deeply rooted national tradition of local control of the schools as well as the large degree of local autonomy provided by Michigan's educational structure. *Id.*

olation or segregative effects within a school district, courts may not impinge upon local district autonomy.[57] Given the *Milliken* emphasis on local control, it may be difficult to perceive how even the intentional acts of one school district can cause segregation in another district outside its control.[58] The busing of minority students across district lines furnishes the clearest example.[59] It denies minority students the opportunity to attend integrated schools, and it reinforces the identification of certain districts as "white" or "black".[60] Refusal of a primarily white school district to consolidate with a primarily black school district provides another example of single district acts that reinforce and perpetuate racial disparity across district lines.[61]

When one or more school districts cause extra-district segregation, *Milliken* requires that the effects be "significant" to justify an interdistrict remedy.[62] Yet courts have left "significant," like "mean-

57. 418 U.S. at 744-45.

58. *See* Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of* Milliken v. Bradley, 21 WAYNE L. REV. 751, 758 (1975) (difficult to demonstrate that the *de jure* actions of city school board had segregative impact on suburban schools; segregated city schools probably induce white families to remain in city); United States v. Board of School Comm'rs (Indianapolis), 506 F. Supp. 657, 667 (S.D. Ind. 1979) (city school segregation more likely to keep whites from leaving than the reverse; in contrast, desegregation tends to cause white flight from districts involved), *aff'd in part, rev'd in part*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980).

59. The interdistrict effect of such a transfer is that the sending district remains white and the receiving schools become blacker. *See* Newburg Area Council, Inc. v. Board of Educ. (Louisville), 510 F.2d 1358 1360 (6th Cir. 1974) (sending children across district lines continued to have an effect on racial imbalance in county's schools), *cert. denied*, 421 U.S. 931 (1975).

60. *See, e.g.*, Evans v. Buchanan (Wilmington), 393 F. Supp. 428, 433 (D. Del. 1975) (city schools to which black suburban children had been sent remained identifiably black though transfers had ceased), *aff'd mem.*, 423 U.S. 963 (1975).

61. *See, e.g.*, United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975). The case involved three suburban St. Louis County school districts. Prior to 1954, school officials split one statutorily segregated district into an all-black district and an all-white district. The district judge held that state, county, and local defendants had maintained the black district for discriminatory reasons. Numerous reorganization plans excluded the black district. The electorate defeated the only reorganization plan that included it. This inaction, for discriminatory reasons, in the face of past segregation, justified consolidating the black district with two adjoining white districts. *Id.* at 1369-70. The district judge viewed the circumstances as fitting the *Milliken* formulation of discriminatory acts of one or more districts causing segregation in an adjacent district. *Id.*

62. 418 U.S. at 745.

ingful portion",[63] undefined. Two courts have found cross district busing of a few children to be *de minimis*, without indicating what number would be significant.[64] On the other hand, two courts cited transfers across district lines as a partial justification for an interdistrict remedy.[65] In a case where refusals to consolidate affected an entire school district, a court has found the significance to be more obvious.[66] Thus, even if plaintiffs meet the burden of establishing cause and intent, proving that the effects are significant poses a substantial obstacle.

2. State Segregative Acts with Multidistrict Effects

Almost every interdistrict school case includes a claim against the state for exercising its controls over several school districts to effect multidistrict segregation.[67] State legislatures and executive agencies can cause multidistrict segregation through their power to draw school district lines, regulate consolidation, and fund school district activities like busing.[68] Segregative line drawing has been the most

63. *See* notes 36-40 and accompanying text *supra*.

64. Milliken v. Bradley (Detroit), 418 U.S. at 750 (transfer of black high school students from black suburban district to black city high schools may have had interdistrict effect; this isolated instance, however, did not justify interdistrict consolidation); Tasby v. Estes (Dallas), 572 F.2d 1010, 1015-16 (5th Cir. 1978) (effect of transfer of eleven black students from suburban school district to inner-city school was negligible; therefore, denial of interdistrict remedy was correct), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas N.A.A.C.P., 444 U.S. 437 (1980).

65. *See* Evans v. Buchanan (Wilmington), 393 F. Supp. at 430 (interdistrict transportation of students attending all-black or all-white schools prior to 1954 cited as one of eight violations justifying interdistrict remedy); Newburg Area Council, Inc. v. Board of Educ. (Louisville), 510 F.2d at 1360-61 (interdistrict transfer involving two largest of three county districts justified, in part, interdistrict remedy; not mere isolated instance as in *Milliken*).

66. *See* United States v. Missouri, 515 F.2d at 1370 (each defendant, including predominantly white suburban district, responsible to substantial degree for maintaining all-black segregated district).

67. *See, e.g.*, United States v. Board of School Comm'rs (Indianapolis) 637 F.2d at 1104 (state legislature prevented expansion of school district boundaries); Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Motion of St. Louis School Board for Leave to Amend Its Answer to Add a Cross-claim (Jan. 9, 1981) (alleged state refusal to consolidate school districts); Evans v. Buchanan, 393 F. Supp. at 430 (state legislature excluded Wilmington School District from general consolidation of districts).

68. *See, e.g.*, Morrilton School Dist. No. 32 v. United States, 606 F.2d 222 (8th Cir. 1979) (consolidation of school districts on basis of race done under neutral state consolidation law) *cert. denied*, 444 U.S. 1071 (1980); Evans v. Buchanan (Wilming-

common form of liability.[69] Several recent cases, however, have found states liable for preventing heavily minority school districts from consolidating with surrounding, primarily white school districts.[70] One case held that state funding of cross district busing of minority or white students had segregative effects.[71] Particularly in cross-district transfer cases, however, courts must address the issue of whether the effects were significant.[72] Thus, each court's assessment of significance of effects varies with the actor and the type of action examined. A state's discriminatory line-drawing or prevention of consolidation produces obviously significant effects where racial imbalance between districts results. On the other hand, courts more carefully scrutinize significance when local or state actions in one district give rise to effects in another.

In brief, to establish pure school liability in non-statutory states, plaintiffs may have to satisfy vague, undefined tests for intent, meaningful portion and significant effects. Only when plaintiffs meet these heavy evidentiary burdens will courts remedy the constitutional violations.

C. *Pure School Remedies*

Once courts find a defendant liable for school segregation, they must fashion appropriate remedies. Several amorphous general principles govern their broad equitable remedial powers. The nature and scope of the constitutional violation determines the nature of the

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ton), 393 F. Supp. at 436, 447 (state subsidized interdistrict transportation of public, private, and parochial students; also passed legislative act governing school district consolidation).

69. *See, e.g.*, Morrilton School Dist. v. United States, 606 F.2d 222, 228 (8th Cir. 1979) (state consolidated smaller school districts on basis of race); United States v. Missouri, 515 F.2d at 1369 (state created black school district by splitting it off from larger, pre-existing district); Haney v. County Bd. of Educ. (Sevier County), 410 F.2d 920, 924 (8th Cir. 1969) (state allowed gerrymandered districts which produced one white and one black district); Hoots v. Commonwealth of Pa., 510 F. Supp. 615, 620 (W.D. Pa. 1981) (state and county boards liable for discriminatory line-drawing; surrounding districts may be included in remedy, though allegedly uninvolved).

70. *See* note 67 *supra*.

71. *See, e.g.*, Evans v. Buchanan (Wilmington), 393 F. Supp. at 436-37 (state transportation subsidy for private school pupils travelling across district lines augmented racial disparity between Wilmington and suburbs).

72. *See* note 64 *supra*.

remedy.[73] It must be related to the condition that offends the Constitution.[74] The district judge or school authorities must make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation.[75] Courts must consider whom they should require to participate in the remedy and the extent of remedy justified by the violation. Based on these principles, the broad affirmative school remedies courts typically award in both single and interdistrict cases are highly intrusive upon the policies and practices of school board defendants.

For single-district violations the court-approved desegregation techniques include: busing, redrawing of attendance zones and pairing of schools,[76] magnet schools,[77] retraining[78] and reassignment of teachers,[79] remedial programs and curriculum changes,[80] and efforts to effect voluntary interdistrict exchanges.[81] In addition, some courts have ordered state governments to pay part of the desegregation cost.[82]

Multidistrict remedies may not include governmental units that were neither involved in nor affected by a constitutional violation.[83] Courts can, however, order non-liable school districts to participate in multidistrict remedies when they find that the constitutional violations of others affect them.[84] For example, where courts have found

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73. Milliken v. Bradley (Milliken II), 433 U.S. 267, 280 (1977); Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 16 (1971).

74. 433 U.S. at 280.

75. Davis v. Board of School Comm'rs (Mobile County), 402 U.S. 33, 37 (1971).

76. *See, e.g.*, Swann v. Charlotte Mecklenburg, 402 U.S. at 27-30.

77. Liddell v. Board of Educ. (St. Louis), 491 F. Supp. at 354.

78. Milliken v. Bradley (Detroit), 402 F. Supp. 1096, 1139 (E.D. Mich.), 411 F. Supp. 943 (E.D. Mich. 1975), *modified and remanded*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (Milliken II).

79. 491 F. Supp. at 357. Milliken v. Bradley (Detroit), 402 F. Supp. at 1144.

80. 402 F. Supp. at 1138, 1144.

81. 491 F. Supp. at 353.

82. *Id.* (State of Missouri to pay one-half of desegregation cost of $22 million); *Milliken II*, 433 U.S. at 293 (state to pay one-half of certain desegregation programs).

83. Hills v. Gautreaux (Chicago), 425 U.S. at 292-96; Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 855 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

84. *See* United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1115 (power of court to order interdistrict remedy does not depend on culpability or innocence of suburban districts where discriminatory actions by state had significant impact across district lines); Hoots v. Commonwealth of Pa., 510 F. Supp. at 620

states liable for discriminatory line-drawing or the prevention of consolidation of black and white districts, they have imposed remedies on non-liable school districts.[85] Multidistrict school remedies may include all the measures available in single district school cases.[86] Those ordered to date have ranged from the highly intrusive forced consolidation of school districts[87] to the less intrusive one-way busing of black children to white suburbs.[88]

D. *Summary of the Pure School Model*

In general, vague tests for establishing constitutional violations pose difficult obstacles for school plaintiffs seeking to establish the liability of school actors. Initially, plaintiffs must demonstrate a causal connection between official actions and resulting segregation. In both single and interdistrict cases in non-statutory states, plaintiffs then face the complex problem of proving that defendants acted with discriminatory intent. Moreover, concepts of "meaningful portion" in single district cases and "significant effects" lack definite quantitative measures to guide either the litigants or the courts. Yet plaintiffs must successfully achieve these threshholds to obtain remedy.

(where state and county boards are liable for segregative district line drawing, court may include surrounding districts in interdistrict remedy, despite alleged lack of involvement); School Dist. of Kansas City v. State of Mo., 460 F. Supp. 421, 429-30 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979) (rejected idea that metropolitan remedy can only encompass guilty suburbs); Note, *Interdistrict Remedies for Segregated Schools*, 79 COL. L. REV. 1168, 1183 (1979).

85. *See* United States v. Board of School Comm'rs (Indianapolis) 637 F.2d at 1115 (interdistrict remedy ordered although no evidence that suburban districts involved were unitary systems; state liable for preventing expansion of significantly black city district); Morrilton School Dist. No. 32 v. United States, 606 F.2d at 228-29, (state consolidated small districts on basis of race; therefore, interdistrict remedy could include school districts that are state's instrumentalities and which were product of violation); Hoots v. Commonwealth of Pa., 510 F. Supp. at 620 (where state's discriminatory line-drawing created segregated district, court may include surrounding districts in consolidation remedy, despite their alleged lack of involvement in the discrimination process); Evans v. Buchanan (Wilmington), 393 F. Supp. at 437-38 (state government acts causing interdistrict effects justified interdistrict remedy even though suburban districts were operating unitary schools).

86. *See* notes 76-82 and accompanying text *supra*.

87. *See, e.g.*, Morrilton School Dist. No. 32 v. United States, 606 F.2d at 230 (consolidation of three school districts); Evans v. Buchanan (Wilmington), 416 F. Supp. at 350 (some type of consolidation of city and suburban districts required).

88. *See* United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1114-15 (although two-way busing would have been permissible, remedy that only transferred city black students to suburban districts not an abuse of discretion).

Nevertheless, once plaintiffs satisfy these difficult evidentiary burdens, courts typically award broad affirmative decrees that impinge upon local autonomy. Multidistrict plans that consolidate city and suburban districts are even more intrusive. A yet more salient consequence of interdistrict remedies is that courts may include even nonliable local districts if plaintiffs show that significant effects of another's liable acts extend within their boundaries. Thus, although plaintiffs in school cases must meet stringent liability standards, they may win broad, far-reaching remedies. In contrast, as the next subsection will discuss, housing plaintiffs bear a lesser burden in proving liability. Yet they generally achieve much narrower relief.

II. PURE HOUSING MODEL

Despite the apparent connection between residential segregation and segregated schools,[89] housing cases are traditionally separate from school cases. Consequently, housing law has developed along different lines, reflecting different standards and concerns.[90] Plaintiffs who satisfy the tough liability standards in school cases receive extensive remedies that heavily impinge upon local autonomy. Although housing plaintiffs may prove liability more easily, they generally cannot obtain broad equitable relief. Most housing plaintiffs sue under federal statutes that provide more flexibility than equal protection standards.[91] Due to judicial deference to federal, state, and local housing entities[92] and the fragmented nature of the residential housing market,[93] however, housing plaintiffs seldom receive systemwide relief from governmental discrimination. Instead, they usually receive only site-specific relief.[94]

Two recent developments in housing law may indicate an early trend toward more systemwide remedies.[95] Discriminatory site selection cases, led by a recent Supreme Court decision,[96] suggest that courts may build upon the unique capability of some housing entities

89. *See* note 2 *supra*.

90. *See* notes 102-16 and accompanying text *infra*.

91. *See* notes 102-09 and accompanying text *infra*.

92. *See* notes 110-16 and accompanying text *infra*.

93. *See* note 112 and accompanying text *infra*.

94. *See* note 116 and accompanying text *infra*.

95. *See* notes 119-54 and accompanying text *infra*.

96. Hills v. Gautreaux (Chicago), 425 U.S. 284 (1976). *See* notes 122-27 and accompanying text *infra*.

to provide metropolitan-wide remedies that do not impinge on local autonomy. Furthermore, as in school cases, a court may order intrusive housing remedies that reach as far as the proven segregative effects.[97] For example, several exclusionary zoning cases provide tests for proving patterns and practices of discrimination by governmental housing entities.[98] By proving a more pervasive liability, plaintiffs may obtain more comprehensive relief. At this time, it is too early to ascertain what impact the developments will have on housing case law.

In recent school cases, plaintiffs have joined government housing officials, alleging that residential segregation reinforced and even caused school segregation.[99] By charging that housing segregation reinforced school segregation, plaintiffs avoid the difficult problems of merging the different standards of school and housing cases.[100] At

97. *See* notes 123-35 and accompanying text *infra*.

98. *See* notes 139-43, 147-52 and accompanying text *infra*.

99. *See, e.g.*, United States v. Yonkers Bd. of Educ., 518 F. Supp. 191, 193, 196 (S.D.N.Y. 1981) (plaintiffs alleged that community development agency's discriminatory public housing site selection perpetuated and aggravated housing and school segregation); Bell v. Board of Educ. (Akron), 491 F. Supp. 916, 945-48 (N.D. Ohio 1980) (plaintiffs failed to prove race was a factor in actions of Ohio Real Estate Commission, City of Akron, and housing authority that caused segregative impact in schools); Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Order (Aug. 24, 1981) (plaintiff intervenors and defendant school board crossclaimed against housing agencies and municipalities; district court stayed motion against most of housing parties), *remanded for want of jurisdiction*, No. 81-1828, slip op. at 43 (8th Cir. Feb. 25, 1982); United States v. Board of School Comm'rs (Indianapolis), 419 F. Supp. 180, 182 (S.D. Ind. 1975) (defendant school board alleged in crossclaim that discriminatory public housing policies contributed to segregated schools), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded mem. sub nom.* Board of School Comm'rs v. Buckley, 429 U.S. 1068 (1977), 573 F.2d 400 (7th Cir. 1978), 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in part, rev'd in part*, 637 F.2d 1101, 1117 (7th Cir. 1980) (court enjoined public housing authority from constructing any public housing in racially impacted Indianapolis), *cert. denied*, 449 U.S. 838 (1980); Evans v. Buchanan (Wilmington), 393 F. Supp. 428, 430 (D. Del.) (plaintiff alleged *inter alia* that state enforcement and authorization of private racial discrimination in housing caused interdistrict school segregation), *aff'd mem.*, 423 U.S. 963 (1975) (dissenting opinion did not address housing grounds for school remedy); Hart v. Community School Bd. (Brooklyn), 383 F. Supp. 699, 706 (E.D.N.Y.) (school board defendants impleaded city, state and federal housing officials, charging that housing acts caused school segregation), *modified*, 383 F. Supp. 769, 775 (E.D.N.Y. 1974) (rigid decree against housing entities would be poorly designed to restructure an entire community; only progress reports required), *aff'd*, 512 F.2d 37, 56 (2d Cir. 1975) (case against third party housing defendants moot and should be dismissed).

100. *See* notes 158-59, 167-99 and accompanying text *infra*.

the same time, they can increase the range of remedies that contribute to school desegregation.[101]

The following subsections will analyze limitations derived from traditional housing cases, describe new housing developments, and illustrate the new developments in discriminatory site-selection and exclusionary zoning cases. The final subsection will then discuss the application of the housing model in school desegregation cases.

A. *Limitations Within Traditional Housing Cases*

Housing law has evolved more lenient liability standards but narrower remedies than those found in school cases. Whereas plaintiffs must generally bring school cases under rigorous equal protection standards,[102] victims of alleged housing discrimination may bring suit under equal protection[103] or federal statutes.[104] Unlike equal

101. *See* notes 160-61 and accompanying text *infra*.

102. *See* notes 28-35 and accompanying text *supra*.

103. U.S. CONST. amend XIV. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1972) (plaintiffs alleged violations under equal protection and Fair Housing Act); Resident Advisory Bd. v. Rizzo (Philadelphia), 564 F.2d 126 (3d Cir. 1977) (plaintiffs alleged violations under equal protection and Fair Housing Act), *cert. denied*, 435 U.S. 908 (1978); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (plaintiffs alleged violations under equal protection and § 1983).

104. Plaintiffs may bring actions under executive order or statutes.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1976) prohibits discrimination on the basis of race, color, or national origin against persons eligible to participate in and receive benefits of any federally assisted program. Title VI exempts FHA mortgate insurance, VA loan guarantees, Farmers Home housing, and conventionally financed housing outside of urban renewal areas.

The Fair Housing Act of 1968 (Title VIII), 42 U.S.C. §§ 3601-19 (1976) prohibits discrimination in the sale or rental of *all* housing, except single family housing not sold through a broker and not advertised preferentially, and owner-occupied four-family housing. *See, e.g.*, Resident Advisory Bd. v. Rizzo (Philadelphia), 564 F.2d at 153 (city and housing agencies violated Fair Housing Act); United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) (city's exclusionary zoning violated Fair Housing Act), *cert. denied*, 422 U.S. 1042 (1975).

42 U.S.C. § 1982 (1976) of the Civil Rights Act of 1866, as revitalized in Jones v. Alfred Mayer Co. (St. Louis County), 392 U.S. 409 (1968), prohibits discrimination in sale or rental of all housing, without exception. Clark v. Universal Builders, Inc. (Chicago), 501 F.2d 324, 334-39 (7th Cir.) (plaintiffs established *prima facie* case that realtors exploited black demands for housing in pattern and practice of discrimination, violating 42 U.S.C. § 1982), *cert. denied*, 419 U.S. 1070 (1974).

Executive Order 12, 259, 46 Fed. Reg. 1253 (1980), issued by President Carter after his defeat, required the Attorney General and HUD to provide coordinated enforcement and administration to further Fair Housing by all federal agencies. Executive

protection cases, statutory housing cases merely require plaintiffs to show some form of discriminatory effect[105] rather than intent.[106] Furthermore, while equal protection housing cases have generally denied standing to plaintiffs unable to prove a specific direct harm,[107]

Order No. 11,063, 27 Fed. Reg. 11,527 (1962) bars discrimination in FHA insured or VA loan guaranteed housing as well as federally assisted public housing.

105. The effects tests vary by jurisdiction and have not been reconciled by the Supreme Court. *See, e.g.*, Resident Advisory Bd. v. Rizzo (Philadelphia), 564 F.2d at 148-49 (once plaintiff has developed *prima facie* case of discriminatory effect, defendant has burden to show that action serves a legitimate, bona fide interest and no less discriminatory alternative available); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290-93 (7th Cir. 1977) (once plaintiff establishes a racially discriminatory effect, the court will consider the strength of the plaintiff's showing, evidence of discriminatory intent, defendant's interest in taking the action, and whether plaintiff seeks affirmative or injunctive relief), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d at 1184-85 (once plaintiff has established *prima facie* case of discriminatory effect, defendant has burden to demonstrate a compelling governmental interest). For further discussion of discriminatory effect and Title VIII, see Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199 (1978).

106. *See* notes 28-35 and accompanying text *supra*.

107. In Warth v. Seldin (Penfield), 422 U.S. 490, 508, 514, 517 (1974), the court denied standing to individual plaintiffs and organizations alleging exclusionary zoning by the city of Penfield. The court applied constitutional and prudential limitations to arrive at its finding. Under the constitutional limitation, plaintiffs must have suffered some threatened or actual injury to satisfy the "case or controversy" requirements of U.S. CONST. art. III. 422 U.S. at 498-99. The individual plaintiffs were neither residents of Penfield nor developers denied construction permits. *Id.* at 503. The court held that plaintiffs failed to demonstrate a "substantial probability" that, absent Penfield's restrictive zoning practices, they would have been able to purchase or live there. *Id.* at 504. Thus, even though Penfield's zoning allocated 98% of its vacant land to single family detached housing, and other regulations made multifamily residential development infeasible, plaintiffs were denied standing. *Id.* at 495, 508.

Under prudential limitations, the Court refused to permit claims of "generalized grievances" or allegations based on the interests of third parties. *Id.* at 499. Consequently, the Court denied standing to the organizations, none of whose members could demonstrate direct harm. *Id.* at 510, 514, 517.

In vigorous dissent, Justice Brennan presented a portrait of "total, purposeful, intransigent exclusion of certain classes of people . . . pursuant to a conscious scheme never deviated from," *id.* at 523, that presented insurmountable difficulties to potential developers. He stated that the court rewarded the city's exclusionary practices by turning its "allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation." *Id.*

The Court may have loosened its standing requirements in *Arlington Heights*. The Court granted standing to a developer denied a zoning change, based on his economic injury and "right to be free of irrational zoning actions." 429 U.S. at 262-63. Because the developers planned a specific housing project, the Court also provided standing to a minority plaintiff who had a "substantial probability" of residing there. *Id.* at 264.

recent Fair Housing Act cases interpret the act to impose more relaxed standing requirements. For example, courts permit nonresident plaintiff "testers" to allege harm from discriminatory practices.[108] As a result, most successful plaintiffs in housing cases sue under the statutes rather than the equal protection clause.[109]

Two factors have caused courts to limit the scope of the resulting housing remedy: the fragmented nature of housing and broad fed-

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Thus the Court bootstrapped an individual plaintiff into the case. The presence of the black plaintiff also required the Court to increase its level of scrutiny. *Id.* at 266.

See generally Sager, *Questions I Wish I Had Never Asked: The Burger Court in Exclusionary Zoning*, 11 SW. U.L. REV. 509-44 (1979), which paints a discouraging picture of Supreme Court deference to municipal land use practices at the expense of minority rights. The author calls the *Warth* decision an "analytical embarrassment" and a "practical disaster for the federal litigation of exclusionary zoning classes." *Id.* at 517. Despite some loosening of standing requirements subsequent to *Warth*, *id.* at 519, the author notes that the court has generally restricted such cases to site-specific allegations of direct, rather than indirect harm. *Id.* at 516. *See also* Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective On* Arlington Heights, 55 TEX. L. REV. 1217-53 (1977), who argues for a more activist judicial role in protecting housing opportunities for minorities against exclusionary zoning practices traditionally deferred to by the Supreme Court. *Id.* at 1229, 1253.

For state court decisions rejecting the *Warth* standing rule, see Stocks v. City of Irvine, 114 Cal. App. 3d 520, 520, 170 Cal. Rptr. 724, 724 (Cal. 1981); Homebuilders League v. Township of Berlin, 81 N.J. 127, 405 A.2d 381, 383 (1979).

See also note 141 and accompanying text *infra*.

108. *See, e.g.*, Coles v. Havens Realty Corp. (Richmond), 633 F.2d 384, 387-88 (4th Cir. 1980), *aff'd sub nom.* Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982) (testers granted standing to assert injuries on behalf of third parties under 42 U.S.C. §§ 3601, 3604, and 3612 of the Fair Housing Act); Gladstone v. Village of Bellwood, 441 U.S. 91, 111 (1978) (plaintiff homeowners in community where violation occurred granting standing as "persons aggrieved" to present a private right of action under 42 U.S.C. § 3612 of the Fair Housing Act); Trafficante v. Metropolitan Life Ins. Co. (San Francisco), 409 U.S. 205, 208 (1972) (residents of apartment complex granted standing as "persons aggrieved" to seek HUD assistance under 42 U.S.C. § 3610(a) of the Fair Housing Act because they had lost the social benefits of living in an integrated community, had missed business and professional advantages, and suffered embarrassment and economic damage). *See generally* Note, Havens Realty Corp. v. Coleman: *Extending Standing in Racial Hearing Cases to Housing Associations and Testers*, 22 URBAN L. ANN. 107 (1981).

109. *See, e.g.*, United States v. Parma, 661 F.2d 562, 565 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3830 (U.S. April 20, 1982); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1008 (7th Cir. 1980) (after Supreme Court found no equal protection violation, the circuit court found defendants violated the Fair Housing Act); Park View Heights v. City of Black Jack, 605 F.2d 1033, 1035 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); Resident Advisory Board v. Rizzo (Philadelphia), 564 F.2d at 130.

eral court deference to municipal control[110] and agency discretion.[111] While government entities, such as public housing agencies or municipalities, exercise general regulatory controls over zoning and construction standards, they directly control only a small percentage of housing construction.[112] Accordingly, any remedy to violations of a specific governmental entity will have a minimal impact on racial residential patterns. In addition, federal courts avoid intruding into housing and land use decisions by agencies and municipalities.[113] For example, courts generally hesitate to permit occupants of public housing to challenge the policies of HUD and its agents, without a clear case of racial discrimination.[114] In a series of major cases, the

110. A series of Supreme Court cases demonstrate broad deference to municipal zoning practices that inhibit or prevent low to moderate income housing. *See, e.g.*, Warth v. Seldin (Penfield), 422 U.S. at 504 (courts could not grant standing without site-specific remedy); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (zoning classifications excluding apartment houses justified under general welfare); James v. Valtierra (San Jose), 402 U.S. 137, 142-43 (1971) (sustains referendum provision requiring voter approval of low income housing projects, absent proof of racial intent); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (permits exclusionary zoning to promote "family values").

See generally Mandelker, *supra* note 107, at 1217-53 (strict intent test permits challenges to racially discriminatory practices of municipalities only in the most blatant cases); Sager, *supra* note 107, at 509-44 (notes traditional federal court deference to local government expertise, political accountability, and capacity; the failure of the courts to develop a test of racial impact on housing to reach exclusionary zoning practices; and the courts' failure to require regional responsibility from municipal entities).

111. *See, e.g.*, Falzarano v. United States (Boston), 607 F.2d 506, 509-13 (1st Cir. 1979) (denied standing to plaintiff tenants in federally subsidized housing projects under each of three theories: private right of action under the National Housing Act; third party beneficiaries of the regulatory agreement between HUD and the landlords; and persons harmed by landlords acting under color of state law. Thus court deferred to HUD's administrative discretion under 5 U.S.C. § 701(a)(2) (1976)). *But see* N.A.A.C.P. v. Harris (Boston), 607 F.2d 514, 518-26 (1st Cir. 1979) (minority plaintiffs allegedly harmed by HUD's failure to ensure affirmative action requirements in C.D.B.G. and U.D.A.G. programs granted standing to seek injunctive and declaratory relief). *See generally* HOUSING AND COMMUNITY DEVELOPMENT 68-69 (D. Mandelker et al. eds. 1981) (courts generally defer to federal agency discretion except when plaintiffs submit challenges on racial discrimination grounds; even then, courts defer to agency decisions about programs, limiting challenges to specific projects).

112. For example, subsidized housing constitutes approximately two percent of the St. Louis metropolitan housing stock. Interview with St. Louis County Housing Authority official, Mar. 2, 1981.

113. *See* notes 110-11 and accompanying text *supra*.

114. *See* note 111 and accompanying text *supra*.

Supreme Court acknowledged broad powers of municipalities to make decisions regarding zoning and building standards.[115] As a result, when plaintiffs prove housing violations, courts have generally limited the remedy to site-specific relief rather than general sanctions against municipalities or other government housing agencies.[116]

Thus housing case law has primarily developed along statutory, rather than constitutional standards because of the looser requirements for intent and standing. Nevertheless, the fragmented nature of housing and the traditional judicial deference to municipalities and government agencies has limited the scope of remedies that housing plaintiffs can obtain. The following subsection will explore new developments in housing case law that may signal judicial acceptance of expanded theories of liability and remedy.

B. *New Housing Developments of Systemwide Liability*

Although courts in housing cases have generally limited the remedies to site-specific relief, they have required zoning changes, ordered issuance of building permits, and enjoined municipal interference with the remedy.[117] More recent cases build on these types of remedies to offer broad scale relief to general classes of plaintiffs.[118] These

115. *See* note 110 *supra*.

116. *See, e.g.*, Park View Heights v. City of Black Jack, 605 F.2d at 1040 (although class of plaintiffs entitled to equitable relief for the exclusionary affects of the city's zoning ordinance, district court should avoid ordering a remedy more intrusive than necessary); Resident Advisory Bd. v. Rizzo (Philadelphia), 564 F.2d at 152 (where action against public housing authority delayed construction of one low income housing project, court denied injunctive order requiring a tenant reassignment plan for all public housing projects in Philadelphia); Garrett v. City of Hamtramck, 503 F.2d 1236, 1248-49 (6th Cir. 1974) (circuit court cut back on district court's remedy that required provision of replacement housing outside of the municipality where discriminatory urban renewal policies took place). *See generally* Mandelker, *supra* note 107, at 1219 (as of that time all federal cases on racial discrimination in zoning had been "site-specific"), and Sager, *supra* note 107, at 518 (exclusionary zoning litigation has been narrowed to a "project-by-project" basis).

117. *See, e.g.*, United States v. City of Black Jack, 508 F.2d at 1188 (ordered district court to enjoin city from enforcing exclusionary zoning ordinance); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 869-73 (N.D. Ill. 1979) (approved consent decree in which Arlington Heights agreed to annex, rezone, and provide services to land for construction of multi-family units), *aff'd*, 616 F.2d 1006, 1015 (7th Cir. 1980); Resident Advisory Bd. v. Rizzo (Philadelphia), 425 F. Supp. 987, 1029 (E.D. Pa. 1976) (ordered public housing authority to construct a housing project and enjoined all parties from interference), *aff'd*, 564 F.2d 126, 150 (3d Cir. 1977).

118. *See* notes 122-54 and accompanying text *infra*.

cases involve discriminatory site selection and exclusionary zoning.

1. Discriminatory Site Selection Cases

Government housing agencies often exercise authority over a broad geographic area that may include several municipalities.[119] Generally, courts have limited remedies against public housing agencies, like municipalities, to site-specific relief.[120] However, a recent Supreme Court case suggested that plaintiffs can obtain broader remedies.[121]

In *Hills v. Gautreaux* (Chicago),[122] the Court noted that the relevant geographic area for considering potential housing remedies may include the entire area of the guilty actor's authority, even if it overlaps other government entities.[123] In *Gautreaux*, the range of authority of the defendants, HUD and the Chicago Housing Authority, extended beyond the site of their violations in Chicago to include suburban entities.[124] The Court stated that *Milliken* did not confine the remedy to the site of the violation or its effects.[125] Because HUD

119. *See, e.g.*, Hills v. Gautreaux (Chicago), 425 U.S. 284, 298, & n.14 (1976); United States v. Board of School Comm'rs (Indianapolis), 637 F.2d 1101, 1109 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980); Crow v. Brown (Atlanta), 332 F. Supp. 382, 385 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972), *overruled on other grounds* in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976).

120. *See* note 116 and accompanying text *supra*.

121. Hills v. Gautreaux (Chicago), 425 U.S. 284 (1976).

122. *Id.*

123. *Id.* at 298. The Court held that the Department of Housing and Urban Development (HUD) and the Chicago Housing Authority (CHA) wrongfully confined plaintiffs to segregated public housing in the City of Chicago, depriving plaintiffs of housing opportunities throughout the metropolitan area. *Id.* at 299. Both HUD and the CHA had authority to operate beyond Chicago city limits. *Id.* at 298 n.14. The Court distinguished housing from school remedies by stating that the "relevant geographic area" for an injured party's housing option is the metropolitan housing market rather than the city limits. *Id.* at 299. *Milliken* did not suggest that federal courts lack authority to remedy violations outside the place of the harm, as long as the courts do not interfere with government entities not implicated in the violation. *Id.* at 298, 300-01. Thus HUD and the CHA could provide remedies in Chicago suburbs if they could do so without infringing on non-liable suburban government entities. *Id.* at 298-99.

124. *Id.* at 298 & n.14.

125. *Id.* at 298. The Court notes that "*Milliken* required either a showing of an interdistrict violation or a segregative effect" before the court could interfere with local district autonomy. *Id.* at 296 n.12. Consequently, when the Court discusses government entities "not implicated in unconstitutional conduct," *id.* at 298, it means entities that have not committed violations or have not been effected by such viola-

and the CHA discriminated in public housing site selection in Chicago with effects shown only in Chicago, the court could not require non-liable suburbs to participate in the remedy.[126] Even so, the court could require HUD and the CHA to exercise their statutory discretion over existing Section 8 programs to provide suburban housing opportunities for minority families.[127] Thus *Gautreaux* permits courts to order housing agencies to provide broad, affirmative relief outside the specific site of the violation.

One appellate court extended *Gautreaux* reasoning to justify area-wide injunctive relief against a housing agency in a school desegregation case. Yet the court failed to take full advantage of *Gautreaux* to order affirmative housing remedies, despite a broader case for liability throughout the housing actor's area of control. In *United States v. Board of School Commissioners* (Indianapolis),[128] the court found public housing officials guilty of intentionally discriminatory site selection.[129] As in *Gautreaux*, the housing authority's area extended

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tions. In *Gautreaux*, the Court found no interdistrict violation or effects. *Id.* at 292, 294 n.11.

126. *Id.* at 298, 305-06.

127. *Id.* at 303-06. The Court noted that the Housing and Community Development Act of 1974, 42 U.S.C. § 1437 (Supp. III 1979) had enlarged HUD's role in creating housing opportunities. The Act permitted HUD to contract directly with private landlords to lease units to low income persons without local government approval, although local governments often had the right to comment. 42 U.S.C. § 1437f; 425 U.S. at 303-05.

128. 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973), 368 F. Supp. 1191 (S.D. Ind. 1973), *aff'd*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975), 419 F. Supp. 180 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded, mem. sub nom.* Board of School Comm'rs v. Buckley, 429 U.S. 1068 (1977), 573 F.2d 400 (7th Cir. 1978), 456 F. Supp. 183 (S.D. Ind. 1978), 506 F. Supp. 657 (S.D. Ind.1979), *aff'd in part, rev'd in part*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980).

129. 637 F.2d at 1111, 1114, 1117. *Indianapolis* is primarily a school desegregation case. The defendant school board originally crossclaimed against the public housing authority in 1971, alleging that discriminatory housing policies contributed to segregation of Indianapolis schools. 419 F. Supp. at 182. However, the district court stayed the proceedings against the housing officials until 1974 after Justice Stewart noted in *Milliken* that "purposeful, racially discriminatory use of state housing or zoning laws" could justify a school desegregation decree. 418 U.S. 717, 755 (1974); *cited in* 419 F. Supp. at 182.

The allegations against the public housing authority assumed a dual nature, due to the dual remedies sought by plaintiffs. In response to the Seventh Circuit's test for an interdistrict desegregation remedy, 637 F.2d at 1109, claimants alleged that intentionally discriminatory public housing site selection caused significant interdistrict segregative effects on housing patterns and, in turn, on school attendance patterns. *Id.* at

beyond Indianapolis city limits into the suburbs.[130] Unlike *Gautreaux*, however, the court found that its discriminatory public housing site selection effected residential segregation throughout its area of control by containing minority public housing within Indianapolis city limits.[131] But for this containment, many of the 5,000 minority residents of public housing would have resided in the primarily white suburbs.[132] The metropolitan-wide effects justified an injunction prohibiting all further family public housing construction within Indianapolis, with the corollary assumption that defendants would construct any future family public housing in the suburbs.[133]

Because *Indianapolis* did not order an affirmative housing remedy in the suburbs, the court did not take full advantage of the opportunities provided by *Gautreaux*.[134] Since the court found effects in the

1109-111. The court determined that the public housing authority had constructed all housing projects within the old central city of Indianapolis, despite its authority throughout Marion County extending five miles beyond city limits. Projects that housed families were 98% black. Further, the housing authority had made no serious attempts to gain suburban municipalities' support for housing projects outside Indianapolis. The purpose was to keep blacks within Indianapolis and keep the suburban areas segregated for whites only. *Id.* at 1109-111. The Seventh Circuit found the evidence sufficient to award a housing remedy, *id.* at 1117, and a school remedy, *id.* at 1114. The court enjoined further construction of family public housing in the city. *Id.* This housing remedy was a new development for school cases. *See also* Evans v. Buchanan, 393 F. Supp. at 434, in which the court awarded only a school remedy in response to state housing violations. Although the housing remedy in *Indianapolis* reduces the housing authority's segregative impact on the schools, it also responds directly to the housing harm resulting from the housing violations. Thus, from the dual nature of the housing counts in *Indianapolis*, the authors derive two models for school cases. Claimants may develop a housing case for the purpose of obtaining a housing remedy that contributes to school desegregation, as presented in this model. Additionally, claimants may develop a housing case for the primary purpose of obtaining school desegregation remedies, as illustrated in the next model, notes 162-206 and accompanying text *infra*.

130. 637 F.2d at 1109. *See* note 124 and accompanying text *supra*.

131. 637 F.2d at 1110.

132. The district court estimated that 4,958 black students from 2,395 housing units would have resided in primarily white suburbs and attended desegregated suburban schools had the housing authority located the public housing outside the old city of Indianapolis. 506 F. Supp. at 664. Although the Seventh Circuit agreed with the housing defendants that the judge may have miscalculated, the actual number was not insignificant. 637 F.2d at 1114. The circuit court did not address the perhaps more practical question of what the balance of housing between suburbs and Indianapolis should have been.

133. 506 F. Supp. at 665, 637 F.2d at 1117.

134. *See* note 127 and accompanying text *supra*.

suburbs, it could have justified coercing suburban municipalities to some degree.[135] Both cases thus provided the opportunity for area-wide remedies rather than site-specific relief.

2. Exclusionary Zoning Cases

Generally, exclusionary zoning reinforces segregation within the municipality's area of control, but also affects the excluded minorities outside the municipality.[136] Traditionally, courts limited plaintiffs' remedies to site-specific relief.[137] By presenting more comprehensive evidence than that required in site-specific cases, plaintiffs in two recent cases have argued for broader relief.

In *Hope, Inc. v. County of DuPage*,[138] plaintiffs brought a class action under the equal protection clause, the Civil War statutes, and the Fair Housing Act against an Illinois county outside of Chicago.[139] The plaintiffs alleged that the county's restrictive zoning and building codes implemented a policy to exclude low and moderate income non-residents, including minority families, from unincorporated ar-

135. In *Gautreaux*, the Court asserted that the *Milliken* test was not unique to school desegregation cases, 425 U.S. at 294 n.11; it extended to public housing cases as well. *Id.* at 294. Thus a court can exercise its remedial powers to "restructure the operation of local and state government entities" wherever a court finds a constitutional violation or its significant effects. *Id.* at 293, 294, 296 n.12.

136. *See, e.g.*, United States v. Parma, 661 F.2d at 566 (exclusionary zoning contributed to racial disparity between Cleveland and suburbs); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d at 1288 (exclusion of low to moderate income housing for minorities reinforced Arlington Heights' almost totally white nature in metropolitan area containing significant percentage of blacks); United States v. City of Black Jack, 508 F.2d at 1183 (suburb's exclusionary zoning enhanced disparity between its 99% white population and 40% black population of the City of St. Louis).

137. *See, e.g.*, Warth v. Seldin (Penfield), 422 U.S. at 508 (required allegation of harm entitling plaintiffs to site-specific remedy in order to grant standing); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d at 1015 (approved consent decree to construct low and moderate income housing units on newly annexed land); Park View Heights v. City of Black Jack, 605 F.2d at 1040 (remanded for plaintiffs plan for housing relief to remedy city's failure to construct 144 units of public housing).

138. Planning for People Coalition v. DuPage County, 70 F.R.D. 38 (N.D. Ill. 1976) (standing), *sub nom.* Hope v. County of DuPage, (1981) Equal Opp. in Housing (P-H) ¶ 15, 404 (N.D. Ill.) (liability).

139. ¶ 15, 404 at 15,998.308. Plaintiff class included persons residing within the defendant county as well as outside the county. The defendants included the county, county board, and certain landowners and developers in the county. *Id.* at 15,998.307.

eas of the county.[140] Defendants argued that the non-resident plaintiffs lacked standing since they could not demonstrate the county's denial of a concrete project that would have benefitted them.[141] Nevertheless, the court granted standing because the county's housing policies were so prohibitive that a knowledgeable developer would not even attempt to apply for a permit.[142] To demonstrate intention-

140. Plaintiffs alleged that county zoning ordinances unreasonably increased the cost of all housing, thereby increasing land costs. These higher costs prevented construction of low and moderate income housing. The county's ordinance vested the county board with "unfettered discretion" to grant or deny permits for multi-family units, thus creating economic reasons for developers to carefully tailor development proposals. County officials repeatedly expressed the desire to limit housing opportunities to the wealthy. Zoning of agricultural areas for residential development eliminated the possibility of industrial or commercial development that would have lowered housing costs. The county and its housing authority had not built one unit of public housing since 1942. Virtually all of the special use and zoning permits resulted in development of residential housing for wealthy, white residents. Because of strong economic incentives, developers had "acted in concert" with county officials to further discriminatory housing practices. Plaintiffs alleged that defendants' practices resulted in more expensive housing in unincorporated areas of the county, denying housing opportunities to poor, black persons, while encouraging white, wealthy persons to move into the county. Such acts contributed to racial polarization of the Chicago metropolitan area. Schools became more segregated as well. *Id.* at 15,998.308-.309.

141. 70 F.R.D. at 40. Defendants raised the standing issue subsequent to *Warth*. *Id.* The court noted that, as in *Warth*, individual plaintiffs alleged no direct injury to an interest in land because they were not developers and they had not sought a permit to construct housing. *Id.* at 44. Unlike *Warth*, plaintiffs had defined a class that was injured due to a conspiracy between the county and developers. *Id.* at 44-45. Evidence of a possibly effective and complete conspiracy convinced the court that plaintiffs could allege a personal interest. To deny them standing might reward a "combined racial and economic discrimination which *Warth* specifically eschews." *Id.* at 46, 47. The court granted standing to the organizational plaintiff, Hope, Inc., under the *Warth* test because it had alleged injury to its members. *Id.* at 47.

Defendants later asserted the related objection that plaintiffs failure to allege denial of a specific concrete project rendered their claim not ripe for adjudication. The court acknowledged that it had not determined that the developers conspired with the county. The court, however, held that developers did not apply for permits to develop low to moderate income projects because they were aware of the county's exclusionary policies. A finding that the issue was not ripe for adjudication would only encourage defendants to be more discriminatory in their practices. *Id.*

The court's holding accords with concerns expressed by Justice Brennan in Warth v. Seldin (Penfield), 422 U.S. at 523 (court turns success of exclusionary scheme into a barrier to a lawsuit). *See also* Mandelker, *supra* note 107, at 1239 (unless a municipality has historically discriminated against proposals for subsidized housing, no opportunity presented to allege racially discriminatory intent); Sager, *supra* note 107, at 516. (*Warth*'s "substantial probability" test requires plaintiffs be deprived of the benefit itself, ignoring deprivation of the opportunity to secure a benefit).

142. Hope v. County of DuPage, ¶ 15,505 at 15,998.330.

ally discriminatory policies and practices, plaintiffs presented evidence that county actions satisfied a majority of the *Arlington Heights* criteria.[143] Upon finding that the violations justified equitable relief, the court asked the litigants to propose a remedy.[144] Plaintiffs recommended that the court enjoin any further zoning approvals or building permits for new developments unless developers or the county adequately provide for privately funded or publicly subsidized low and moderate income housing.[145] Conceivably, plaintiffs' success in proving a policy and practice of discrimination may justify such broad scale relief.

A court actually ordered such broad scale relief in *United States v. City of Parma*.[146] In *Parma*, the Attorney General exercised his unique statutory authority[147] to allege that city officials implemented a pattern and practice of discrimination, thereby excluding minorities from a Cleveland suburb.[148] Although the attorney general faced no

143. *Id.* at 15,998.327-.328. First, the impact of the challenged action bore more heavily on blacks than whites, effectively excluding blacks, and leaving a nearly 100% white population. Secondly, a series of official actions revealed opposition to a discriminatory purpose. These actions included: proposed integregated housing project, the failure of the housing authority to build new public housing, and opposition to possible applications for zoning variations and building permits for low to moderate income housing. Finally, official activities and statements reflected a legislative and administrative history of opposition to low and moderate income housing, including housing for blacks. *Id.*

144. *Id.* at 15,998.331. The court held that county policies and practices constituted "a continuing threat of irreparable harm" warranting equitable relief. *Id.*

145. *Id.* at 15,998.308.

146. 494 F. Supp. 1049 (N.D. Ohio) (finding of liability), 504 F. Supp. 913 (N.D. Ohio 1980) (order of remedy), *aff'd in part, rev'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3830 (U.S. April 20, 1982).

147. The Attorney General can bring civil action when she or he "has reasonable cause to believe that any person or group of persons is engaged in a pattern and practice" of discrimination. 42 U.S.C. § 3613 (1976). The Attorney General alleged a pattern and practice of discrimination by the suburban municipality of Parma, Ohio, in violation of 42 U.S.C. §§ 3604 (refusal to sell or rent), and 3617 (interference, coercion, or intimidation).

148. The District Court found that an "extreme condition of racial segregation exists in the Cleveland metropolitan area," 494 F. Supp. at 1055, with 90% of the blacks living in Cleveland. *Id.* at 1056. Although the metropolitan area was 16% black and Parma was Cleveland's largest suburb, Parma's black population was a fraction of one percent. *Id.* at 1056-57.

The district court denied two Parma rationales for the segregated condition of the metropolitan area. Parma alleged that blacks, like other ethnic groups, preferred to associate with each other, and migrated along natural "ethnic corridors" from the city to the suburbs. The defendants' own expert witness, however, admitted that blacks

standing problems, he had to satisfy the stricter test for proving a pervasive pattern and practice of discrimination.[149] The test required "more than an isolated incident of discrimination."[150] Defendants must have implemented a discriminatory policy, statute, or ordinance that caused significant segregative effects.[151] In affirming the district court's judgment against the city, the Sixth Circuit approved extremely intrusive, broad remedies, not limited to site-specific relief.[152]

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had been continuously discriminated against in the housing market. The court also found it "simply not plausible to believe that the supposed preferences of blacks to live in black neighborhoods would subordinate people's desire to lead better lives." 494 F. Supp. at 1060-61. The district court also rejected Parma's explanation that economic factors explained racial patterns. An expert witness presented statistical evidence showing that if residential location were based on socio-economic factors, blacks would be dispersed throughout the metropolitan area. Parma's black population would be 12.7% instead of a fraction of one percent. *Id.* at 1063.

Consequently, the Sixth Circuit affirmed district court findings that

> [R]ejection of the fair housing resolution, the consistent refusal to sign a cooperation agreement with CMHA, the adamant and long-standing opposition to any form of public or low-income housing, the denial of the building permit for Parmatown Woods, the passage of the 35-foot height restriction ordinance, the passage of the ordinance requiring voter approval for low-income housing, and the refusal to submit an adequate housing assistance plan in the Community Block Development Grant application, individually and collectively, were motivated by a racially discriminatory and exclusionary intent. The purpose of these actions, the Court finds, was to exclude blacks from residing in Parma and to maintain the segregated "character" of the City. These actions individually and collectively, also violated the Fair Housing Act by denying to blacks, Parma residents, and prospective low-income housing developers rights secured by Sections 804(a) and 817.

494 F. Supp. at 1096.

149. 494 F. Supp. at 1095; 42 U.S.C. § 3617 (1976). According to the district court, "the government must prove more than an isolated incident of unlawful discrimination." 494 F. Supp. at 1095. The unlawful discrimination must have been a regular procedure that defendant followed through actions or failure to act. A discriminatory policy, statute, or ordinance constitutes a discriminatory pattern or practice. Further, the failure to eliminate a policy that prevents fair housing is a pattern or practice. *Id.*

150. 494 F. Supp. at 1095. *Accord*, United States v. Pelzer Realty Co. (Montgomery), 484 F.2d 438, 445 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

151. 494 F. Supp. at 1095.

152. The district court issued a four point injunction prohibiting Parma and its employees from engaging in further segregative housing practices; ordered Parma to develop a fair housing education program for officials and employees; ordered enactment of a fair housing resolution; required Parma to advertise itself as an "equal housing opportunity community" through regional newspapers; vacated a discriminatory low income housing ordinance; and modified height limitations, parking, and zoning referendum ordinances to prevent their application to low and moderate income housing. The court further ordered Parma to take five actions to increase the

Both *Hope, Inc.* and *Parma* provide new methods for proving liability justifying broad, systemwide relief. Both require more than an isolated incident that would justify only site-specific relief. *Hope, Inc.* requires a showing of racial discrimination that would satisfy equal protection standards for intent. *Parma* requires that the attorney general prove a pervasive pattern and practice of discrimination. Unlike school desegregation cases,[153] neither case considers the possibility of remedying the effects outside the liable actor's area of control.[154]

Thus recent developments in site selection and exclusionary zoning cases support an expanded scope of housing remedies. Courts may utilize the greater capabilities of certain housing agencies to provide metropolitan remedies outside the specific area of the violation. Further, when plaintiffs prove pervasive patterns of discrimination by defendants, courts may order more intrusive and comprehensive housing remedies.

C. *Applications of Housing Remedies in School Cases*

Plaintiffs in school desegregation cases may find it in their best interests to allege a housing count. Where segregated neighborhoods

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low income housing supply: (1) form a Fair Housing Committee to develop the remedial plan, and an Evaluation Committee to review its work; (2) cooperate with the county housing authority or form its own authority to develop public housing; (3) develop a program for interjurisdictional use of Section 8 existing housing programs; (4) proceed with its Community Development Block Grant application; and (5) ensure construction of 133 units per year of public housing. Finally, the district court appointed a special master to ensure that Parma implement the remedial order. 504 F. Supp. at 918-26.

The Sixth Circuit affirmed most of the district court's order. 661 F.2d at 576-78. However, it struck the threshhold requirement of 133 units as "premature," and left the determination of the number of units needed to the Fair Housing Committee. *Id.* at 577-78. The circuit court also vacated the appointment of a Special Master, finding that the Fair Housing and Evaluation Committees provided adequate assistance to the court and less intrusion in achieving the government's fair housing goal. *Id.* at 578-79.

153. *See* notes 56-66 and accompanying text *supra*.

154. In *Hope v. County of DuPage*, the court found that defendant's zoning practices effectively excluded nonwhite residents. ¶ 15,404 at 15,998.312-.313, 15,998.327. Yet plaintiffs sought relief within the county, not outside. 15,404 at 15,998.308. In *Parma*, the court found that the city's exclusionary practices contributed to metropolitan-wide racial disparity, 661 F.2d at 566, and focused most of the remedy on Parma alone. *Id.* at 576-78. However, the requirement that Parma advertise in regional newspapers its willingness to welcome minority residents may have some county-wide effects. *Id.* at 577.

exist, neighborhood school systems will inevitably be segregated regardless of the school board's intent.[155] In addition, housing remedies themselves may contribute to school desegregation as well. For example, remedies that disperse public housing for minority families into primarily white neighborhoods may cause the natural integration of surrounding neighborhood schools, reducing the need for busing.[156] Alternatively, injunctions preventing housing agencies from constructing minority housing in heavily minority neighborhoods may stem accelerating segregation in the schools.[157]

By presenting the housing count separately, plaintiffs may avoid difficult problems of merging the standards and tests of school cases with those of housing cases.[158] Courts may be more receptive to cases argued within their traditional framework.[159] By arguing the

155. *Cf.* notes 175-76 *infra*.

156. In Adams v. United States (St. Louis), 620 F.2d 1277, 1293, & n.23 (8th Cir. 1980), the Department of Justice supported the court expert's recommendation to exempt from busing schools with enrollments 30 to 50% black in integrated neighborhoods. The circuit court recommended this approach as one option to the district court. *Id.* at 1295-96. *See* Taylor, *Remarks of William L. Taylor*, 23 HOWARD L.J. 113, 118 (1980), which discusses the desegregation plan in Louisville, Kentucky. Professor Taylor related that after the desegregation order exempted racially desegregated neighborhoods from busing, the head of the Kentucky Human Rights Commission successfully persuaded city and county housing authorities to counsel black applicants to reside in white communities. *Id. See also* D. Pierce, Breaking Down Barriers: New Evidence of the Impact of Metropolitan School Desegregation on Housing Patterns 1, 4 (Nov. 1980) (Final Report submitted to the National Institute of Education) (suggests that metropolitan school desegregation may increase housing integration by removing an incentive for whites to flee; may also provide incentive for integration by exempting neighborhoods from busing programs).

157. *See, e.g.*, United States v. Board of School Comm'rs (Indianapolis), 419 F. Supp. at 186, *aff'd*, 541 F.2d at 1223.

158. *See* notes 167-99 and accompanying text *infra*.

159. Despite a relatively large number of opinions alleging the causal relationship between school segregation and housing segregation, *see* note 2 and accompanying text *supra*, courts have rendered few decisions based on the interrelationship. *See* note 99 *supra*. Plaintiffs have successfully pled that a state housing agency caused school segregation in only one case, Evans v. Buchanan (Wilmington), 393 F. Supp. at 438, although defendant school officials successfully crossclaimed against the housing authority in United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111. *But see* Bell v. Board of Educ. (Akron), 491 F. Supp. at 943-48, in which plaintiffs failed to prove housing actors intentionally caused school segregation, and Hart v. Community School Bd. (Brooklyn), 383 F. Supp. at 775, in which the court determined a housing decree to be unworkable. Three justices of the Supreme Court have signalled their strong hesitancy to attribute housing segregation to school authorities. In Austin Indep. School Dist. v. United States, 429 U.S. 990, 994 (1976), Justices Powell, Burger, and Rehnquist concurred in vacating a school case and stated

counts jointly, however, plaintiffs may have an impact on the remedies awarded. The court may tend to structure the remedies to reinforce each other to ensure that school and housing policies do not work at cross purposes.[160] *Indianapolis* provides the only example to

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The principal cause of racial and ethnic imbalance in urban public schools across the county—North and South—is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing—whether public or private—cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

Id. Other attempts to prove that school acts cause housing violations with actionable school effects have been unsuccessful to date. *See* notes 207-63 and accompanying text *infra*. In Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Motion of the Board for Leave to Amend its Answer to Add a Cross Claim (Jan. 9, 1981), cross-claimants appear to have alleged an actional housing violation by school officials. *See* notes 327-30 and accompanying text *infra*. Consequently, plaintiffs may be well advised to present a housing count on its own terms wherever possible, alleging that it contributes to school segregation. Discussion of a school count in a housing case is beyond the scope of this Note.

160. Federal housing policy appears to reflect dual, contradictory standards. The Housing and Community Development Act of 1974, § 101(c), 42 U.S.C. § 5301(c) (1976), lists as its primary objective the "development of viable urban communities, by providing decent housing and suitable living environment and expanding economic opportunities, preferably for persons with low and moderate income". *Id.* The specific objectives within that subsection include elimination of slums and blight where low and moderate income persons reside. *Id.* at § 5301(c)(1), (2)(3). Another goal is "the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income." *Id.* at § 5301(c)(6). Thus the objectives appear to be improvement of the neighborhoods where low income persons reside and promotion of dispersal. Project Selection Criteria, 24 C.F.R. §§ 200.700-.710 (1981), requiring HUD to consider the impact on currently integrated neighborhoods of proposed public housing, seem to reinforce the dispersal orientation. *See* Shannon v. United States Dep't. of Housing and Urban Dev. (Philadelphia), 436 F.2d 809, 821-22 (3d Cir. 1970) (HUD must consider impact of proposed public housing on racial balance in the area). *But see* the recent Young Amendment, Act of October 8, 1980, Pub. L. No. 96-399, § 216, 94 Stat. 1638 (to be codified in 42 U.S.C. § 1436(b)), that states, "The Secretary of Housing and Urban Development shall not exclude from consideration for financial assistance under federally assisted housing programs proposals for housing projects solely because the site proposed is located within an impacted area." *Id.*

It appears that placing public housing in racially impacted areas will not contribute to school desegregation; in fact, it would exacerbate it. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1117 (discriminatory site selection by public housing authority, placing all public housing in racially impacted Indianapolis rather than the primarily white suburbs, caused racial segregation in the schools justifying an interdistrict school remedy and injunction against further public housing construction in Indianapolis). The *Indianapolis* concern that public housing must not hamper desegregation is supported by HUD regulations issued during President Carter's term. Under these site selection regulations, public housing authorities must

date of joint school and housing remedies in a school case. The *Indianapolis* court enjoined construction of public housing in the central city. Thus the court ensured that the housing authority would not exacerbate school segregation by requiring the agency to support school integration through construction in primarily white suburbs.[161] Thus the housing count provides the means to reach non-school actors whose violations reinforce school segregation, and to require them to enhance desegration.

D. *Summary*

Although housing and school segregation often appear to be causally connected, housing law has developed separately from school law. In addition to the equal protection standards employed in school cases, plaintiffs may bring housing cases under less strict statutory standards. Nevertheless, the fragmented nature of housing violations, combined with judicial deference to municipalities and federal agencies, traditionally have limited housing remedies to site-specific relief. In recent cases, however, where plaintiffs satisifed more stringent standards of proof and established patterns and practices of discrimination, courts awarded broad relief throughout the actors' control. The willingness of courts to pursue this trend remains uncertain.

The next section will analyze a hybrid model, derived from the pure housing model, in which plaintiffs allege that intentional housing acts caused segregated schools.

III. Housing Violations Cause School Effects

Courts have noted, and school defendants have argued, that segregated residential patterns not only reinforce but also cause school segregation.[162] In past school cases, when school defendants success-

consider both residential and school impacts in reviewing housing proposals where a school remedy is in operation. Notice H-81-2 (HUD), Clarification of Site and Neighborhood Standards for New Assisted Housing Projects in Areas of Minority Concentration (Jan. 5, 1981). Thus, for school and housing remedies to reinforce each other, they must promote dispersal.

161. 637 F.2d 1101 at 1117. *See* note 160 *supra*.

162. *See* Milliken v. Bradley (Detroit), 418 U.S. 717, 755, 756 n.2 (1974) (Stewart, J., concurring). Justice Stewart stated that a school desegregation remedy might be proper where state officials contributed to separation of races by purposeful, racially discriminatory use of state housing or zoning laws. For cases in which litigants successfully argued that government housing officials caused school segregation, see

fully asserted that they were not responsible for segregated schools,

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United States v. Board of School Comm'rs (Indianapolis), 419 F. Supp. 180, 182 (S.D. Ind. 1975) (defendant school board alleged and court found that discriminatory site selection by public housing officials caused residential and school segregation, justifying housing injunction and interdistrict school remedy), *aff'd*, 541 F.2d 1211 (7th Cir. 1976), *vacated and remanded on other grounds mem. sub nom.* Board of School Comm'rs v. Buckley, 429 U.S. 1068 (1977); Evans v. Buchanan (Wilmington), 393 F. Supp. 428, 436-38 (D. Del.) (plaintiffs alleged and court found that government housing policies assisted, encouraged, and authorized public and private discrimination in housing, causing interdistrict school segregation, justifying an interdistrict school remedy), *aff'd mem.*, 423 U.S. 963 (1975). Litigants unsuccessfully attempted to include housing officials in the remedy in Bell v. Board of Educ. (Akron), 491 F. Supp. 916, 943-48 (N.D. Ohio 1980) (plaintiffs failed to prove that Ohio Real Estate Commission, City of Akron, and city housing authority used urban renewal and public housing programs to intentionally segregate housing, thus affecting schools); Hart v. Community School Bd. of Educ. (Brooklyn), 383 F. Supp. 699, 706-07, 757-58 (E.D.N.Y.) (defendant school board impleaded city, state, and federal housing officials, alleging that intentional acts of public housing officials racially tipped the neighborhood, causing segregated schools; court ordered housing officials to develop a joint plan), *modified*, 383 F. Supp. 769, 775 (E.D.N.Y. 1974) (after housing officials failed to agree on joint plan, court determined that housing decree unworkable), *aff'd*, 512 F.2d 37 (2d Cir. 1975). For cases in which litigants are currently alleging that intentional housing acts caused school segregation, see United States v. Yonkers Bd. of Educ., 518 F. Supp. 191, 193, 196 (S.D.N.Y. 1981) (plaintiffs alleged that city and community development agency discriminated in public housing site selection, perpetuating and aggravating school segregation; court refused to separate the housing count from claim against school officials); Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Order (Aug. 24, 1981) (plaintiff intervenors and defendant school board cross claimed against housing agencies for reinforcing and causing segregated schools, but district court stayed motion against most of housing parties), *remanded for want of jurisdiction*, No. 81-1828, slip op. at 43 (8th Cir. Feb. 25, 1982). For cases in which defendant school officials unsuccessfully argued that public and/or private acts of residential segregation independent of intentional acts of school officials caused school segregation, see, *e.g.*, Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 259 (S.D. Ohio 1977) (housing segregation in part caused by federal agencies, local housing authorities, restrictive covenants, zoning and annexation, and private action promoting segregation in schools; nevertheless, demographic change is no defense since school defendants should have acted to "break the segregative snowball". *aff'd and remanded*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979); Reed v. Rhodes (Cleveland), 422 F. Supp. 708, 789-90 (N.D. Ohio 1976) (racially segregated public housing in conjunction with school board policies operated to spawn segregated schools; because the school board knowingly incorporated governmentally caused residential segregation into their neighborhood school policy, they cannot claim residential segregation as a defense), *remanded for reconsideration*, 559 F.2d 1220 (6th Cir. 1977). Arthur v. Nyquist (Buffalo), 415 F. Supp. 904, 968 (W.D.N.Y. 1976) (fact that residential segregation substantially caused by public and private actions resulting in segregated schools is not a defense for school officials who were aware of residential segregation and failed to alleviate it in their school polices), *aff'd*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978); Morgan v. Hennigan (Boston), 379 F. Supp. 410, 470 (D. Mass.) (defense that segregated residential

courts refused to grant a school remedy.[163] In *Milliken*, however, Justice Stewart stated that an interdistrict school remedy might be appropriate if public officials contributed to segregated schools by racially discriminatory use of state housing or zoning laws.[164] His formulation suggests that dual effects of residential and school segregation may result from intentional housing discrimination, and both may be subject to a remedy.

The independent evolution of school and housing case law raises particular problems in fusing the unique requirements of school and housing cases. Courts must determine how housing acts can cause school effects, and resolve the appropriate standards for intent, standing, and significance of effect.[165] The *Indianapolis* court has applied a test for establishing liability of housing officials sufficient to justify housing and school remedies.[166] The following subsection will examine some of the problems encountered in merging housing and school cases under the *Indianapolis* test, and discuss the scope of housing and school remedies that plaintiffs may obtain.

A. *Problems Encountered in Proving Housing Actors Caused Actionable School Effects: The* Indianapolis *Test*

Although Justice Stewart stated that discriminatory housing acts may justify an interdistrict school desegregation remedy,[167] he did not address the difficult questions posed by merging a housing cause of action with the strict standards of school cases. Following Justice Stewart's dictum, the *Indianapolis* court[168] developed a four part test for determining whether housing violations justified school desegre-

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patterns caused school segregation unacceptable when school officials intentionally incorporated residential segregation into the system's schools), *aff'd sub nom.* Morgan v. Hennigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

163. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976) (demographic shifts in residential patterns causing segregation of schools not attributable to intentional acts of school officials); Milliken v. Bradley (Detroit), 418 U.S. at 745, 752 (absent a showing of an interdistrict constitutional violation or effect, court may not order metropolitan school consolidation).

164. 418 U.S. at 755.

165. *See* notes 167-99 and accompanying text *infra*.

166. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d 1101, 1109 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980). *See* notes 167-70 and accompanying text *infra*.

167. 418 U.S. at 755.

168. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1109.

gation remedies.[169] The court framed the test so broadly that it left many issues unresolved. Therefore, traditional school and housing cases must be analyzed to determine the meaning of the *Indianapolis* test's requirements.[170]

Where school plaintiffs are unable to prove that school officials intentionally caused segregated schools, they may seek to sue housing actors who caused the school effects. Should plaintiffs convince the courts that housing actors were liable for causing segregated schools, the courts may order the non-liable school districts to participate in the remedy.[171] Such an order is no different than requiring non-liable school boards to remedy the segregative effects of another school board's intentional violation.

Plaintiffs face, however, the critical issue of standing not addressed by the *Indianapolis* test. Under the holdings of some equal protection cases, school plaintiffs may have difficulty gaining standing against housing actors.[172] Housing defendants may assert they are incapable of remedying the school effects of their violations,[173] and, therefore,

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169. *Id.* The circuit court had instructed the district court as follows:

> [A]n interdistrict desegregation remedy is appropriate if the following circumstances are shown to exist (given the fact that there is a vast racial disparity between IPS and the surrounding school districts within the "new" City of Indianapolis): (1) that discriminatory practices have caused segregative residential housing patterns and population shifts; (2) that state action, at whatever level, by either direct or indirect action, initiated, supported, or contributed to these practices and the resulting housing patterns and population shifts; and (3) that although the state action need not be the sole cause of these effects, it must have had a significant rather than a *de minimis* effect. Finally, an interdistrict remedy may be appropriate even though the state discriminatory housing practices have ceased if it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and, in turn, on school attendance patterns) within the Indianapolis metropolitan area.

Id.

170. Note that the *Indianapolis* test requires plaintiffs to prove a housing case in which discriminatory practices of government officials caused significant segregative housing effects with a continuing effect in school patterns. *Id.* at 1109. The test did not address standing problems presented for school plaintiffs or school board defendants presenting a counterclaim. *See* notes 172-79 and accompanying text *infra*.

171. 637 F.2d at 1114. *See* note 202 and accompanying text *infra*.

172. *See* notes 107-08, 141-42 and accompanying text *supra*.

173. Defendants may allege that plaintiffs do not meet standing requirements on constitutional or prudential grounds. Under Warth v. Seldin (Penfield), 422 U.S. 490, 498-508 (1978), plaintiffs must have suffered some threatened or actual injury resulting from the allegedly illegal action, giving the plaintiff a "personal stake in the outcome." The asserted injury must be the consequence of defendant's action. Finally, the prospective relief sought must be capable of removing the harm. *Id. Accord*,

school plaintiffs lack standing for failure to allege a causal link between the violation and remedy.[174] Plaintiffs have three alternative responses to the housing actor's contention that they lack standing. First, if plaintiffs can allege specific housing harm, such as that presented by occupants of segregated public housing,[175] they can obtain standing on housing grounds.[176] Once the housing actors are parties in the case, plaintiffs can then allege the school harm as well. Secondly, plaintiffs may argue that an injunction may reduce discriminatory housing impacts upon the schools.[177] Therefore, a remedy is available for the school harm caused by the housing actors. Finally, plaintiffs may allege that absent the opportunity to prove constitutional violations by school officials, their segregative school effects would remain without a remedy. Traditional equitable doctrine provides that parties harmed deserve the opportunity to seek a remedy.[178] Plaintiffs' successful presentation of any of these theories

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School Dist. of Kansas City v. Missouri, 460 F. Supp. 421, 437 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979). Defendants may allege either that they have no responsibility for public schools or that a housing remedy would not redress plaintiff's school harm. *See* Note, *Housing Remedies in School Desegregation Cases: The View From* Indianapolis, 12 HARV. C.R.-C.L. L. REV. 649, 687 ("orders remedying discrimination in housing will not automatically lead to school integration"). Defendants may also allege that plaintiffs are barred under prudential limitations for stating a "generalized grievance" shared in substantially equal measure by all or a large class of citizens." 422 U.S. at 499. *See generally* note 107 *supra*. *Contra*, School Dist. of Kansas City v. Missouri, 460 F. Supp. at 443-44 (plaintiff school children granted standing to challenge HUD actions allegedly causing school segregation, even though plaintiffs not beneficiaries of HUD programs). *See* note 177 *infra*.

174. Defendants alleged a similar claim in Hope, Inc. v. County of DuPage, (1981) Equal Opp. in Housing (P-H) ¶ 15,404 at 15,998.330 (N.D. Ill.). *See* note 141 and accompanying text *supra*.

175. *E.g.*, United States v. Board of School Comm'rs (Indianapolis), 506 F. Supp. 657, 664 (S.D. Ind. 1979) (nearly 5,000 black students represented in class action resided in public housing), *aff'd in part, rev'd in part*, 637 F.2d 1101, 1109-10 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980). *See* note 132 and accompanying text *supra*.

176. 637 F.2d at 1104.

177. *Id.* at 1109. In School Dist. of Kansas City v. Missouri, 460 F. Supp. at 443-44, defendant HUD alleged that plaintiffs, including the school board and school children represented by their parents, *id.* at 427, lacked standing to challenge actions of HUD on grounds that plaintiffs were not beneficiaries of HUD programs allegedly administered in a discriminatory manner. The court dismissed defendant's claim, stating that plaintiff's constitutional rights are not dependent on whether they are direct recipients of the housing. It was sufficient that plaintiffs alleged that HUD and other federal agency practices were conducted in such a discriminatory manner as to cause school segregation. *Id.* at 444.

178. Sullivan v. Little Hunting Park, 396 U.S. 229, 238-39 (1969) (where plaintiffs'

should prevent housing officials from successfully using the shield of standing to avoid liability. Once housing actors are parties in the case, plaintiffs may reach non-liable school districts to participate in the remedy.[179]

Assuming the court allows plaintiffs seeking a school remedy to bring housing defendants into the suit, plaintiffs may have to satisfy the four part test of *Indianapolis* to establish a housing defendant's liability.[180] It requires that discriminatory housing practices must have caused segregated housing patterns. Furthermore, direct or indirect state action must have initiated, supported, or contributed to these practices. If state action was not the sole cause of housing segregation, it must have had a significant effect. Even if the housing practices have ceased, their continuing segregative effect on housing patterns and, in turn, on school attendance patterns may warrant an interdistrict remedy.[181]

The test thus presents three critical problems that courts must resolve before fashioning a school remedy based upon a housing actions discriminatory action. First, how can state housing officials cause segregated schools? Secondly, what is the standard for determining an act was discriminatory? Finally, when are the effects significant enough to warrant a school remedy?

Evans v. Buchanan (Wilmington)[182] illustrates several examples of housing acts found to cause segregative school effects that justified an interdistrict remedy. The court determined that two decades of demographic changes had caused the net outmigration of white residents and the net increase of minority residents in the City of Wilmington, resulting in segregated neighborhood schools.[183] Government poli-

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rights violated under 42 U.S.C. § 1982 and statute failed to provide an explicit method of enforcement or designate damages, the existence of a statutory right implies the existence of all necessary and proper remedies); Jones v. Alfred H. Mayer Co. (St. Louis County), 392 U.S. 409, 414-15 (1968) (42 U.S.C. § 1982 enforceable despite omission of express means of enforcement); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836, 858, & n.23 (N.D. Ill. 1979) (consent decree approving city's annexation of land to remedy effects of exclusionary zoning when no land available within present city boundaries within equitable powers of the court), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

179. 637 F.2d at 1114. *See* note 202 and accompanying text *infra*.

180. *Id.* at 1109.

181. *Id.*

182. 393 F. Supp. at 432-38.

183. *Id.* at 434.

cies, not just residential choice and economics, had contributed to demographic changes in several ways.[184] The Federal Housing Agency and the Delaware Real Estate Commission promoted and encouraged racial steering.[185] State and local officials had enforced racially restrictive convenants.[186] Additionally, the public housing authority had concentrated virtually all public housing units within the City of Wilmington.[187] Thus government acts had racially identified neighborhoods throughout the metropolitan area, which in turn racially identified the schools.[188]

In addition to proving that defendants' acts caused school effects, plaintiffs must prove the acts were "discriminatory."[189] While school cases have required that the acts be intentional,[190] housing cases have primarily relied on loose statutory standards requiring less than intent.[191] Because a statutory housing violation would not satisfy the equal protection standard required in school cases, courts presumably would require a finding of segregative intent before ordering a school desegregation remedy.[192] Although plaintiffs must prove in-

184. *Id.*

185. *Id.* The 1936 Federal Housing Administration Mortgage Underwriting Manual, continued in use until 1949, advocated racially homogenous neighborhoods. The Delaware Real Estate Commission, responsible for licensing realtors, encouraged racial discrimination by private parties in the sale or rental of private housing until 1968, and advocated racial steering until 1970. *Id.* at 434-35.

186. *Id.* at 434. They enforced racially restrictive convenants until 1973. *Id.*

187. *Id.* at 435. Until 1972, the housing authority constructed over 98% of 2,000 public housing units within the Wilmington city limits despite its authority to build up to five miles beyond city limits. *Id.*

188. *Id.* at 437-38. The court noted that racial imbalance in housing contributed to the racial imbalance in schools. *Id.* at 437, *citing* Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 20-21 (1971). Although suburban districts converted to unitary systems after *Brown I*, government authorities continued to condone discrimination in the private housing market and to provide segregated public housing within Wilmington, thus causing corresponding continuing segregative effects in the schools. 393 F. Supp. at 437-38.

189. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1109. *See* note 169 *supra*. The Circuit Court noted that "discriminatory" meant the intent requirement applied. *Id.* at 1109. Merger of housing and school requirements, however, requires an analysis of the appropriate standard.

190. *See* note 28 and accompanying text *supra*.

191. *See* notes 105, 109 and accompanying text *supra*.

192. 637 F.2d at 1109. The Seventh Circuit derived its test from Justice Stewart's concurrence in *Milliken*, 418 U.S. at 755, that expanded on the majority's test for interdistrict school liability. *Id.* at 745. The majority provided that "racially discriminatory acts of the state or local school districts" could justify an interdistrict remedy.

tent to racially discriminate in housing, courts do not appear to require that government housing actors must have intended the school effects.[193] This accords with the language of *Milliken*[194] and *Gautreaux*,[195] which does not require that the guilty party intend all of the effects of his actions. Thus courts may remedy even unintended or continuing housing and school effects of intentional housing violations.

Once plaintiffs prove intentional acts of housing officials caused segregative effects, they must also show that the school effects were of sufficient magnitude to justify systemwide desegregation[196] or an interdistrict school remedy.[197] Absent clear standards in school cases, it is difficult to determine the number of persons who must be affected to justify a school remedy. The interdistrict cases provide limited guidance as to the meaning of "significant." For example, two courts concluded that the interdistrict effect of busing a small number of school children for discriminatory purposes was *de minimis*.[198] On

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Id. Justice Stewart applied the same language of "racially discriminatory" to the acts of housing officials that could warrant an interdistrict school remedy. *Id.* at 755. The Seventh Circuit stated that Washington v. Davis, 426 U.S. 229 (1976), had imposed objective intent standards on the finding of racially discriminatory actions within the meaning of the equal protection clause. 573 F.2d at 410-13.

Although the equal protection intent standard may be the appropriate standard to use, the court failed to consider whether the merger of school and housing tests could permit a statutory effects standard to be applied. This possible approach warrants consideration because the *Indianapolis* test focuses on the housing acts, with the school effects appearing almost incidental. 637 F.2d at 1109. The test appears to equate housing and school effects. Conceivably, however, a court may find that effects deemed "significant" in housing may not be "significant" in the schools. The *Indianapolis* court's reliance on *Milliken*, 637 F.2d at 1104-05, suggests the test would require school effects be significant as well.

193. 637 F.2d at 1109. The test permits the segregative school effects to be remedied even if the discriminatory housing acts have ceased, as long as the prior housing practices had a "continuing" segregative effect on housing and, in turn, on school patterns. *Id.*

194. 418 U.S. at 745. *See* note 54 *supra*.

195. 425 U.S. at 296 & n.12.

196. The *Indianapolis* test apparently applies only to an interdistrict desegregation remedy. 637 F.2d at 1109. However, if government housing violations can justify an interdistrict school remedy, there is no reason why such violations may not warrant a single district school remedy.

197. *Id.*

198. Milliken v. Bradley (Detroit), 418 U.S. at 749-50 ("isolated instance" of suburban school district's transfer of black high school students to Detroit black school had *de minimis* effect); Tasby v. Estes (Dallas), 572 F.2d 1010, 1015 & n.19 (5th Cir. 1978) (interdistrict transfers of eleven black children not significant enough to war-

the other hand, segregative housing of 5,000 minority residents in *Indianapolis* was "significant."[199] The threshold of significance presumably lies somewhere in between.

Thus, problems of standing, cause, intent, and quantification derived from housing and school cases carry into this hybrid model of liability. These problems further complicate the tasks of litigants and the courts. The next subsection will address the opportunity afforded by this model to gain school and housing remedies.

B. *Scope of Remedies*

School and housing cases have differed in remedies provided. In school cases, courts on occasion have accepted evidence of extradistrict effects to support school desegregation remedies beyond the intentional actor's area of control.[200] In housing cases, on the other hand, courts have restricted their remedies to the intentional housing violator's area of control.[201]

Consequently, when school and housing effects result from an intentional housing violation, the remedies may differ depending on whether the proven effects are within or outside the housing violator's area of control. *Indianapolis* exemplifies a case in which the housing and school effects took place within the geographical authority of the housing authority.[202] While acknowledging that it was not address-

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rant inclusion of suburban school district), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas N.A.A.C.P., 444 U.S. 437 (1980).

199. 506 F. Supp. at 664.

200. *See* notes 83-85 and accompanying text *supra*.

201. Hills v. Gautreaux (Chicago), 425 U.S. at 294 n.11. *See* notes 122-27, 134-35, 154 and accompanying text *supra*.

202. 637 F.2d at 1109, 1114. *Indianapolis* involved two separate allegations found to justify an interdistrict school remedy. In 1969, the state legislature authorized consolidation of all of Marion County into a new City of Indianapolis, titled Uni-Gov. Sixteen days prior to the Uni-Gov legislation, the legislature repealed a 1961 act that would have required school district boundaries to consolidate as well. The Uni-Gov procedures were held to cause interdistrict violations justifying a school desegregation remedy throughout the Uni-Gov area of Marion County. *Id.* at 1106-08, 1114. The second violation involved the housing authority's discriminatory siting of public housing. This action affected housing and school patterns throughout the agency's area of authority, that extended five miles beyond the old city limits. The court noted that "if this were the only constitutional violation present . . ., an appropriate remedy . . . would have to be limited to the territory within the (housing agency's) area of operation at the time the projects were built." *Id.* at 1114. This language implies that the housing violation alone could justify a school remedy.

ing the issue of whether the housing authority's violation affected schools outside of its area of control,[203] the court held that its violations justified the participation of non-liable school boards in the remedy within the authority's boundaries.[204] Theoretically, an exclusionary zoning case such as *Hope, Inc.*[205] might justify a varied set of remedies. For example, where the effects of intentional housing violations reach beyond county boundaries, courts may restrict housing remedies to the county while ordering multi-county school desegregation. Thus minority residents conceivably would be entitled either to participate in interdistrict busing or to take advantage of housing opportunities within the county.[206]

C. *Summary of the Hybrid Housing Model*

In *Indianapolis*, Justice Stewart's dictum came to fruition when the court ordered housing and school remedies in response to proven housing segregation. For purposes of analysis, the Seventh Circuit developed a test that requires a showing that discriminatory housing violations by government actors contributed to significant, continuing housing and school effects. This merger of housing and school liability still leaves many issues of standing, cause, intent, significance of effects, and the scope of remedies unresolved. The next section will address a second hybrid model derived from a pure school model that contains similar issues.

IV. School Violations Cause Housing Effects That Cause School Effects

Chief Justice Burger noted that school board acts such as decisions to construct or demolish schools "may well promote segregated residential patterns which, when combined with 'neighborhood zoning' further lock the school system into separation of the races."[207] Subsequently, some courts have acknowledged the validity of a theory that intentional school acts can cause housing effects which cause fur-

203. *Id.* at 1114.

204. *Id.*

205. (1981) Equal Opp. in Housing (P-H) ¶ 15,404 (N.D. Ill.).

206. *See* notes 83-88, 145, 152, 156-57 and accompanying text *supra*.

207. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971). Justice Burger asserted that "people gravitate toward facilities. . . . [T]he location of schools may thus influence the patterns of residential development of a metropolitan area and have an important impact on composition of inner-city neighborhoods." *Id.*

ther school effects.[208] This theory logically arises from the defense asserted by school board officials in single district cases that demographic changes caused the school effects.[209] Litigants have expanded it in attempts to prove interdistrict liability justifying a school desegregation remedy.[210] To date, however, no ligitants have successfully proved the theory in an interdistrict case.[211]

As in the previous hybird model derived from the pure housing case, courts must resolve a number of problems resulting from the merger of school and housing causes of action.[212] The primary new issue in the hybrid school model centers on the causal relationship between school acts and housing effects.[213] In single district cases,

208. *See, e.g.*, Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 202-03 (1973) (earmarking schools according to racial composition may have a profound reciprocal effect on racial residential composition within a metropolitan area, thereby causing further racial concentration within the schools); Bradley v. Milliken (Detroit), 620 F.2d 1143, 1150 (6th Cir. 1980) (*de jure* school segregation contributed to segregated residential patterns and existing one race schools in Detroit; it encouraged whites to flee from racially changing neighborhoods and ultimately from the city school district); United States v. Texas Educ. Agency (Lubbock), 600 F.2d 518, 525 (5th Cir. 1979) (if housing patterns that are based on neighborhood school assignment plan are themselves the product of board's intentional acts, a constitutional infirmity exists).

209. *See* note 162 *supra* for cases where defendants raised the demographic defense unsuccessfully. *See also* Bradley v. Milliken (Detroit), 620 F.2d at 1149-50 (segregative effects of school defendants' discriminatory acts not obliterated by demographic changes those policies helped produce; further remedy can be ordered); United States v. Texas Educ. Agency (Lubbock), 600 F.2d at 527 (if intentional school acts helped establish housing patterns, schools' resegregation is a violation despite brief period of integration).

210. *See* notes 255-58 and accompanying text *infra*.

211. *See, e.g.*, Andrews v. City of Monroe, 513 F. Supp. 375, 393 (W.D. La. 1980) (court refused to qualify plaintiff's expert's testimony concerning residential effects of school segregtion since she knew nothing about the metropolitan area), *aff'd sub nom.* Taylor v. Ouachita Parish School Bd., 648 F.2d 959 (5th Cir. 1981); United States v. Board of School Comm'rs (Indianapolis), 506 F. Supp. 657, 666 (S.D. Ind. 1979) (court rejected plaintiff's sociological and psychological opinion testimony as being without foundation), *aff'd in part, rev'd in part*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied*, 449 U.S. 838 (1980).

212. See notes 167-99 and accompanying text *supra* concerning problems of intent, causation, and significance of effects.

213. *See, e.g.*, Taylor v. Ouachita Parish School Bd., 648 F.2d at 970 (court refused to admit testimony that allowing city whites to transfer to another district caused city schools and neighborhoods to become blacker); Bell v. Board of Educ. (Akron), 491 F. Supp. 916, 940 (N.D. Ohio 1980) (perception of school as black causes whites not to settle in residential area served by that school; they will also avoid elementary attendance zones that serve black secondary school); Evans v. Buchanan (Wilmington), 393 F. Supp. 428, 435-36 (D. Del.) (discriminatory optional transfer

school defendants may have to disprove that causal relationship.[214] In multidistrict cases, plaintiffs must prove causality[215] and significant interdistrict effects.[216]

The principal purpose of this liability model is to obtain systemwide or interdistrict school desegregation remedies,[217] although it may also justify housing remedies.[218] The following subsection will analyze the problems unique to this model, illustrate the application of this model in single district and interdistrict cases, and discuss the scope of school remedies that plaintiffs may obtain.

A. *Problems Encountered in the Hybrid School Model*

In this model, courts may encounter most of the same problems found in the hybrid housing model that result from the merger of school and housing causes of action.[219] Only standing presents no difficulty because plaintiffs are alleging that school defendants intentionally segregated schools, causing demographic shifts that produced more extensive school harm.[220] Defendants are clearly capable of remedying such school effects. The issue of intent is the same as that presented in the pure school[221] and hybrid housing

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policy allowed whites to transfer elsewhere, leaving some neighborhood schools disproportionately blacker; this may have encouraged white families to move out and discouraged white families from moving in, thus affecting racial balance in housing and schools in city suburbs), *aff'd mem.*, 423 U.S. 963 (1975).

214. *See* United States v. Texas Educ. Agency (Lubbock), 600 F.2d at 527 (district court must determine how much incremental segregative effect school board's intentional acts had on residential distribution of present school population; board continues to bear burden to show its intentional acts did not contribute to current segregation of certain schools). *See* notes 249-54 and accompanying test *infra*.

215. *See* notes 255-58 and accompanying text *infra*.

216. *See* Milliken v. Bradley (Detroit), 418 U.S. at 744-45 (must be shown that discriminatory acts of one or more districts have been substantial cause of interdistrict segregation).

217. Examples of cases where plaintiffs sought interdistrict school remedies based upon the hybrid school theory are United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111, and Andrews v. City of Monroe, 513 F. Supp. at 392-93. For a single-district case, see United States v. Texas Educ. Agency (Lubbock), 600 F.2d at 520.

218. *See, e.g.*, note 152 and accompanying text *supra*.

219. *See* notes 167-99 and accompanying text *supra*.

220. Since school officials are alleged to have caused the harm and can provide the remedy, *Warth* standing requirements are satisfied. *See* discussion of standing in notes 107-08, 141-42 and accompanying text *supra*.

221. *See* notes 28-35 and accompanying text *supra*.

models.[222] This model may present unique burdens of showing causation and quantifying effects.

Theories of how school segregation causes residential segregation are largely conjectural, based upon intuitive concepts that some scholars and courts have attacked.[223] Causal explorations originate with the concept of "tipping". Some courts have observed that white families will tolerate only a certain level of racial mixing.[224] "White

222. *See* notes 189-95 and accompanying text *supra*.

223. *See* Austin Indep. School Dist. v. United States, 429 U.S. 990, 994 (1976) *vacating and remanding* 532 F.2d 380 (5th Cir. 1976)) (Powell, J., concurring) (discrimination in housing cannot be attributed to school authorities); note 159 *supra*. *See also* United States v. Board of School Comm'rs (Indianapolis), 506 F. Supp. at 667 (cannot demonstrate that segregative acts by one board within its own boundaries have any significant effect on school or residential population in adjoining districts; rather it appears that school desegregation causes white flight); Wolf, *supra* note 1, at 66 (only way in which racial composition of a school could have a corresponding effect upon racial composition of a neighborhood would be through an indirect causal relationship; evidence is flimsy and unconvincing). *But see* Keyes v. School Dist. No. 1 (Denver), 413 U.S. at 202-03 (common sense dictates that racially inspired school board actions have an impact beyond the particular schools acted upon; a reciprocal effect on racial composition of residential neighborhoods within metropolitan areas may exist); Taeuber, *supra* note 1, at 843. Professor Taeuber posits a "signalling" theory of causation. When school board actions identify schools as black or white, people make housing choices accordingly. The public receives a signal that school authorities expect changing schools to become all-black. Whites tend to move away from or avoid such schools. If schools could not be identified by race or black schools were not considered inferior, then neighborhood school zones would have little effect on real estate steering or residential choices. *Id.*

224. *See, e.g.*, Business Ass'n of University City v. Landrieu, 660 F.2d 867, 869, 875-76 (3d Cir. 1981) (HUD's finding that housing project had no significant impact on minority concentration held not arbitrary or capricious); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133, 1137 (2d Cir. 1973) (court must consider housing authority's defense that it took challenged actions to prevent neighborhood tipping); Shannon v. United States Dep't of H.U.D. (Philadelphia), 436 F.2d 809, 821-22 (3d Cir. 1970) (court required HUD to reconsider impact of subsidized housing project on racial balance of neighborhood); King v. Harris (Staten Island), 464 F. Supp. 827, 837, 842-43 (E.D.N.Y.) (HUD has an affirmative duty to promote racial integration through housing; therefore, proposed housing project enjoined because it would racially tip an integrated community), *aff'd mem. sub nom.* King v. Faymor Dev. Co., 614 F.2d 1288 (2d Cir. 1979), *rev'd and remanded on other grounds*, 446 U.S. 905 (1980); Trinity Episcopal School Corp. v. Romney (Manhattan), 387 F. Supp. 1044, 1063-75 (S.D.N.Y. 1974) (plaintiffs failed to delineate critical ghetto area correctly or prove that construction of public housing would tip the area), *aff'd in part, rev'd in part, and remanded*, 523 F.2d 88 (2d Cir. 1975); Coffey v. Romney (Greensboro), 1971-75 Equal Opportunity in Housing (P-H) ¶ 13,588 (M.D.N.C. 1972) (HUD's finding that subsidized housing project would not racially tip neighborhood not arbitrary and capricious).

In *Trinity Episcopal School Corp.*, the court defined the tipping point as "that point

flight" occurs when percentages of minority families exceed that level.[225] "Tipping" causes "racial identification."[226] Depending upon their racial makeup, neighborhoods become identified as "white" or "black." This identification influences private residential choices in addition to government and private agency practices.[227] Federal courts have held government agencies liable for "tipping" neighborhoods. For example, a court may find a agency liable if it assigns minority tenants[228] or constructs minority housing[229] in racially integrated neighborhoods already at the "tipping point."

Federal courts carried "tipping" and "racial identification" an additional step, stating that racial identification of schools directly affects perceptions of the surrounding neighborhoods.[230] Thus school boards may racially identify schools and neighborhoods, affecting

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at which a set of conditions has been created that will lead to the rapid flight of an existing majority class under circumstances of instability which result in the deterioration of the neighborhood environment." 387 F. Supp. 1065-66. The court established three criteria to determine whether the area had reached the tipping point: "(1) gross numbers of minority group families likely to adversely affect area conditions; (2) . . . quality of community services and facilities; and (3) . . . attitudes of majority group residents who might be persuaded by their subjective reactions . . .". *Id.* at 1066. *See generally* HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 111, at 588-92; Taeuber, *Social and Demographic Trends: Focus on Race*, in THE FUTURE OF METROPOLIS: PEOPLE, JOBS, INCOME (E. Ginzberg ed. 1975); Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 260 (1974).

225. Trinity Episcopal School Corp. v. Romney (Manhattan), 387 F. Supp. at 1065-66.

226. *Cf.* Coffey v. Romney (Greensboro), ¶ 13,588 at 13,870-71 (expert noted that blacks and whites seeking housing and real estate brokers would perceive the neighborhood as changing from predominantly white to predominantly black, affecting their housing choices; but court refused to accept conclusions with respect to specific project due to expert's lack of familiarity with the community). *See generally* HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 111, at 589-90.

227. *See* note 223 *supra*.

228. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133, 1137 (2d Cir. 1973) (public housing authority satisfied its duty to integrate by refusal to assign minority tenants to project in neighborhood at tipping point).

229. King v. Harris (Staten Island), 464 F. Supp. at 837, 842-43 (housing project enjoined because it would racially tip integrated community).

230. *See, e.g.*, Adams v. United States (St. Louis), 620 F.2d 1277, 1291 (8th Cir. 1980) (public perception of the racial identity of a school can be, and often is, a powerful factor shaping the residential patterns of a neighborhood); Evans v. Buchanan (Wilmington), 393 F. Supp. at 437 (demographer testified that specific school zone is part of the identification of neighborhoods that the general public and real estate industry use to characterize housing).

residential choices and even causing white flight.[231] As more whites flee to primarily white neighborhoods and realtors steer more families into racially identified neighborhoods, the effects spread to fringe neighborhoods, affecting more housing and schools.[232] Thus, original intentional school segregation may have a perhaps unintended ripple effect on neighborhoods and schools.[233]

School plaintiffs may find it extremely difficult to demonstrate a significant causal relationship between residential choice and school segregation.[234] It is not an easy task to statistically determine why families chose to reside in certain neighborhoods. Proving why families chose *not* to reside in certain neighborhoods, however, poses an even more difficult problem. If hostility to racially identified neighborhoods or schools was the reason for residential choice, many families presumably would not admit it. Some families may have been totally unaware that they were victims of racial steering. Further, housing opportunities may have dictated residential choices. As indicated in *Evans*, some government programs encouraged racial steering and provided low interest loans to support the white exodus from the inner cities.[235] Other government programs selected sites for low income minority housing in racially impacted areas.[236] Thus the un-

231. *See, e.g.*, Bradley v. Milliken (Detroit), 620 F.2d at 1149 (discriminatory policies of school defendants helped to drive white population from Detroit school district and to contain black students in core of city); Evans v. Buchanan (Wilmington), 393 F. Supp. at 435-36 (discriminatory transfer option increasing minority concentrations in neighborhood schools may have encouraged white families to move out and discouraged whites from moving in).

232. *See generally* Orfield, *supra* note 1, at 22. Dr. Orfield explained there is a common expectation that a neighborhood beginning substantial integration will inevitably become a ghetto. Consequently, realtors show homes to black homebuyers in such areas, but steer white homebuyers elsewhere, speeding up the process of change. Neighborhood school policy augments this transition and helps to make the expectation a self-fulfilling prophecy. *Id.*

233. *See, e.g.*, United States v. Texas Educ. Agency (Lubbock), 600 F.2d at 529 (if board's intentional acts inadvertently contributed, through housing effects, to segregation of schools surrounding old *de jure* minority schools, a constitutional violation exists).

234. In *Lubbock*, the Fifth Circuit instructed the district court to determine how much "incremental segregative effect" the school board's intentional discriminatory acts had on the residential distribution of the present school population, compared to what it would have been but for those acts. 600 F.2d at 527.

235. 393 F. Supp. at 434 (FHA mortgage underwriting manual, in use until 1949, advocated racially homogeneous neighborhoods; realtor code of ethnics advocating racial discrimination not eliminated from state publication until 1970).

236. *Id.* at 435.

derlying discriminatory causes of private housing choices may not be readily apparent even to the families themselves.

The impact of segregated schools on residential choices is even more difficult to quantify. Professor Karl Taueber has conducted studies that demonstrate a high correlation between segregated schools and segregated housing.[237] He utilized general statistical findings to assert that segregated schools have a "signalling" effect that racially identifies neighborhoods, causing further school segregation.[238] Yet several courts have rejected expert testimony based on this theory without a sufficient showing of concrete local statistics.[239] Presumably, courts would require plaintiffs to provide the following evidence to prove causality: first, plaintiffs must present evidence

237. K. TAEUBER & A. TAEUBER, NEGROES IN CITIES 29, 34 (1965) (index of dissimilarity measures the degree of residential segregation in major cities). *See also* Taeuber, *supra* note 1, at 834.

238. Taeuber, *supra* note 1, at 843. *See* note 223 *supra*.

239. In Taylor v. Ouachita Parish School Bd., 648 F.2d at 970 (affirming Andrews v. City of Monroe, 513 F. Supp. 375 (W.D. La. 1980)), the government's expert sought to show that where city whites were allowed to transfer to another district, minority concentrations in city schools and neighborhoods increased. *Id.* The district court, however, refused to allow the expert's testimony since she knew nothing about the metropolitan area. She had spent only one day in the area. 513 F. Supp. at 393. The Fifth Circuit asserted such testimony would have been irrelevant since the interdistrict transfer was not, in its view, an interdistrict violation. Had it been, the court acknowledged that testimony about the transfer options' effects on residential patterns would be important. 648 F.2d at 971 & n.13.

In *Indianapolis*, the district court viewed plaintiffs' theory that city school acts caused housing effects with further interdistrict school effects as illogical and wrong. The court rejected plaintiffs' sociological and psychological opinion testimony since it did not relate to the statistical evidence. Even assuming that many whites do not want their children to go to school with blacks, the court reasoned that segregated city schools would more likely keep whites from fleeing, since many whites could continue to reside near all-white schools. Conversely, the court pointed to statistics that showed the threat of desegregation stimulated white flight from the city. Additionally, the later threat of county-wide desegregation appeared to contribute to white flight to outer, unaffected suburbs. 506 F. Supp. at 666-67.

In Bell v. Board of Educ. (Akron), 491 F. Supp. at 940, plaintiffs also failed to persuade the court to accept the signalling theory. *See* note 223 *supra*. The court's expert, Dr. Taeuber, gave his opinion as a sociologist and demographer that schools are an important factor in private housing decisions. He did not, however, detail any concrete facts in support. Another expert presented a study of West Akron residents that showed they were thinking about moving away or taking children out of public schools because of dissatisfaction with area schools. The court concluded there was no evidence to show people actually moved because of the schools. Another expert testified that schools are only a marginal factor in housing decisions. Following the third opinion, the court found that plaintiffs did not establish their theory. *Id.*

that intentional school board acts caused segregation in the schools. Second, plaintiffs must quantify their segregative effects within the schools. Third, plaintiffs must demonstrate and quantify residential population shifts during the same periods. Fourth, plaintiffs must demonstrate that the distribution of the black residential population did not generally conform to their expected distribution by income and household characteristics.[240] This showing would raise the question of why blacks were unevenly distributed. Finally, plaintiffs must demonstrate a high statistical correlation between segregation in the schools and residential segregation.[241] This will strongly support the case that "but for" discriminatory school acts, segregated housing and, in turn, further segregated schools would not have occurred.

The fourth step poses the greatest problem. However, a study presented in *Parma* provides a guide for such an analysis. In *Parma*, defendants presented non-discriminatory rationales for segregated residential patterns. They alleged that blacks, like other ethnic groups, preferred to live together,[242] moving along "ethnic corridors" to certain communities.[243] Further, defendants stated that for economic reasons blacks could not afford housing in certain communities.[244] The judge, however, accepted statistical evidence that belied defendants assertions.[245] Contrary to the distribution of other ethnic groups, distribution of the black population in Parma and throughout the county did not generally conform to their expected distribution by income and household characteristics.[246] Despite alleged "associational preferences",[247] all ethnic groups except blacks had dispersed throughout the county.[248] Consequently, defendants failed to justify exclusionary zoning practices with segregative impacts on excluded minority plaintiffs.

The plaintiffs in *Parma* utilized the evidence to establish municipal

240. *Cf.* United States v. Parma, 494 F. Supp. at 1062-65. *See* notes 242-48 and accompanying text *infra*.

241. *See, e.g.*, K. TAEUBER & A. TAEUBER, *supra* note 237, at 29; Taeuber, *supra* note 1, at 834.

242. 494 F. Supp. at 1059-60.

243. *Id.* at 1060.

244. *Id.* at 1062-65.

245. *Id.*

246. *Id.* at 1064-65.

247. *Id.* at 1059-62.

248. *Id.* at 1062-65.

liability for housing discrimination. Conceivably, plaintiffs may employ the same method to demonstrate the causal relationship between school acts and housing and school effects. Further, it provides a means for quantifying the significance of the effect in an interdistrict case. Consequently, plaintiffs may utilize expert sociological testimony supported by concrete local statistical evidence. The next subsection will discuss how such evidence may be applied in single district and interdistrict school cases.

B. *Applications of the Model*

1. Single District Application

A recent case illustrates how this liability theory may work successfully in a single district. In *United States v. Texas Education Agency* (Lubbock),[249] the government proved intentional school board discrimination in seven schools. Based on this showing, the court applied the presumption of systemwide liability to all the segregated minority schools.[250] The district court held, however, that the board successfully rebutted the presumption as to certain minority schools. The board proved that shifting housing patterns, not produced by board acts directed at those schools, had caused their segregation.[251] The Fifth Circuit observed that the lower court's analysis failed to address whether the original segregative acts affected shifts in racial housing patterns that resegregated schools formerly integrated.[252]

249. 600 F.2d 518 (5th Cir. 1979).

250. *Id.* at 524. See notes 38-39 and accompanying text *supra* for a discussion of the *Keyes* presumption.

251. 600 F.2d at 524. Twenty-two schools had minority population exceeding 70%. *Id.* at 521. Of these, the district court held that the school board had successfully rebutted the *Keyes* presumption as to 13 schools. *Id.* at 524. The district court's analysis viewed each school as an island. *Id.* at 525. The court had only examined, first, whether the school in question had been fully integrated, and second, whether the board took any direct action to cause resegregation in that school. *Id.* at 524.

252. *Id.* at 524. The court asserted that a constitutional violation would exist if the housing patterns upon which racially neutral neighborhood zones are based were themselves the product of the board's intentional acts of discrimination. *Id.* at 525. It noted that the Supreme Court had never explicitly addressed the question of whether unintended effects of intentionally segregative acts could form the basis of a constitutional violation. The court outlined three possible effects of intentionally discriminatory acts that could be considered fourteenth amendment violations: only intended effects, only foreseeable effects, or any segregative effect. The court chose the latter, reasoning that a strict definition of intent should only apply where harsh punishment might result. School desegregation orders, however, are remedial, not punitive. The

Essentially, the court presumed that any demographic changes that caused segregation elsewhere in the district resulted from these original board acts.[253] Thus, defendants would have to prove that the demographic shifts in no way, even inadvertently, resulted from their intentional school violations. If courts adopt the *Lubbock* test, it would render the presumption of systemwide liability nearly irrebuttable.[254]

2. Interdistrict Application

Three courts[255] have acknowledged the validity of the theory that single district school segregation could cause extradistrict residential segregation with significant extradistrict school effects. In *Indianapolis*, for example, plaintiffs alleged that intentional systemwide segre-

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goal is to restore the victims of discrimination to the position they would have occupied but for the conduct. *Id.* at 527.

253. *Id.* at 527-28. The court's language can be read as setting up this presumption. It instructed the lower court to make specific findings concerning the effects, if any, of the intentional discriminatory acts on Lubbock housing patterns. The court then stated, "On remand, the school board continues to bear the burden to show its intentional segregative acts did not contribute to the current segregation of those schools." *Id. But see* Note, *The Segregative Impact of Changing Demographics Upon School Districts Subject to Court-Ordered Desegregation*, 49 GEO. WASH. L. REV. 100 (1980). The author states that the court in *Lubbock* did not apply a presumption that the school authorities were responsible for resegregation, *id.* at 119, but argues that courts should apply such a presumption. *Id.* at 102.

254. *See* Lee v. Macon County, 616 F.2d 805, 810 (5th Cir. 1980) (not until all vestiges of dual system are eradicated can demographic changes constitute legal cause for racial imbalance in schools); Tasby v. Wright (Dallas), 520 F. Supp. 683, 704 (N.D. Texas 1981) (*Keyes* presumption may be irrebuttable; demographic changes are insufficient to rebut); Symposium, *Civil Rights*, 12 TEX. TECH. L. REV. 139, 155 (1981) (school board's proof that existence of one-race school attributable to residential patterns no longer a *per se* rebuttal of *Keyes* presumption).

Where, however, plaintiffs attempt initially to use the hybrid school theory, without the aid of the *Keyes* presumption, they face a difficult burden of proof. *See, e.g.*, Bell v. Board of Educ. (Akron), 491 F. Supp. at 940 (plaintiffs failed to prove signalling theory). *See also* notes 223, 239 *supra*.

255. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111-12 (theory that intradistrict school segregation caused interdistrict housing and school effects not implausible); Andrews v. City of Monroe, 513 F. Supp. at 392 (if intentional segregative acts of local school officials helped establish the residential patterns of a metropolitan area, then the segregated status of the schools violates the Constitution); Bradley v. Milliken (Detroit), 460 F. Supp. 299, 307-08 (E.D. Mich. 1978) (record did not show that *de jure* acts in city had segregative effects beyond boundaries; had record shown that such acts created additional residential segregation which in turn created additional school segregation, court assumed that Supreme Court would have allowed interdistrict remedy), *aff'd*, 630 F.2d 1143 (6th Cir. 1980).

gation in one or more school districts reinforced the racial identification of the schools.[256] This racial identification affected perceptions of the racial character of surrounding neighborhoods, influencing private housing choices and resulting in white flight to the suburbs. Consequently, these segregative residential effects extended across school district lines with significant effects on surrounding school districts.[257] Although the court accepted the rationale presented by plaintiffs as plausible it did not disturb the lower court's conclusion that plaintiffs failed to present sufficient statistical support to warrant an interdistrict remedy.[258]

In sum, although courts have considered this chain of causation, the burden of proof is so difficult that the bearer will rarely prevail. In single district cases, where the presumption aids plaintiffs they have an excellent chance to succeed. Yet plaintiffs will not succeed in interdistrict cases unless they develop methods of proof acceptable to the courts. The next subsection will briefly discuss remedies that plaintiffs may obtain when they satisfy the evidentiary requirements of this theory of liability.

C. *Scope of Remedies*

Plaintiffs have principally sought to obtain systemwide or interdistrict school remedies through the use of this model.[259] However, under some circumstances housing remedies may be justified. In the single district case, plaintiffs need only establish a *prima facie* school case that the defendant school board intentionally segregated a meaningful portion of the school district. Where defendants fail to rebut the presumption of systemwide liability, plaintiffs will not have proved any housing violations.[260] Consequently, courts could only

256. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111.

257. *Id.*

258. *Id.* Since plaintiffs' experts did not ground their theory on any of the statistical evidence in the case, the court rejected the theory. The court thought the statistics showed that the threat of desegregation, rather than the fact of segregated city schools, increased white flight from the city. Statistics also indicated that the possibility of county-wide desegregation contributed to white flight to outer, unaffected suburbs. 506 F. Supp. at 666-67.

259. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111 (only interdistrict school remedy sought); United States v. Texas Educ. Agency (Lubbock), 600 F.2d at 520 (only single-district school remedy sought); Andrews v. City of Monroe, 512 F. Supp. at 392-93 (only interdistrict school remedy sought).

260. Defendants simply will have failed to rebut the presumption of system-wide

order a systemwide school remedy. In interdistrict cases plaintiffs will necessarily have to prove the residential and school effects of intentional school violations.[261] Such a showing will justify an interdistrict school desegregation remedy[262] and possibly a housing remedy[263]. However, the question remains whether courts may require non liable government housing actors to remedy the housing effects of private residential choices. This issue will be addressed in the next model.

D. *Summary of the Hybrid School Model*

This theory is based on intuitive notions, subject to dispute, that families consider the racial makeup of schools in formulating their residential decisions. To date, plaintiffs have failed to prove the causal relationship between intentional school segregation and subsequent residential segregation. The model best serves plaintiffs in the single district case who have already demonstrated that defendants segregated a "meaningful portion" of the school district. A court may then presume that the original school segregation contributed to residential and school segregation in the remainder of the district, shifting a nearly impossible burden onto the defendants.

V. School Violations Cause Housing Effects

Just as government housing actors rather than school boards may be primarily responsible for causing segregated schools[264], school boards rather than government housing actors may have caused segregated residential patterns. Thus, plaintiffs may be able to secure a housing remedy by proving intentional school violations.[265] To date,

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segregation caused by their intentional acts in a significant portion. *See* notes 36-40, 253-54 and accompanying text *supra*.

261. *See* notes 237-41 and accompanying text *supra*.

262. *See* notes 83-88 and accompanying text *supra*.

263. *See* notes 133, 152 and accompanying text *supra*.

264. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d 1101, 1111, 1114 (7th Cir. 1980); Evans v. Buchanan (Wilmington), 393 F. Supp. 428, 432-36 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975). *See* notes 162-206 and accompanying text *supra*.

265. This model primarily focuses on the demographic effects of school violations largely resulting from private choice or racial steering, *see* notes 230-48 and accompanying text *supra*, rather than housing acts of government officials. In the latter case, a housing count may be brought directly against the housing officials. *See* notes 89-161 and accompanying text *supra*.

however, courts have not considered the validity of this model.[266] Judicial recognition of the causal relationship between school acts and housing segregation,[267] however, makes this model conceivable. Moreover, recent use of housing remedies in school cases, both mandated[268] and voluntary,[269] may focus attention on the potential benefits of seeking a housing remedy for the effects of intentional school violations.

Although this second hybrid school model has a certain rationality, it poses the same problems as the first hybrid school model in merging school and housing liability.[270] Further, it presents a new issue of whether courts can order government housing agencies to remedy

266. Litigants appear to have presented the district court with that opportunity in Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Cross-Claim of the Board of Education of the City of St. Louis (Jan. 9, 1981). *See* notes 327-30 and accompanying text *infra*.

267. *See, e.g.*, Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 202 (1973) (discriminatory school acts may earmark schools according to their racial composition; together with student assignment and school construction such acts may have a "profound reciprocal effect on the racial composition of residential neighborhoods within the metropolitan area"); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971) (location of schools may influence patterns of residential development in a metropolitan area with an important impact on the composition of inner-city neighborhoods); United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1111-12 (court stated that expert's theory "not implausible" that *de jure* school segregation racially identified certain areas within the county, and private housing choices followed those "quasi-official" neighborhood designations); Bradley v. Milliken (Detroit), 620 F.2d 1143, 1148-50 (6th Cir. 1980) (discriminatory school policies, including school constructions and closings helped drive whites from the Detroit school district and contain blacks in an ever-expanding core of the city); United States v. Texas Educ. Agency (Lubbock), 600 F.2d 518, 525 (5th Cir. 1979) (school board's discriminatory acts may produce segregated housing patterns); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 259 (S.D. Ohio 1977) (although school officials do not control housing segregation their actions may have had a significant impact on housing patterns), *aff'd and remanded*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979); Reed v. Rhodes (Cleveland), 422 F. Supp. 708, 790 (N.D. Ohio 1976) (local school board actively contributed to segregated nature of public housing projects by agreeing to construct schools to service housing projects), *remanded for reconsideration*, 559 F.2d 1220 (6th Cir. 1977); Evans v. Buchanan (Wilmington), 393 F. Supp. at 435-36 (school board's optional attendance zones created disproportionately larger black population in transferee schools; presence of proportionately more black children in the school than in the neighborhood may have encouraged whites to move and discouraged whites from moving in).

268. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1117 (court enjoined further construction of public housing in city of Indianapolis).

269. *See* note 156 *supra* and notes 279-82 and accompanying text *infra*.

270. *See* notes 219-48 and accompanying text *supra*.

segregated residential effects that did not result from intentional government housing violations.[271] The following subsection will analyze the possible justifications for requiring government housing agencies to participate in the remedy.

A. *Justifications for Housing Remedies to School Violations*

Cases suggest two possible methods for joining non-liable housing actors in a school case, based on the residential effects of school violations. Courts may join government housing actors under principles of equity or agency. In *Milliken* and *Gautreaux* the Supreme Court noted that equitable principles, not limited to school violations, require courts to remedy the effects of constitutional violations.[272] *Indianapolis* applied that principle in the hybrid housing model, requiring non-liable school boards to remedy the school effects of intentional housing violations.[273] Thus a court could extend this equitable principle to require non-liable housing officials to remedy the housing effects of an intentional school violation.

Agency theories provide an alternative rationale for government actor participation in the remedy. In *Morrilton School District No. 32 v. United States*,[274] the Eighth Circuit held that courts could order school districts to participate in the remedy as instrumentalities of the state[275] despite their lack of liability. An earlier case, *Hart v. Community School Board of Education* (Brooklyn),[276] held that intentional school violations by one arm of the state justified the district court in forcing other arms of the state to participate in the remedy.[277] In *Evans*, the court found that state housing violations justified requir-

271. *See* notes 272-78 and accompanying text *infra*.

272. Hills v. Gautreaux (Chicago), 425 U.S. 284, 294 n.11 (1976), *citing* Milliken v. Bradley (Detroit), 418 U.S. at 744. *See* note 125 and accompanying text *supra*.

273. 637 F.2d at 1114. *See* notes 202-04 and accompanying text *supra*.

274. 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

275. *Id.* at 228-29 (although two school districts not implicated in the constitutional violation, they may be required to participate in remedying the state's violation).

276. 383 F. Supp. 699 (E.D.N.Y.), *modified*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

277. *Id.* at 752-53 (because the state is liable for carrying out the decree of the court to desegregate schools, it must use each of its arms, including the public housing authority, to effectuate the decree), *modified*, 383 F. Supp. at 775 (rigid housing decree undesirable due to the "cooperative spirit" of various governmental officials and the "complexity of the matter").

ing non-liable local school boards to participate in remedying the school effects.[278] Arguably, the same agency rationale could require state government housing agencies to remedy the effects of intentional state school violations.

Once housing actors are joined, two recent cases involving voluntary and mandatory housing remedies suggest a range of remedies that courts may consider. In *Newburg Area Council, Inc. v. Board of Education* (Louisville)[279] the court provided an incentive for neighborhoods to residentially desegregate. The decree exempted from busing students in neighborhoods that became naturally integrated.[280] Local government housing agencies voluntarily provided Section 8 existing housing units to promote suburban integration.[281] This successful effort in Louisville may encourage courts to utilize housing resources to promote desegregation of housing and schools, especially where plaintiffs prove segregated housing effects.[282] In *Indianapolis*, on the other hand, the court focused on the continuing

278. 393 F. Supp. at 438.

279. Newburg Area Council, Inc. v. Board of Educ. (Louisville), 489 F. 2d 925 (6th Cir. 1973) (reversed district court dismissal of plaintiffs' complaints), *vacated and remanded*, 418 U.S. 918 (1974) (in light of Milliken v. Bradley), *reinstated upon removal*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), *aff'd sub nom.* Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

280. 541 F.2d at 540 & n.1. The district judge exempted from busing black and white pupils attending elementary schools 12 to 40% black and secondary schools 12.5 to 35% black. *Id.* at 540 n.1. The court noted that such exemptions are common in desegregation plans and knew of no cases invalidating such exemptions. *Id. See, e.g.*, United States v. School Dist. of Omaha, 521 F.2d 530, 546-547 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Clark v. Board of Educ. (Little Rock), 465 F.2d 1044 (8th Cir. 1972), *cert. denied*, 413 U.S. 923 (1973); Tasby v. Estes (Dallas), 412 F. Supp. 1192 (N.D. Tex. 1976), *remanded*, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed sub nom.* Estes v. Metropolitan Branches of Dallas N.A.A.C.P., 444 U.S. 437 (1980).

281. *See* note 156 *supra*.

282. A Vanderbilt University policy institute recently completed a comprehensive assessment of school desegregation strategies. The group recommended the following measures to facilitate school desegregation through housing desegregation: (1) design school decrees so as to preserve integrated and racially changing neighborhoods; (2) provide busing exemption incentives to encourage segregated neighborhoods to desegregate; (3) give incentives to induce individuals to move into communities predominantly of the other race; (4) create a school district office concerned with eliminating housing discrimination; (5) persuade local housing agencies to use scattered site housing; (6) include local and federal housing agencies as parties in school desegregation cases. CENTER FOR EDUCATION AND HUMAN DEVELOPMENT POLICY INSTITUTE FOR PUBLIC POLICY STUDIES, STRATEGIES FOR EFFECTIVE DESEGREGATION: A SYNTHESIS OF FINDINGS 51-60 (1981).

harm of discriminatory public housing site selection practices. It enjoined government housing agencies from constructing family public housing where it would perpetuate segregated schooling in old Indianapolis.[283] Such a remedy also provided an incentive to construct housing where it would enhance school desegregation, by absolutely limiting public housing construction to the primarily white suburbs.

B. *Summary of the Second Hybrid School Model*

The fifth model elevates the causal link between school segregation and residential segregation to the level of a constitutional violation. Whereas school plaintiffs in the past have sought only school remedies, successful use of housing remedies in recent school cases may redirect plaintiffs to seek housing remedies to reinforce school desegregation efforts. Thus, when school actors cause segregative housing effects, courts may remedy school and housing segregation partly through government housing programs. They may prohibit segregative housing practices, require affirmative housing remedies, and support housing incentives as alternatives to busing.

VI. Summary of the Liability Models

Plaintiffs may utilize one or more of five liability models to obtain their desired remedies in a school desegregation case. Due to the separate evolution of school and housing desegregation law, each model raises different obstacles for proving liability and provides different remedies. In each case, plaintiffs must decide whether they want school desegregation remedies, housing remedies, or both. That decision, in addition to evidence available, will determine which models that plaintiffs should use.

To obtain a school desegregation remedy, plaintiffs may utilize the pure school model, the hybrid school model, or the hybrid housing model. In the pure school model, plaintiffs must prove that either a school board or the state intentionally caused school desegregation. In the hybrid school model, segregated housing patterns play a major part: plaintiffs must prove that intentional school acts caused residential segregation, exacerbating school segregation. In the hybrid housing model, plaintiffs must prove that government housing actors, rather than school actors, intentionally caused segregated schools.

283. United States v. Board of School Comm'rs (Indianapolis), 637 F.2d at 1114.

The traditional pure school model[284] imposes stringent equal protection standards on plaintiffs. They must prove intent and quantify the effects of school board acts. In the single district case, once plaintiffs prove intentional discrimination in a meaningful portion of the district, plaintiffs are assisted by the presumption that defendants intentionally segregated the entire school district. The burden on plaintiffs is greater in an interdistrict case, because they often must prove the effects of defendants' intentional violations are substantial enough to warrant intruding on non-liable school boards. The gains, however, are also great because courts generally order broad, intrusive remedies once they find defendants liable.

Plaintiffs' choice of the hybrid school model[285] to obtain a school remedy may depend on whether they seek a single district or interdistrict remedy. Under the *Lubbock* decision, plaintiffs are aided by the presumption of systemwide liability. Once they prove that defendant school boards intentionally segregated a meaningful portion of the school district, the court will shift an almost impossible burden on defendants to disprove the causal links between school acts, their housing effects, and their ultimate school effects. To obtain an interdistrict remedy, on the other hand, courts require that plaintiffs prove those causal links. Plaintiffs must provide extremely strong statistical evidence of the causal relationships to convince courts it should provide an interdistrict remedy.

If plaintiffs have a weak case against school officials, they may have to rely on the hybrid housing model,[286] developing a case against government housing entities to obtain a school desegregation remedy. This is a difficult task for several reasons. First, plaintiffs can not rely on the school effects of segregated housing patterns; rather, they must identify a government housing actor that intentionally discriminated. Second, because courts are traditionally hesitant to provide more than site-specific relief for discriminatory housing acts, plaintiffs may have to prove a pattern and practice of discrimination justifying the more intrusive relief sought in school cases. Third, plaintiffs must prove that those housing practices causes quantifiably significant school effects. Thus courts may impose even greater obstacles to proving liability justifying school remedies as plaintiffs stray further from the pure school case. Yet plaintiffs may

284. *See* notes 18-88 and accompanying text *supra*.

285. *See* notes 207-63 and accompanying text *supra*.

286. *See* notes 162-206 and accompanying text *supra*.

have to meet those burdens if they lack a strong case against school officials.

To obtain a housing remedy, plaintiffs may utilize the pure housing model or the second hybrid school model. In the pure housing model, plaintiffs must prove that housing actors either intentionally caused residential segregation or they caused segregative housing effects without sufficient justification. When plaintiffs lack a case against a government housing actor, they could argue the second hybrid school model. Under that model, plaintiffs must prove that school officials' segregative acts caused residential segregation.

Plaintiffs using the pure housing model[287] must usually argue their case under the Fair Housing Act or Section 1982 due to the easier liability standards of the statutes. The easier standards, however, traditionally afford only site-specific relief. Plaintiffs in a school case, seeking comprehensive housing remedies to reinforce school desegregation efforts, may find site-specific relief inadequate. Consequently, they will have to satisfy more stringent equal protection standards that often include standing problems. Alternatively, they may have to prove a pattern and practice of discrimination warranting more intrusive remedies. By satisfying those greater requirements, however, plaintiffs can take advantage of the broad metropolitan-wide remedies within the authority of housing actors that *Gautreaux* provides.

If plaintiffs want to obtain housing remedies but cannot prove liability against government housing officials, they may use the second hybrid model to present a case against school officials.[288] However, plaintiffs have the difficult task of proving that school acts caused housing effects. This requires more than sociological theory; rather, plaintiffs must present a statistically strong case. Further, plaintiffs will have to identify a government housing actor capable of remedying school officials' discriminatory housing effects. As housing remedies increase in importance within school desegregation cases, more plaintiffs may assume these burdens of proof.

Finally, plaintiffs may choose to seek dual school and housing remedies in a school desegregation case. This may be accomplished by mixing any of the five liability models, depending upon the nature of the evidence available. Whenever plaintiffs utilize the hybrid models

287. *See* notes 89-161 and accompanying text *supra*.

288. *See* notes 264-83 and accompanying text *supra*.

of liability, their evidentiary burden will be more severe. The next section will apply the five models to the factual allegations of a metropolitan school desegregation case in St. Louis.

APPLICATION OF THE LIABILITY MODELS TO *LIDDELL V. BOARD OF EDUCATION*

The five liability models provide a conceptual framework for determining liability and projecting the potential scope of remedies. *Liddell v. Board of Education* (St. Louis)[289] furnishes an opportunity to apply the models to a metropolitan school desegregation case. The *Liddell* complaints[290] appear to represent all five models. Because the case has not reached the stage of an interdistrict liability hearing, the analysis must be confined to the complaints.

Consideration of *Liddell* is also important because it adds a new dimension to the merger of school and housing case law. While *Liddell* was still a single district school case, the district court ordered the parties to recommend plans for affirmative housing activities that would promote interdistrict school desegregation.[291] Their compliance, though minimal, may have forestalled complainants' efforts to join government housing officials as defendants, thereby weakening complainants' case for an interdistrict remedy.[292]

The following subsections will present the facts of the *Liddell* case, apply the five liability models to the interdistrict complaints, analyze the housing proposals, and discuss the impact of the judge's refusal to join certain housing entities on complainants' case.

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289. 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd and remanded sub nom.* Adams v. United States, 620 F.2d 1277 (8th Cir.), 491 F. Supp. 351 (E.D. Mo.), *cert. denied*, 449 U.S. 826, 491 F. Supp. 351 (1980), *aff'd*, No. 80-1458, slip op. (8th Cir. Feb. 13, 1981), *cert. denied*, 50 U.S. L.W. 3447 (U.S. Dec. 1, 1981).

290. Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Motion of the Board for Leave to Amend Its Answer to Add a Cross Claim (Jan. 9, 1981) [hereinafter Board Complaint]; Caldwell Plaintiffs-Intervenors' Motion for Leave to Add Additional Parties Defendant and to File Amended, Supplemental and Cross Complaint (Jan. 16, 1981) [hereinafter Caldwell Complaint].

291. 491 F. Supp. at 354. The order and the resulting proposals represent the first major effort to develop a comprehensive remedy relating school and housing plans. Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), The Housing Issues in the St. Louis Case (April 21, 1981) (court expert's report to Judge William L. Hungate) [hereinafter Housing Issues].

292. See note 350 and accompanying text *infra*.

I. *LIDDELL V. BOARD OF EDUCATION*

The metropolitan St. Louis area reflects segregated residential and school patterns.[293] The St. Louis City School District is coterminous with the City of St. Louis.[294] Three counties in the metropolitan area, including St. Louis County, contain over forty school districts.[295] Prior to *Brown v. Board of Education*,[296] state law required segregation of the schools by race. In response to *Brown*, the St. Louis School Board adopted a neighborhood school plan.[297] Since that time, the exodus of white families from the City of St. Louis and its schools has caused the racial composition of the schools to shift from a sixty-five percent white majority to a seventy-six percent black majority in 1979-80.[298]

In 1972, black school children and their parents brought suit against the City of St. Louis Board of Education.[299] The number of parties grew. Plaintiffs included: the N.A.A.C.P., a white parent's group, the United States, and the City of St. Louis.[300] Defendants included: the State of Missouri, the Commissioner of Education, and the State Board of Education.[301]

The original suit was a pure school case in which plaintiffs alleged that defendants failed to fulfill their affirmative duty to desegregate

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293. P. Fischer, Racial Patterns in Housing and Schools: A Report on St. Louis, 4, 5 (July 17, 1980). One researcher concluded that racial concentrations intensified within the city and northeastern St. Louis County in the last decade. Blacks made up approximately 46% of the city by 1980. The entire north side is predominantly black. Projected census figures indicate that the "white flight" which reduced St. Louis' white population by half over the past twenty years, has now been joined by "black flight." Blacks have been moving into St. Louis County in a process of ghetto spillover and expansion. They now constitute 15% of the county population. *Id.*

294. The City of St. Louis is also a county, separate and distinct from St. Louis County.

295. *See* Board Complaint, *supra* note 290, at 2-3.

296. 347 U.S. 483 (1954).

297. Adams v. United States (St. Louis), 620 F.2d at 1280.

298. Adams v. United States (St. Louis), 620 F.2d at 1285. Eighty-two percent of the black students still attend schools that were 90% or more black. Three-fourths of the schools were essentially one-race schools. *Id.*

299. 620 F.2d at 1281.

300. 469 F. Supp. at 1312.

301. *Id.* The court had earlier denied the defendant school board's motion to join 20 suburban school districts as defendants. *Id.* at 1309.

the city system after *Brown*.[302] In response, the defendants denied they had intentionally segregated the schools.[303] Further, defendants pointed to subsequent demographic shifts beyond their control as the cause of current racial imbalance in the schools.[304]

After the district judge ruled for the defendants,[305] the Eighth Circuit reversed and remanded for remedy.[306] The district court approved a school desegregation plan submitted by the school board.[307] Following the appellate court's suggestion, the judge the parties to

302. *Id.* at 1309. The court proceeded to trial on the issues of liability and remedy simultaneously. 620 F.2d at 1283.

303. 620 F.2d at 1283.

304. *See* R. PATTON, RESOLVING THE DESEGREGATION ISSUE IN THE ST. LOUIS PUBLIC SCHOOLS, PART II, at 12 (1979) (school board presented expert testimony to show that federal, state, and local housing policies, and private real estate practices caused the racial segregation of the schools).

305. 469 F. Supp. at 1360. The district court held the board's adoption of a neutral neighborhood school plan effectively achieved a unitary system. He noted that after St. Louis converted to a unitary school system, dramatic demographic changes occurred. They involved a massive migration of whites from the city and an equally massive intra-city migration of blacks. State laws and policies mandated housing segregation prior to 1954. After 1954, discriminatory housing, urban renewal, and land acquisition policies of the federal government contributed to these population shifts. Private discriminatory policies such as redlining and separate newspaper listings for "colored" housing were also instrumental. *Id.* at 1319, 1323-24. The judge concluded that the interaction of the neighborhood school policy with residential segregation was the primary cause of racial imbalance and resegregation in the schools. He viewed this as unforeseeable and beyond the control of the board. *Id.* at 1362.

306. 620 F.2d at 1277. The Eighth Circuit held that the board's neighborhood school plan did not meet its duty to dismantle the dual system. The court pointed out that most schools in north St. Louis were black in 1954 and remained so in 1980. The same was true of white south St. Louis schools. *Id.* at 1291. The record indicated that, without sacrificing the neighborhood concept, the board could have drawn boundaries that would have provided more desegregation. *Id.* at 1285 n.11. Instead, the board's steps, taken to avoid conflict, ensured that no significant desegregation would occur. *Id.* at 1284 n.8. It drew school attendance zones to relocate the smallest possible number of students. Whenever possible, the board ensured that school staffs retained their present assignments. "Preservation of the status quo, obviously meant preservation of a segregated system." *Id.* at 1287. Furthermore, numerous board policies after 1956 preserved segregation: intact busing of whole classes, school site selection, permissive transfers, and faculty assignments. *Id.* at 1288. Having found the board liable for perpetuating school segregation, the court turned to the question of the appropriate remedy. It issued guidelines to be followed, including a cooperative program exchanging students with suburban school districts and exemption from busing for naturally integrated neighborhoods. *Id.* at 1296.

307. 491 F. Supp. at 357. The plan contained several components. Among them were clustering of schools, busing, magnet schools, faculty integration, and remedial and enrichment programs for the many schools remaining all-black. *Id.* The court

propose voluntary interdistrict school and housing remedies. He required party defendants and the United States to develop a voluntary interdistrict pupil exchange with suburban school districts.[308] Additionally, the judge ordered parties to suggest plans to insure that federally-assisted housing programs throughout the metropolitan area would facilitate school desegregation.[309] Finally, the desegregation plan exempted from busing those neighborhoods that achieved certain levels of integration.[310] Thus the judge approved incentives for housing desegregation within the city while seeking voluntary metropolitan remedies.

In the following year, plaintiffs and the defendant St. Louis Board of Education petitioned to expand *Liddell* into a metropolitan-wide school desegregation case, seeking to join numerous suburban school districts, government housing actors, and other government units as defendants.[311] To date, the court has joined seventeen suburban school districts, the state of Missouri, and the St. Louis County Government as defendants,[312] staying the motion as to city, county, and state housing authorities, in addition to suburban districts voluntarily accepting black city students.[313] The following subsection will re-

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also found the state liable for failing to dismantle the dual system, and ordered it to pay one-half the desegregation cost. *Id.* at 353.

308. *Id.* at 354. He also ordered development of a suggested plan of interdistrict school desegregation necessary to eradicate remaining vestiges of governmental school segregation in St. Louis city and county. *Id.*

309. *Id.* at 354.

310. *See* Housing Issues, *supra* note 291, at 6. The plan gave busing exemptions in the first year to two neighborhoods that had 30 to 50% black enrollment and also to one majority black school in a stable integrated neighborhood. New exemptions can be granted to predominantly white neighborhoods that are more than 25% black for at least two years as long as they are not changing too rapidly. Finally, the court will not require busing of children from any majority white neighborhood school where the all white neighborhood has accepted enough subsidized housing to produce a 20% black enrollment. *Id.*

311. *See* Board Complaint, *supra* note 290, at 1-3, and Caldwell Complaint, *supra* note 290, at 1-3.

312. Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), No. H(337)81, Order at 5 (Aug. 24, 1981) (joining St. Louis County suburban school districts and county government officials) [hereinafter Joinder].

313. *Id.* at 3-4. The judge stayed the motion as to two outlying counties and their school districts. He issued a stay, pending an evidentiary hearing, as to the Missouri Housing Development Commission and St. Louis city and county housing and redevelopment agencies. Finally, he stayed the motion against those St. Louis County school districts that agreed to participate in his proposed voluntary interdistrict plan.

view the allegations of the interdistrict complainants in terms of the five liability models.

II. Application of the Models to Complainants' Allegations in the Interdistrict Case

In order to fully develop a case that school and housing violations justify the broadest possible remedy,[314] complainants sought to join numerous school and housing defendants. These included over forty school districts in three counties. They also included as housing defendants the City of St. Louis, St. Louis County and two other county governments, the housing authorities of St. Louis City and County, the land clearance agencies of St. Louis City and County, and the Missouri Housing Development Corporation.[315]

The complaints noted two primary sources of liability that, linked together, created and maintained racially segregated interdistrict public education before and after *Brown*. Plaintiffs alleged statutory school segregation prior to 1954, and continuous discriminatory school acts until the present.[316] Secondly, they alleged discriminatory zoning laws, racially restrictive covenants, discriminatory public housing policies, other government actions prior to 1954, and continued discriminatory housing activities since then.[317] From these two sources, plaintiffs derived patterns of liability that may be categorized under the five liability models.

Id. To date, the court has stayed motions against eight school districts that have voluntarily participated. St. Louis Post Dispatch, May 29, 1982, at 1A, col. 2.

314. The Board Complaint seeks to enjoin all defendants, including housing defendants, from further discriminatory policies. It also requests a metropolitan school remedy that would consolidate districts, establish magnet schools, provide compensatory programs, and desegregate faculties. Board Complaint, *supra* note 290, at 32. In addition, the Caldwell complaint seeks affirmative housing desegregation. Caldwell Complaint, *supra* note 290, at 21.

315. Caldwell Complaint, *supra* note 290, at 2-3; Board Complaint, *supra* note 290, at 2-3.

316. Caldwell Complaint, *supra* note 290, at 4-5; Board Complaint, *supra* note 290, at 4-5. Prior to 1954, Missouri law mandated racial segregation of schools, and authorized the interdistrict transfer of black students to ensure that all schools were segregated. The complaints allege that after 1954 the school defendants failed to discharge their constitutional duty to dismantle the dual metropolitan system. Caldwell Complaint, *supra* note 290, at 4-5; Board Complaint, *supra* note 290, at 4-5.

317. Board Complaint, *supra* note 290, at 4, 5.

A. *Pure School Case*

The complainants alleged that local school boards caused extradistrict effects through a variety of acts and omissions. Segregative acts included interdistrict transfers of minority students to designated minority schools[318] and local acceptance of white transfer students from predominantly black districts.[319] The omissions included refusals to consolidate or to enter cooperative student transfer agreements with other districts.[320]

The complaints also charged the state with direct and indirect liability for interdistrict school segregation. They charged the state with failure to dismantle dual systems after *Brown* and perpetuation of segregation through financial assistance, planning, and discriminatory policies.[321] Specifically, the state legislature had rejected integrative school consolidation proposals[322] and fiscal incentives for voluntary desegregation.[323] In addition, complainants argued the state was liable for the segregative activities of its agents, the local school boards.[324]

The school complaints thus represent a traditional set of interdistrict allegations[325] that, if proven, would justify participation of nonliable school districts where significant effects occurred.[326]

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318. Caldwell Complaint, *supra* note 290, at 13; Board Complaint, *supra* note 290, at 16.

319. Board Complaint, *supra* note 290, at 21.

320. *Id.* at 23.

321. *Id.* at 13.

322. *Id.* at 23-25. In 1967, the state legislature established a Missouri School District Reorganization Commission (Spainhower Commission). In 1968, this commission recommended division of the state into 20 regional districts. The St. Louis region would have divided the city district among four of 16 local subdistricts. The state board of education and local districts did not support the plan. The legislature considered the proposal but did not approve it. Additionally, the allegations charge the state and local school defendants with rejection of other consolidation proposals that would have had desegregative effects. *Id.* Moreover, the allegations charged the state with using its laws to prevent or hinder desegregative consolidations. Specifically, the maintenance of the St. Louis school district as a "metropolitan school district" effectively prevented its consolidation with adjoining school districts. *Id.* at 26.

323. *Id.* at 23.

324. *Id.* at 13.

325. *See* notes 67-72 and accompanying text *supra*.

326. *See* notes 62-82 and accompanying text *supra*.

B. *School Violations Cause Housing Effects*

Complainants alleged that local school officials directly and indirectly caused significant extradistrict housing effects. Some districts allegedly opposed zoning changes and construction of low to moderate income housing.[327] Further, all of the intentionally segregative school acts had racially identified schools and surrounding communities, contributing to residential segregation throughout the metropolitan area.[328] The complaints extended indirect liability to the state as well for supporting school segregation that racially identified surrounding communities.[329] By proving these allegations, complainants conceivably could obtain remedies by government housing officials even if courts did not find them liable for intentional segregation.[330]

C. *School Violations Cause Housing Effects That Cause School Effects*

Complainants stated that school officials opposed zoning changes and construction of low to moderate income housing with the intent and effect of perpetuating segregated schools.[331] These allegations, combined with the alleged residential effects of intentional school violations, reinforce complainants' case for an interdistrict school desegregation remedy.

D. *Pure Housing Case*

Complainants alleged that housing officials before and after *Brown* pursued segregative practices that restricted or displaced blacks to certain geographic areas, perpetuating residential segregation.[332] These acts included discriminatory public housing site-selection[333]

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327. Board Complaint, *supra* note 290, at 27.

328. *Id.* at 30.

329. *Id.* at 30 (state's maintenance of dual metropolitan school structure contributed to residential segregation by identifying certain geographic areas as black and others as white.).

330. *See* note 84 and accompanying text *supra*.

331. Board Complaint, *supra* note 290, at 27.

332. *Id.* at 19.

333. *Id.* The complaint alleged that prior to 1954, housing officials sited all conventional public housing in black city neighborhoods, to be occupied exclusively by black families. *Id.* Public housing officials continued those practices after 1954,

and segregative use of other subsidized housing programs.[334] The complaints charged that urban renewal had disproportionately dislocated blacks.[335] Acts of omission included failure to use subsidized housing to promote integration[336] and failure to rezone land to encourage development of low income and multi-family housing.[337] Government entities had also failed to enforce fair housing laws,[338] prohibit racial steering practices,[339] or prohibit redlining by lending institutions.[340]

If proved, the complaints would directly implicate government housing entities in residential discrimination that reinforced segregated school patterns thereby justifying extensive housing remedies as well as a school remedy.[341]

E. *Housing Violations Cause School Effects*

Complainants alleged that all the intentional housing violations helped create and perpetuate segregated schools throughout the metropolitan area.[342] In addition, certain governmental acts at the state and local level prior to *Brown* had continuing segregative effects on the schools. These included discriminatory zoning laws,[343] enforcement of restrictive covenants,[344] and other discriminatory housing policies.[345] If proved, they would justify housing[346] and school remedies[347] where the effects occurred.

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building almost all conventional public housing in or adjacent to black residential areas. Those units were almost exclusively black-occupied. *Id.* at 28.

334. *Id.* at 28.

335. *Id.* at 29. The complaint alleged that demolition of dwellings in black areas, without provision of appropriate housing for those displaced, caused the dislocation of black residents into predominantly black neighborhoods. *Id.*

336. *Id.* at 29.

337. *Id.*

338. *Id.* at 30.

339. *Id.*

340. *Id.*

341. *See* notes 155-61 and accompanying text *supra*.

342. Board Complaint, *supra* note 290, at 14.

343. *Id.* at 18.

344. *Id.*

345. *Id.* at 19.

346. *See* notes 202-06 and accompanying text *supra*.

347. *See* notes 62-82 and accompanying text *supra*.

F. *Summary of the* Liddell *Allegations*

In sum, complainants have alleged a series of violations stemming from intentionally discriminatory school and housing acts by federal, state, and local officials with continuing interdistrict school and housing effects. These comprehensive allegations, if proved, would justify broad school and housing remedies.[348] These could be obtained through the variety of approaches represented in the liability models.

III. Analysis of the Housing Proposals

When the district court ordered the state and the St. Louis School Board defendants to develop housing proposals in cooperation with HUD and the City of St. Louis Community Development Agency, only the state refused to cooperate.[349] The parties' cooperation in the proposals may have forestalled joinder of HUD, the city and the housing agencies as defendants.[350] Although their proposals include new, affirmative housing remedies, they fail to recommend the severe restrictions ordered in *Indianapolis*.

The participants proposed measures that would reduce the segregative impact of public housing on the schools, while providing some housing incentives to promote integration. HUD agreed to reject housing proposals likely to resegregate stable integrated neighborhoods exempt from housing.[351] The housing agencies also proposed to refer all public housing proposals to the school board for comment

348. *See* notes 73-82, 146-161 and accompanying text *supra*.

349. The parties filed two separate housing plans, containing generally similar proposals. *See* Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Plan Submitted Pursuant to Paragraph 12(d) of this Court's Order of May 21, 1980 (Dec. 8, 1980) [hereinafter HUD Plan]; Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), Plan submitted by the Board of Education of the City of St. Louis in conjunction with the Community Development Agency of the City of St. Louis under Paragraph 12(d) of this Court's Order of May 21, 1980, at 14 (Dec. 15, 1980) [hereinafter School Board Plan]. The state defendants chose to refrain from participation even after a reminder by the court. *Id.* at 1-2.

350. The district court stayed, pending an evidentiary hearing, the motion to join as defendants the Missouri Housing Development Commission, the Housing Authority of St. Louis, and the Land Clearance for Redevelopment Authority of St. Louis County. Joinder, *supra* note 312, at 5. The judge had also stayed the motion against those few school districts willing to participate in his voluntary metropolitan school desegregation plan. Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), No. H(336)81, Order at 1-2 (Aug. 24, 1981).

351. HUD Plan, *supra* note 349, at 7.

on their potential segregative impacts on the schools.[352] The City of St. Louis committed to giving priority to scattered-site housing proposals to further neighborhood and, consequently, school desegregation.[353] Further, HUD and the Department of Justice agreed to coordinate interagency civil rights enforcement[354] and impose sanctions on non-complying federal grant recipients.[355] HUD also promised to intensify affirmative marketing enforcement.[356] Thus the principal benefits of the proposals include increased communication between school and housing agencies and some attempts to disperse housing opportunities for low income blacks.

Although the proposed measures would give priority to housing proposals that promote school desegregation,[357] they do not incorporate the measures ordered in *Indianapolis*. There the court prohibited any further construction of family public housing other than in primarily white residential areas.[358] The *Liddell* housing proposals recommend that only a percentage of public housing and Section 8 subsidies be used to promote residential desegregation.[359] Thus, as the court's expert observed, the housing plans may reduce the risk of government housing programs damaging school integration.[360] The plans, however, guarantee little positive action.[361] Even so, if ap-

352. HUD Plan, *supra* note 349, at 4, 14. HUD promised to use such comments to rank housing proposals. *Id.* School Board Plan, *supra* note 349, at 5.

353. School Board Plan, *supra* note 349, at 35.

354. HUD Plan, *supra* note 349, at 5.

355. *Id.* at 4.

356. *Id.* at 8.

357. For example, the HUD plan would give priority ranking to housing proposals that would help neighborhoods achieve the integration level required for a busing exemption. Also, HUD promised to use § 8 subsidies to assist minority families in moving out of ghetto areas. *Id.* at 15-16.

358. United States v. Board of School Comm'rs (Indianapolis), 419 F. Supp. 180, 186 (S.D. Ind. 1975), *aff'd*, 541 F.2d 1211, 1223 (7th Cir. 1976), *vacated and remanded mem. sub nom.* Board of School Comm'rs v. Buckley, 429 U.S. 1068 (1977).

359. HUD said it would not approve proposals for assisted family housing that would place more than 50% of units in any one year in racially-impacted areas. HUD Plan *supra* note 349, at 6. Although HUD desired a net increase of minority children living outside such areas, *id.* at 7, it noted its obligation to help minority communities rehabilitate their neighborhoods. *Id.* at 3.

360. Housing Issues, *supra* note 291, at 129.

361. *Id.* at 130. Dr. Orfield, the court's expert, observed that the commitments in the plans were primarily negative or passive, although the plans did embrace important goals. The parties however, gave no firm commitment to any significant expenditure, nor any guarantee that they would construct or otherwise subsidize housing

proved by the court, these proposals would become the first affirmative housing remedy ordered in a school case.

IV. Effects of Omitting Housing Actors as Parties

By complying with the court's request to submit voluntary housing proposals, the housing participants may have delayed, at least temporarily, their inclusion as defendants in the school desegregation suit.[362] As a consequence, the only government housing actors presently joined as defendants are the state and the St. Louis County Government.[363] The absence of some of the housing defendants may weaken the claimants' case for interdistrict housing liability and reduce the possibility for interdistrict school and housing remedies. The pure school case and the two derivative school models remain virtually intact. In contrast, the housing case and the derivative allegation that housing violations caused school effects may be weakened in two ways. First, the court can not order housing remedies against

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units to increase integration. *Id.* He outlined what a potentially successful plan would entail: (1) a counseling and marketing center to inform black families about integrated housing opportunities; (2) an Areawide Housing Opportunity Plan (AHOP) designed by the regional planning commission, a state agency, or HUD itself, if necessary, to obtain additional federal funding; (3) intensified Fair Housing enforcement; (4) increased rent ceilings outside ghetto areas; (5) longer rent-up periods for new projects to aid affirmative marketing for integration; and (6) exploration of additional low-interest funding through the Government National Mortgage Association to aid private developers of subsidized rental housing. *Id.* at 131-37. Finally, he recommended further actions to promote naturally integrated neighborhoods and integrated schools without busing: a temporary freeze on federally-assisted construction or rehabilitation of housing in predominantly black school attendance areas; conditions on Community Development Block Grants requiring that each recipient support a housing desegregation order; encouragement to black families to move out of ghetto areas provided through counseling and use of the Section 8 existing program; coordinated housing and jobs counseling; and use of scattered site housing units in white south St. Louis. *Id.* at 141-146. Dr. Orfield recognized these actions would require the joining of additional defendants and additional hearings and findings of liability. *Id.* at 139.

362. *See* note 350 and accompanying text *supra*.

363. Joinder, *supra* note 312, at 3, 5. The court on its own motion named the St. Louis County Executive, Treasurer, and Collector as defendants. *Id.* A year earlier, the district court had denied the Caldwell plaintiffs' motion to make HUD a defendant because the Justice Department was a plaintiff-intervenor. Liddell v. Board of Educ. (St. Louis), 469 F. Supp. 1304 (E.D. Mo. 1979), No. 72-100C(4) (June 27, 1980). Neither plaintiff sought to include HUD as a defendant in the interdistrict suit. Board Complaint, *supra* note 290, at 1-3, and Caldwell Complaint, *supra* note 290, at 1-3.

parties not before the court.[364] Secondly, the judge may not be willing to accept evidence against the housing parties kept out of the case. The judge may be particularly hesitant when such parties have voluntarily complied with his court order.

Consequently, the presence of all housing defendants sought by claimants may be a necessary predicate to a finding that their intentional acts caused interdistrict school segregation that warrants a school remedy. On the other hand, the presence of the State of Missouri and St. Louis County Government as defendants might allow plaintiffs to introduce evidence against housing agencies under their control.

V. SUMMARY OF APPLICATIONS TO *LIDDELL*

The five liability models offer a framework for categorizing and analyzing the allegations presented in *Liddell*. Further, they reveal the range of remedies that plaintiffs may obtain. As *Liddell* illustrates, the models also provide a means of evaluating the consequences of the court's actions. As an application of the liability models suggests, the omission of several government housing entities from the *Liddell* case could diminish claimants' opportunities for broad, flexible, and effective school and housing remedies.

CONCLUSION

School desegregation law is undergoing a significant evolution. After several decades of separating school and housing cases, courts now accept the interaction of school and housing segregation. Courts assign liability to school and housing officials for the dual effects of their discriminatory acts. Further, courts and litigants have found

364. *See* FED. R. CIV. P. 19 (1966 amend.) (court can conduct legally binding adjudication only between the parties actually joined in the action). For example, in Bell v. Board of Educ. (Akron), 491 F. Supp. 916, 942-43 (N.D. Ohio 1980), plaintiffs stated that intentional discriminatory housing acts of government at all levels caused residential segregation. This rendered resulting school segregation unconstitutional and subject to remedy. The court, however, refused to work backward from the remedy. Although plaintiffs believed they had shown constitutional housing violations at all levels of government, they had not joined all the governmental actors as parties. Citing FED. R. CIV. P. 19, the court stated it was without power to determine the rights and obligations of parties not before it. Therefore, it refused to issue findings concerning alleged discrimination of parties not represented. Plaintiffs had failed to move to join additional parties. Despite the court's power to join additional parties at its discretion, it did not. 491 F. Supp. at 942-43.

new ways to justify dual school and housing remedies that reinforce each other, rather than working at cross purposes. Courts now permit plaintiffs to allege school and housing counts within a school desegregation case. Alternatively, plaintiffs may use three hybrid liability models that may justify school and housing remedies. Despite potential problems in merging housing and school law, courts may gain the opportunity to fashion innovative remedies.

New theories of liability create new problems. When courts find parties liable for segregative effects beyond their sphere of authority, courts may have to require non-liable parties to participate in the remedy. For example, a court may need a non-liable school board to remedy the school effects of discriminatory housing acts by government officials. In those cases, courts are requiring plaintiffs to prove a causal relationship and quantify the segregative effects with concrete evidence. Thus plaintiffs and cross-complainants must present a strong case to overcome judicial reluctance to impinge on the autonomy of non-liable parties.

Vague liability standards and presumptions in school and housing law cause additional problems in hybrid theories of liability. Perhaps courts will eventually develop firmer standards for determining intent and quantifying effects. Until that time, courts will continue to exercise a great deal of discretion in determining, for example, when effects are significant enough to warrant imposing an interdistrict remedy.

New liability theories provide courts with a broader range of remedies. The court may order traditional school remedies to redress the school harm. Further, the court may order long term, slower housing remedies that address problems of demographic shifts difficult for school officials to control. Finally, courts may overcome problems presented by complex interaction of housing and school segregation by combining school and housing remedies. In addition, the court may order affirmative relief, enjoin further discriminatory acts, or use the threat of affirmative or injunctive action to stimulate voluntary proposals. The court may also offer parties incentives to voluntarily promote integration. New theories of liability therefore offer courts the opportunity to provide comprehensive remedies with longer term effects than earlier remedies.

These new liability theories fill a critical need by providing parties and the courts with a framework to categorize and analyze defendants' liability and the range of remedies. They also provide a means

for evaluating the consequences of court orders or tactical decisions by the parties. As school desegregation law continues to develop, these models can provide a framework for analysis.