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tion and at the same time protect the institutions of government from exposure which might render them disfunctional. May they be granted greater wisdom than mortal men.

W. G. CHAMPION MITCHELL

Constitutional Law—School Desegregation—De Facto Hangs On

In *Keyes v. School District No. 1*,[1] a case involving the Denver schools, the Supreme Court handed down an opinion that differs strikingly from earlier desegregation rulings. All prior high court decisions dealt with Southern school systems with long histories of legally enforced segregation. This sort of segregation, termed de jure segregation, was ordered eliminated "root and branch"[2] and was the target of the Court's far-reaching order in *Swann v. Charlotte-Mecklenburg Board of Education*.[3] Since such state-ordered segregation was never present in Denver, *Keyes* was viewed as the first opportunity for the Court to confront the question of de facto segregation,[4] segregation supposedly brought about by "neutral" factors such as residence.[5]

The cases following *Brown v. Board of Education*[6] did not question the constitutional mandate to eliminate segregation, but instead considered what remedies were appropriate for dismantling dual systems. *Keyes* largely ignores the remedy question[7] and returns to an earlier stage in analysis of school problems to consider under what conditions a federal court may act at all in a school case.

The return to consideration of the constitutional right involved was accompanied by a further deterioration of the Court's unanimity in school cases. From *Brown* to *Swann*, all such cases were handed down

[1]93 S. Ct. 2686 (1973). The prior reported opinions in this case may be found at 303 F. Supp. 279 (D. Colo. 1969) (preliminary injunction); 303 F. Supp. 289 (D. Colo. 1969) (supplemental findings); 313 F. Supp. 61 (D. Colo. 1970) (opinion on the merits); 313 F. Supp. 90 (D. Colo. 1970) (opinion on remedies); 445 F.2d 990 (10th Cir. 1971) (affirmed in part and reversed in part); 396 U.S. 1215 (1969) (order of Brennan, J. reinstating a preliminary injunction); 402 U.S. 182 (1971) (per curiam order vacating stay entered by the court of appeals before Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), was decided).

[2]Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

[3]402 U.S. 1 (1971).

[4]93 S. Ct. at 2701.

[5]Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 276 n.6 (1972).

[6]347 U.S. 483 (1954), *implemented* 349 U.S. 294 (1955).

[7]This note will also limit its scope to the constitutional right involved in school desegregation.

by a unanimous court.[8] But, in two cases during the past two terms dealing tangentially with this issue, the Court split badly.[9] In *Keyes*, the first non-unanimous case concerned only with school desegregation, only four justices joined the Court's opinion, although three of the remaining four justices (Mr. Justice White did not take part) concurred in the result.

THE DENVER CASE

The first black residential area of Denver, the "Five Points" or core city area, had largely been segregated since before *Brown*.[10] During the late 1950's and 1960's, the expansion of the black community eastward along a narrow corridor resulted in the segregation of the adjacent area of Park Hill.[11] Several local committees that had studied the problem of equal opportunity in the Denver schools recommended action to integrate the schools in these two communities. In May 1964, the school board adopted a policy favoring integration, but failed to take any action. Indeed, through the use of shifting attendance zones, mobile classrooms, student transfer plans, and other devices, the school board was actually maintaining racially separated schools. In particular, construction of Barrett Elementary School in the Park Hill area and the drafting of its attendance lines purposely established a new all-black school at a time when white schools in the area were severely overcrowded.[12]

In response to this situation and to black protests, the Denver board in 1969 passed three resolutions designed to establish at each Park Hill school a student body that would be approximately eighty per cent white. After a school board election in which these resolutions were an issue, the new board rescinded the earlier actions and went back to the old attendance zones and a voluntary transfer program.[13] At that point, the *Keyes* suit was filed.

After an extensive trial,[14] the district court found that the schools

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[8] *E.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam); Green v. County School Bd., 391 U.S. 430 (1968); Cooper v. Aaron, 358 U.S. 1 (1958).

[9] Richmond School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973) (equally divided Court affirming court of appeals per curiam); Wright v. City of Emporia, 407 U.S. 451 (1972) (5-4 decision).

[10] 303 F. Supp. at 282.

[11] *Id.*

[12] 313 F. Supp. at 64-65.

[13] *Id.* at 66.

[14] The trial lasted fourteen days and involved several hundred exhibits and two thousand pages

in both the core city and Park Hill areas were racially imbalanced.[15] It further found that the board's actions created de jure segregation in relation to the Park Hill schools, and it accordingly ordered remedial action for Park Hill.[16] However, the court insisted that the plaintiffs make a separate showing of de jure segregative acts and intent to segregate for each area that they wished to have integrated. The court then held that the plaintiffs had not met that burden with respect to the core city area.[17]

Although refusing to order integration on the basis of segregated conditions, the district court found that the core city schools were inferior. Applying the "separate but equal" standard espoused in *Plessy v. Ferguson*,[18] the court held that the school board had a minimum duty to maintain schools of equal quality throughout the district. Since the court found that that goal could only be reached through integration, the court ordered the formulation of a desegregation plan for the core city schools.[19] Upon appeal by both the board and the plaintiffs, the

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of testimony. 313 F. Supp. at 63.

[15]This presents a definitional problem. Denver is a tri-ethnic city. Overall, the school population is 60% white, 20% Hispano, and 14% black. The difficulty arises in deciding whether the Hispano students should be counted separately or with the black students. The district court used a standard separating black and Hispano students. The Supreme Court ruled that both minorities should be counted together, and that the district court should consider racial composition of faculties and staffs in identifying segregated schools. In addition, community attitudes towards the schools should be examined. Yet beyond this list of factors, the Court gave no clear guidelines for determining whether a school is segregated. 93 S. Ct. at 2691-92.

The Court has often failed in this manner to define adequately the terms that it uses. Neither dual nor unitary school systems have been meaningfully defined. For that matter, exact definitions of de jure and de facto segregation have never been stated. Indeed *Keyes* may have further obscured their meaning. The Court is not wholly at fault for this situation. These concepts are slippery at best, and exact definition for all circumstances may be impossible. Yet the current ambiguity creates problems for judges trying to apply the Court's mandates to new situations. *Cf.* Craven, *Integrating the Desegregation Vocabulary—Brown Rides North, Maybe*, 73 W. VA. L. REV. 1 (1971).

[16]303 F. Supp. at 296 (preliminary injunction); 313 F. Supp. at 83-84 (final order).

[17]313 F. Supp. at 69-77

[18]163 U.S. 587 (1896).

[19]313 F. Supp. at 96-97. This use of *Plessy* by the district court is part of a minor revival of interest in the case. It is seen as furnishing a standard for school board conduct in areas where actual physical integration may be impossible. This view was given its most important statement by Judge J. Skelly Wright.

> Nevertheless, to the extent the *Plessy* rule, as strictly construed in cases like Sweatt v. Painter, 339 U.S. 629,. . .is a reminder of the responsibility entrusted to the courts for insuring that disadvantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule [equal educational opportunity] the court here recognizes.

Hobson v. Hansen, 269 F. Supp. 401, 496-97 (D.D.C.1967), *aff'd sub nom.* Smuck v. Hobson,

Tenth Circuit affirmed the district court order as it applied to Park Hill, but held that there was no basis for ordering integration of the core city and reversed that part of the district court's decision.[20]

KEYES IN THE SUPREME COURT

The Supreme Court, hearing the case on certiorari, affirmed the findings and order below concerning the Park Hill schools.[21] However, it established a different standard to be applied to the core city schools and remanded the case for further proceedings.

In an opinion written by Justice Brennan,[22] the Court continued to adhere to a distinction between de jure and de facto segregation. To obtain relief, plaintiffs in a school action must not only show segregation, but "also that it was brought about or maintained by intentional state action."[23] In other words, a Northern plaintiff must show that the school board has created by its actions the sort of de jure segregation banned in the South by *Brown* and subsequent cases.

The Court never questioned that the plaintiffs met this burden with respect to the Park Hill schools. Generally, a showing of a statutorily segregated system in effect in 1954 will be sufficient to obtain relief covering the entire district.[24] However, where this showing cannot be made, as in Denver, a finding of intentional segregation in just one part of a school system, albeit a substantial part, will not alone satisfy the plaintiff's burden with respect to the entire district.[25] The Court did recognize, though, "that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions."[26] Accordingly, *Keyes* established a presumption that substantial segregation in one part of a school district has a segregatory effect upon the entire district and thus creates an unconstitutional dual school

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408 F.2d 175 (D.C. Cir. 1969) (footnotes omitted); *see* Gomperts v. Chase, 404 U.S. 1237, 1239-40 (Douglas, Circuit Justice, 1971); Spencer v. Kugler, 404 U.S. 1027, 1030-31 (1971) (Douglas, J., dissenting).

[20]Keyes v. School Dist. No. 1, 445 F.2d 990 (10th Cir. 1971).

[21]93 S. Ct. 2686 (1973).

[22]Justice Brennan was writing for himself and Justices Stewart, Marshall, and Blackmun. Justice Douglas joined the Court while writing a separate opinion. Chief Justice Burger concurred in the result only, and Justice Powell joined the result while dissenting from the Court's opinion (Justice Douglas also joined Powell's dissent). Justice Rehnquist also dissented.

[23]93 S. Ct. at 2692.

[24]*Id.* at 2693-94.

[25]*Id.*

[26]*Id.* at 2695.

system. The defendant school board may rebut this presumption, however, by showing that the district is divisible so that acts in one part did not so affect the entire district as to create segregation throughout.[27]

The opinion seemed to indicate that a finding of a dual system would be dispositive for the entire Denver school system. However, the Court went on to establish a further analysis of the problem of the core city schools. This would be applied in the event that the trial court does not find a dual system. Both inferior courts had demanded a separate showing of de jure segregation in the core city, a demand that the plaintiffs did not meet.[28] Under the Supreme Court's formulation, the essential factor for a finding of de jure segregation is intent to segregate. "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[29] Thus even if the board's acts caused segregation, without segregative intent behind those actions, there is no occasion for a court's intervention.[30]

Where the plaintiffs have shown, as in Denver, that a substantial portion of the district was intentionally segregated, the Court held that this "creates a presumption that other segregated schooling within the system is not adventitious."[31] The board must then show that the other segregation is not the result of its intentional acts.

The board has two ways to meet this burden. First, it may attempt to show that its actions were not taken with segregative intent. This cannot be satisfied by mere reliance on a neutral theory to explain their actions; "[t]heir burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions."[32] Alternatively, the board may present evidence to show that their actions neither caused nor contributed to the segregation that exists. In other words, they may show that the segregated conditions are truly de facto.[33]

In summary, a plaintiff must show at a minimum, de jure acts resulting in segregation affecting a "substantial" portion of the students in a school system. The court will then decide whether the entire system

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[27] *Id.* A finding of a dual system will immediately end further analysis. The sole remaining question will be the remedy to be ordered.

[28] 445 F.2d at 1005-06.

[29] 93 S. Ct. at 2697.

[30] *Id.* at 2699 n.17.

[31] *Id.* at 2697.

[32] *Id.* at 2698.

[33] *Id.* at 2699.

is thus a dual system, requiring affirmative action to eliminate segregation. If it is not, then segregative intent of the board regarding the rest of the district must be shown, but the presumption is against the board. They may rebut it by a showing of no segregative intent or that their acts had no part in creating the segregated conditions. The Court very carefully did not rule on whether a neighborhood school policy evenly applied would justify resulting racial imbalances.[34]

DIFFICULTIES WITH THE KEYES STANDARD

Several problems may be noted with the Court's formulation. To begin with, the facts in Denver, which made the decision an easy one, may not be representative. In the Park Hill area, there was a long history of segregative acts taken over the loud protests of the black community. There was no doubt that these acts constituted a pattern of de jure segregation.[35] In another city however, it might prove considerably more difficult to make the required showing of substantial de jure segregation. Given the uncertain meaning of the terms used here,[36] a court might easily find for the school board, even on similar facts.

Along with the possibilities of uneven application, litigation under the *Keyes* rule is likely to be both lengthy and difficult. Courts will have to consider and evaluate tremendous amounts of data and numerous actions over an extensive period. The difficulties involved just in the initial de jure showing (certainly a simpler task than determining intent or causation over an entire district) have been noted in a comment on the district court decision:

> As to causation, the plaintiff cannot reasonably be required to show that the present stage of segregation is the direct and proximate result of any past state action. This concept of causation presents almost insurmountable problems in relatively simple tort suits. It becomes totally unmanageable when applied to anything so complex as the myriad social forces which go into the determination of racial housing patterns.[37]

Extended litigation will not only tie up court time and provide numerous avenues of delay but may also discourage possible plaintiffs unwilling

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[34] *Id.*

[35] *See* Comment, *Equal Protection—School Desegregation—Keyes v. School District Number One*, 48 DENVER L.J. 417, 422 (1972).

[36] *See* note 15 *supra*.

[37] Comment, 48 DENVER L.J., *supra* note 35 at 437-38.

to begin such a potentially arduous process.[38]

The *Keyes* decision continues to establish a different standard for Northern and Southern school districts. In the South, a plaintiff need only "prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized . . . at the time of our decision in *Brown v. Board*. . . ."[39] A Northern system, even where the factual condition of segregation is identical, has the opportunity of denying responsibility or intent, and thus preventing any integrative action by the courts. This differing regional standard has been the subject of much criticism,[40] and the use of the *Brown* decision (May 17, 1954) as the dividing point seems particularly unfounded. As one authority has noted, the three major cases where courts of appeals have *denied* relief in de facto situations all arose from school districts which were segregated by statute prior to *Brown*, one of them until 1954.[41]

It is difficult to perceive the justification for the Court's double standard, particularly since a state prior to *Brown* reasonably could have believed that *Plessy* was good law,[42] and since the relationship between the practices of twenty years ago and the situation now is often tenuous. Given the sensitivity of this issue, the Court may be fueling Southern resentment of court-ordered integration plans by seemingly continuing to discriminate in espousing two different regional tests for what is now a national problem.

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[38]A reply that earlier suits were also lengthy is not entirely apposite. In a Southern suit, there may be great delay, but there is also great certainty that some relief will result from the effort. In Northern suits, no such certainty can exist.

[39]93 S. Ct. at 2693.

[40]*See* Fiss, *The Charlotte-Mecklenburg Case—Its Signifigance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 699-705 (1971); Goodman, *supra* note 5, at 296.

[41]Goodman, *supra note 5*, at 297. The three cases are Deal v. Board of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967) (Cincinnati, Ohio); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (Kansas City, Kan.); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964) (Gary, Ind.); *cf.* Monroe v. Board of Comm'rs, 380 F.2d 955 (6th Cir. 1967), *vacated*, 391 U.S. 450 (1968). *But see* Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

[42]The argument that a pre-1954 termination of segregation evinces a good faith effort to desegregate would seem to be weakened by the suits in those districts demanding that segregation there be ended in fact, as well as in law. Also, particularly with systems ending segregation just prior to *Brown*, an assumption of good faith on their part, and of bad faith on the part of others not taking the same step until after *Brown*, without further examination of the respective boards' later records, would seem unwarranted.

INTENT AS A TEST

Perhaps the weakest point of the *Keyes* holding is the Court's reliance on the school board's intent.[43] In using intent, the Court both complicates desegregation litigation and seems to reverse a long-established method of viewing school segregation problems.

Brown v. Board appeared to hold as an evidentiary presumption that segregated schools are by that fact detrimental.[44] If segregation creates inherently unequal educational opportunities, the purest motives of school board members will scarcely alleviate its impact; nor will children in segregated schools that were created adventitiously be any better off than those in schools, such as Park Hill in Denver, where intent can be shown. If it bears no relationship to the problem, why must intent be a required element of a plaintiff's case?

In earlier cases, the Court has steadfastly refused to examine the intent of a local board and instead has emphasized the effects of local actions. *Green v. County School Board*[45] and *Swann v. Charlotte-Mecklenburg Board of Education*[46] insisted that integration take place *in fact* and that a plan that actually works be formulated; the board's intentions were not relevant. In *Wright v. City of Emporia*, the Court examined the effects of new school district lines and rejected a "dominant purpose" determination as a test in school cases.[47] "Thus we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system."[48]

Recently the Fifth Circuit has strongly supported the position of ignoring intent,[49] and the Tenth Circuit which decided *Keyes*, stated in

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[43]The use of segregatory intent here can be seen as a substitute for the statutory de jure segregation heretofore required in showing the board's responsibility for segregated conditions.

[44]There has been a tremendous amount of dispute over this, much of it unnecessary. *See, e.g.*, Goodman, *supra* note 5, at 277-78. The central issue seems to be how much reliance the Court placed on the sociological data it cited, 347 U.S. at 494 n.11, much of which is now suspect. The opinion in *Brown* at no point relies on this data, which appears in only one footnote.

Since then, the Court has never questioned the harmful effects of segregation, nor has it shown any signs that it is about to. Suffice it to say that under current doctrine (including *Keyes*) a plaintiff has shown detriment by showing segregation. *Cf.* Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142, 148 (5th Cir. 1972) (en banc), *cert. denied*, 93 S. Ct. 3052 (1973).

[45]402 U.S. 1, 13 (1971).

[46]391 U.S. 430, 439 (1968).

[47]407 U.S. 451, 460-62 (1972).

[48]*Id.* at 462.

[49]Cisneros v. Corpus Christi Ind. School Dist., 467 F.2d 142, 150 (5th Cir. 1972) (en banc), *cert. denied*, 93 S. Ct. 3052 (1973).

a case involving the related area of segregated public housing that "[I]f the proof of a civil right [sic] violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."[50] *Keyes* now ignores this approach to delve into the subjective intent of a local board.[51]

POWELL'S DISSENT—A UNIFORM APPROACH

Although concurring in the result, Justices Douglas and Powell dissented from the doctrine established by the Court.[52] They insist that one standard is needed for all school suits,

> [I]f our national concern is for those who attend such segregated schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.[53]

Justice Powell argued that the imposition of an affirmative duty to integrate urban districts requires "these districts to alleviate conditions which in large part did *not* result from historic state-imposed *de jure* segregation."[54] If the Court then wishes to order urban integration in both North and South, it must find a new standard.

To formulate a proper test, the dissent, relying on *Green* and *Swann*, defined the right involved as "the right, derived from the Equal Protection Clause to expect that once the State has assumed responsibility for education, local boards will operate *integrated school systems* within their respective districts."[55] A court, in determining whether a school board has acted to achieve an integrated system will examine the effect of past actions in fulfilling the duty to desegregate. Among the characteristics that would mark an integrated system are integrated

[50]Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); *cf.* Gautreux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970). *Contra*, Thompson v. Housing Authority, 251 F. Supp. 121 (S.D. Fla. 1966).

[51]This is no easy task. In any school suit, the acts complained of will have taken place over a long period, during which the school board is likely to have changed membership many times. Arriving at a finding over the entire period may be impossible. The search is further complicated by the fact that the members may all have had differing reasons for taking a given action. Inferring a unified intent cannot realistically produce a result consistent with the realities of the board's decision-making process.

[52]Since Justice Douglas' one page opinion covers much the same ground, this note will focus on Justice Powell's longer dissent.

[53]93 S. Ct. at 2702-03 (Powell, J., dissenting in part and concurring in part).

[54]*Id.* at 2704.

[55]*Id.* at 2706 (footnotes omitted).

faculties; equality in facilities, equipment and curriculum; and attendance zoning and school construction designed to maximize integrative opportunities.[56]

In assessing the duty of a school board, Justice Powell introduced an evidentiary presumption similar to *Brown's* that segregated schools are unequal.[57] Given the overall authority that a school board has over the school system, the presence of substantial segregation is "prima facie evidence of a constitutional violation by the responsible school board."[58] Although the presence of other factors affecting segregation is admitted, this holding establishes the presumption that state action is responsible in some degree for school conditions.[59]

Once such a prima facie case is established, Powell argued that the board may rebut it by showing that they have, *in fact*, operated an integrated system in line with the characteristics delineated above.[60] Failing that, a court must order affirmative action to integrate the system.[61]

Powell's suggested test is likely the simplest that we shall see in this area.[62] It concentrates on ascertainable facts rather than subjective intent. It places responsibility for the schools on the school board not by a complex factual determination of the causes of residential segregation,

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[56] *Id.*

[57] *See* text accompanying note 44, *supra.*

[58] 93 S. Ct. at 2707, 2711.

[59] Although there is much evidence to support such a presumption, the limits of social science evidence often prevent conclusively proving the board's responsibility. For a long discussion of the evidentiary problems inherent in approaching de facto segregation, *see* Goodman, *supra* note 5, at 298-374.

[60] 93 S. Ct. at 2711.

[61] The second half of Justice Powell's opinion discusses the available remedies in school cases. 93 S. Ct. at 2711-20. While not absolutely forbidding the use of busing as a tool, he would avoid it, particularly for elementary school children, in all but the most extreme cases. Advocating greater emphasis on factors such as neighborhood schools in creating an equitable remedy, he is finally forced to rely on the good faith of the local boards. The record in the South would suggest that this position is rather naive, but a full discussion of this part of the dissent is beyond the scope of this note.

[62] A number of other approaches to de facto segregation have been suggested, most of them compatible with, but not identical to, the standards suggested in the *Keyes* dissent. *See, e.g.*, Fiss, *supra* note 40; Goodman, *supra* note 5; Silard, *Toward Nationwide School Desegregation: A "Compelling State Interest" Test of Racial Concentration in Public Education*, 51 N. C. L. REV. 675 (1973); Note, *Demise of the Neighborhood School Plan*, 55 CORNELL L. REV. 594 (1970); Comment, 48 DENVER L.J., *supra* note 35; Note, *De Facto School Segregation and the "State Action" Requirement: A Suggested New Approach*, 48 IND. L.J. 304 (1973); Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972).

but by a recognition that, as the agency best able to affect the schools, the board had a significant role in determining how they are operated. It is a standard that can fairly be applied to any region of the country. Justice Powell recognized that integration nationwide is a goal that will be reached eventually, and he proposes a test best designed to achieve that purpose.

CONCLUSIONS

Keyes presents two differing approaches to the school desegregation problem;[63] the Court is cautiously moving forward while adhering to the de facto/de jure distinction, and the dissenters are abandoning it for a uniform national standard. By moving slowly, the Court may have created many new problems of sectional discrimination, opportunities for delay, and difficulty for plaintiffs.

Arguably, the Court is in a dangerous political situation with regard to school desegregation.[64] By acting cautiously, with minimum doctrinal expansion, the Court may be attempting to deflate public resistance. This may be desirable, but the general public likely does not know or care about the doctrine behind a school desegregation order; instead it is interested in its effects upon the schools.

Despite the difficulty, many plaintiffs will still prevail under the *Keyes* standard. Once a trend is established, other Northern school boards may be come convinced of the futility of resistance and agree to integrate. This may accordingly reduce the effects of the difficulties in the Court's standard. Experience has not provided much evidence to support this hypothesis. Indeed, for an elected school board to take such actions may be political suicide. In Denver, those board members supporting the resolutions integrating Park Hill without a court order were defeated in the next election.[65] Unfortunately, Northern aquiescence will not solve the school integration problem by itself.

One may also speculate that the Court does not intend for *Keyes*

[63]Justice Rehnquist presents a third view in his dissent. 93 S. Ct. at 2720. In essence, he feels that the rest of the Court has moved too far, and he objects to the inferences against the board that they announce. He would seem to require a showing of specific de jure acts for each area concerned before ordering relief. Since all of the other participating Justices agreed that at least some extension of the desegregation standards should occur, it seems safe to assume that Rehnquist's approach will remain his alone.

[64]A recent Gallup poll shows that only five percent of Americans favor busing as an integrative tool, although a majority still support integration in principle. N.Y. Times, September 9, 1973, § 1, at 55, col. 3.

[65]313 F. Supp. at 66.

to be a lasting formulation. Brennan's opinion may be just a first step towards eventual adoption of a standard similar to that espoused by Justices Douglas and Powell. The possibility that *Keyes* will not be the lasting standard is increased by the fact that only four justices joined in the opinion and that the views of two other justices, Burger and White, are not known at all. However, if the four justices joining the *Keyes* opinion do not change their position, it is difficult to conceive of the other five being able to concur in any one new standard.

At this writing, the Court has accepted no major school cases for its October 1973 docket.[66] It seems likely that the Court will wait until the effects of *Keyes* can be known before moving significantly further. *Keyes* has left the Court sorely divided in an area where it has been the clear leader in forcing change and is now acting almost alone.[67] The decision has done little to clear up the growing confusion about what standard of conduct a school board must adhere to. It is incumbent upon the Court, it if wishes to maintain the process begun twenty years ago in *Brown*, to decide what the constitutional right to integrated schools is, what standard will determine that right, and how the goal of equal educational opportunity is to be achieved.

JACK GOODMAN

Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy

In *Hart v. Coiner*,[1] the Court of Appeals for the Fourth Circuit reversed a life sentence imposed under West Virginia's habitual offender

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[66]Petition for certiorari has been filed in the Detroit case, where de jure segregation was found. The central question there is not the existence of actionable segregation, but whether a metropolitan area wide plan may be ordered in a situation where integrating within the central school district alone, would have little effect. Bradley v. Milliken, No. 72-1809 (6th Cir., June 12, 1973) (en banc); *petition for cert. filed*, 42 U.S.L.W. 3170 (U.S. Sept. 6, 1973) (No. 73-475).

The Court recently declined to hear two other Northern school cases involving allegedly de jure acts. United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), *cert. denied*, 93 S. Ct. 3066 (1973) (Indianapolis, Ind.); Davis v. School District, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971) (Pontiac, Mich.).

[67]There may be some Congressional input forthcoming. In particular this would concern remedies, one proposal being similar to the approach suggested by Justice Powell *see* Preyer, *Beyond Desegregation—What Ought to be Done?*, 51 N.C.L. REV. 657 (1973).

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[1]No. 71-1885 (4th Cir., July 13, 1973). The case was argued by two third-year law students from the University of North Carolina at Chapel Hill.