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METROPOLITAN DESEGREGATION AFTER *MILLIKEN v. BRADLEY*: THE CASE FOR LAND USE LITIGATION STRATEGIES†

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In 1961 the United States Commission on Civil Rights examined the exodus of whites to the suburbs and the entrapment of blacks and other minorities in the central cities, a phenonemon it described as the "white noose."[1] Over a decade later, the same Commission found the noose was drawing tighter and that racial polarization continued unabated, enhanced by the movement of industry and jobs to the suburbs, exclusionary land use practices of suburban communities, and the proliferation of connecting freeways.[2] The resulting segregation is reflected in three of the most important aspects of our lives: our classrooms, work forces, and residential neighborhoods. The statistical outlook is chilling; if there is no reversal of present trends, by the year 2000 whites will comprise only 25% of the central city population, while blacks will make up 75%.[3]

The urgency of the need for immediate and creative litigation strategies to break down these patterns of metropolitan segregation is all too obvious. The strategies, unfortunately, are not similarly self-evident. In its last two terms the Supreme Court has shown an unwillingness to view the causes of northern-style school segregation broadly or to permit metropolitan-wide

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1. UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 REPORT: HOUSING 1 (1961).

2. UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 11-12, 30-31, 44-46 (1974).

3. *See id.* at 4.

busing as a remedy. In *Keyes v. School District*[4] the Court avoided deciding whether de facto, as well as de jure, discrimination is unconstitutional; in *Milliken v. Bradley*[5] it set limits on permissible judicial remedies for a finding of de jure discrimination. In the aftermath of these cases it is fair to say that plaintiffs in future school desegregation suits seeking a metropolitan-wide remedy have been saddled with a heavy burden of proof—one which, it is also fair to say, will be nearly impossible to carry, in most cases, because of the nature of the underlying causes of segregated school systems outside the South.

It is the purpose of this article to suggest that, in light of the Court's most recent school desegregation decisions, the more successful strategy for breaking down institutionalized patterns of metropolitan segregation may well be in focusing on the area of housing discrimination. Even though housing and land use cases have not given plaintiffs' attorneys much cause to rejoice in the past,[6] two recent Seventh Circuit cases, dealing with the nature of a violation of the constitutional and statutory safeguards against housing discrimination and the relief necessary to cure such violations, illustrate the potential efficacy of this alternative strategy. The first case, *Clark v. Universal Builders, Inc.*,[7] held there was no difference in legal effect between de facto and de jure discrimination; the second, *Gautreaux v. Chicago Housing Authority*,[8] after a lower court finding of de jure discrimination, ordered the consideration of a metropolitan-wide remedy. Under their most expansive interpretation, *Clark* and *Gautreaux* indicate that where public officials pursue a course of conduct having the effect of denying housing opportunities guaranteed by the fourteenth amendment of the Constitution and 42 U.S.C. § 1982,[9] de-

4. 413 U.S. 189 (1973).

5. 94 S. Ct. 3112 (1974).

6. Attacks on institutionalized discrimination in housing unrelated to race have not fared well in the Supreme Court. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (anti-commune ordinance upheld); Lindsey v. Normet, 405 U.S. 56 (1972) (no fundamental right to decent, safe, and sanitary housing); James v. Valtierra, 402 U.S. 137 (1971) (communities may exclude publicly assisted housing by referenda). However, in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Court gave an expansive reading to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-31 (1970), which protects individuals from racial discrimination in housing by holding that a white person has standing to allege denial of housing opportunities to blacks.

7. 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3349 (U.S. Dec. 16, 1974).

8. 503 F.2d 930 (7th Cir. 1974).

9. Section 1982, 42 U.S.C. § 1982 (1970), originally part of the Civil Rights Act of 1866 passed pursuant to the thirteenth amendment, was reenacted under the fourteenth amendment in the Civil Rights Act of 1870. It provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

segregation orders on a metropolitan-wide basis may be appropriate forms of relief. An analysis of *Keyes* and *Bradley* shows nothing that would foreclose such an expansive interpretation of *Clark* and *Gautreaux*. In fact, the school cases suggest that the Court might very well be receptive to a solution that would effectuate total societal integration, rather than just the desegregation of the classroom. But even narrowly interpreted and confined to their own facts, both *Clark* and *Gautreaux* present situations typical enough to be a useful precedent for many urban areas.

What follows is an analysis of the four cases and a discussion of their implications on litigation strategies to desegregate metropolitan areas.

I. The Supreme Court and Northern School Desegregation

Keyes v. School District[10] presented the Supreme Court with an opportunity to reject any legal distinctions between de jure discrimination, a racial classification imposed by public policy or action which discriminates on its face, and de facto discrimination, a policy or act which contains no explicit racial classification, but which nonetheless has the effect of discriminating.[11]

The *Keyes* plaintiffs attacked the segregated character of Denver, Colorado's school system. The district court found that in one outlying section of the city, school officials had pursued a deliberate policy of racial discrimination amounting to de jure segregation. But it also found that, although the core city was racially segregated, the discrimination was the result of the school board's neighborhood school policy, which, superimposed on residential segregation, merely amounted to de facto segregation and as such was not actionable.[12] However, the district court then went on to find that the core city schools were, in any event, in violation of the law, because while "separate educational facilities (of the *de facto* variety) may be maintained . . . a fundamental and absolute requisite is that these shall be equal."[13] Differences in scholastic achievement scores, experience of teachers, and a num-

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white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

10. 413 U.S. 189 (1973).

11. *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), where Judge J. Skelley Wright held de facto discrimination in Washington D. C.'s public school system actionable. Judge Wright wrote that "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Id.* at 497.

12. Keyes v. School Dist., 313 F. Supp. 61, 76 (D. Colo. 1970).

13. *Id.* at 83.

ber of other factors led the court to conclude that the core city schools, compared with the white schools in Denver, were separate but unequal. On appeal, the Tenth Circuit rejected this reformulation of the discarded *Plessy v. Ferguson*[14] doctrine and denied any relief to Denver's core-city school children, finding de facto discrimination unremediable.[15]

Thus, when the case reached the Supreme Court, the Court had the opportunity to decide whether de facto discrimination, in addition to de jure discrimination, violates the equal protection clause of the fourteenth amendment. The Court, however, viewed the segregation in the core city schools differently than either of the lower courts and held that "a finding of intentionally segregative school board actions in a meaningful portion of a school system [the outlying area], as in this case, creates a presumption that other segregated schooling within the system [the core city schools] is not adventitious."[16] Without deciding whether de facto discrimination is unconstitutional, the Court "emphasize[d] that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[17] Therefore, de jure segregation may be the result of a classification which on its face discriminates, or it may be the result of an intentionally discriminatory course of conduct. If the latter is substantial enough, it may infect an entire system, even though direct proof relates only to a portion of that system. On remand, of course, defendants may rebut the presumption that the segregation in the core city is due to their intentionally discriminatory policies against the outlying section of the city.

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14. 163 U.S. 537 (1896). In *Plessy*, of course, the Court, over a strong dissent by Justice Harlan, *id.* at 552, sustained a Louisiana statute requiring separate but equal railroad cars for blacks and whites from a challenge that it violated the equal protection clause of the fourteenth amendment. The Court cited the widespread policy of public school segregation in support of its conclusion. *Id.* at 544.

The Louisiana statute in *Plessy* required "equal" facilities; the Court, however, did not judicially impose the equality portion of the standard until Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (state must provide blacks "facilities for legal education substantially equal to those which the State there afforded for persons of the white race"), although the Court had alluded to the necessity for equal facilities over a decade before *Gaines*. *See* Gong Lum v. Rice, 275 U.S. 78 (1927). Even though equality was broadly interpreted at first, *see* Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 392 (1954), after World War II the Court began to define it more stringently, *see, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (newly established law school for blacks not substantially equal to facilities for whites at the University of Texas Law School), until in Brown v. Board of Educ., 347 U.S. 483 (1954), the Court finally abandoned the rule of *Plessy* and its progeny and held that "in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495.

15. Keyes v. School Dist., 445 F.2d 990 (10th Cir. 1971).

16. 413 U.S. at 208.

17. *Id.* (emphasis in original).

In an opinion in which he concurred in part and dissented in part, Justice Powell in *Keyes* had some harsh words for the continuation of the legal distinction between de jure and de facto discrimination. Believing the distinction "no longer can be justified on a principled basis," Powell admonished that "the facts deemed necessary to establish *de jure* discrimination present problems of subjective intent which the courts cannot fairly resolve."[18] He instead proposed that the Court abandon inquiries into a school board's intent and look solely to the racial patterns of the schools to determine whether a prima facie case of discrimination exists. Powell did not propose a formula for determining an impermissible racial imbalance; he did indicate, though, that the measure of the integrative effect of a school board's actions should be a statistical one. If a prima facie case is made by the statistics, the burden would then shift to the school board or governing body to demonstrate that its decisions were made with a view towards enhancing integrated educational opportunities.[19]

But Powell's concurring opinion is problematical for school litigation in other respects. He acknowledged that residential housing discrimination is the root cause of school segregation and cited an article by Dr. Karl Taeuber that appeared in the August 1965 issue of *Scientific American*.[20] That article concluded that even with all other factors eliminated (*e.g.*, poverty and personal choice), residential segregation will nevertheless occur because of private (*i.e.*, white) prejudices. In addition, Powell found strong values in the neighborhood school policy, including its place in American tradition and its promotion of the competing rights of both parents and children.[21] Thus, while Powell would have the courts measure a violation by the effect of a school board's actions rather than by the intent of the board in so acting, he is extremely reluctant to impose extensive busing as a remedy. The punishment, it seems, does not fit the crime.

Powell's position on busing as a remedy was pivotal to the outcome of *Milliken v. Bradley*,[22] a 5-4 opinion in which he joined the majority in overruling a metropolitan-wide busing order imposed by the district court and affirmed by the Sixth Circuit. At the outset, it is important to note what *Bradley* does *not* stand for and what it does *not* decide in order to assess

18. *Id.* at 224-25.

19. *Id.* at 225.

20. Taeuber, *Residential Segregation*, 213 SCIENTIFIC AMERICAN, Aug. 1965, at 12.

21. Basically, Powell believes the parental right and duty to educate children recognized in Pierce v. Society of Sisters, 268 U.S. 510 (1925), may be infringed with the dissolution of neighborhood schools and concomitant parental control. This parental right was recently denominated "fundamental" in Wisconsin v. Yoder, 406 U.S. 205 (1972).

22. 94 S. Ct. 3112 (1974).

fully its impact on the future of metropolitan-wide desegregation plans. *Bradley* did not, as *Keyes* did not, decide the constitutionality of de facto discrimination. The plaintiffs in *Bradley* did not plead or attempt to prove de facto discrimination on the part of the all-white suburban school districts. In fact, the plaintiffs did not even name the suburbs as defendants; rather, the Sixth Circuit later ordered them joined as necessary parties for relief. The plaintiffs did, however, allege and prove that Detroit's school board committed acts that amounted to de jure discrimination.[23]

The trial and appellate courts were also in agreement that the Michigan State Board of Education, granted significant involvement by statute in the supervision of local school districts, helped to perpetuate Detroit's segregated schools.[24] But the Court majority parted company with the lower courts' conclusion that this "state action" provided sufficient grounds for a remedy extending beyond the city limits of Detroit and cutting across school district lines. The Court reasoned that its prior cases[25] ordering the merger of dual school systems (and disregarding political boundaries) were predicated on a finding of discrimination on the part of the governing school boards. In order to sustain the imposition of an interdistrict remedy without a finding of such discrimination, the Court would first require proof of an interdistrict violation. In the Court's words: "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 inter-district segregation."[26]

Either de jure acts by Detroit must be shown to have had a segregative effect on suburban areas, or the de jure acts of one or more suburbs must be shown to have had a segregative effect on Detroit. This burden of proof may also be met by a demonstration of action by the state significantly affecting discriminatory results by such activities as gerrymandering school district boundaries. Unlike the *Keyes* Court, the Court in *Bradley* declined to engage in any presumptions on an interdistrict level.

The Court's definition of an appropriate remedy for a finding of de jure discrimination on the part of just one political entity is summed up as follows:

> But the remedy is necessarily designed, as all remedies are, to re-

23. *Id.* at 3127. The trial court's finding of de jure discrimination was not appealed and not at issue when the case reached the Supreme Court.

24. It was assumed by the Court that the required state approval for construction of Detroit's educational facilities implicated the state in any segregative results. *See id.* at 3130.

25. The Court distinguished such cases as Brown v. Board of Educ., 349 U.S. 294 (1955) (ordering on remand that merger be considered), and United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972) (state prohibited from carving out separate districts).

26. 94 S. Ct. at 3127.

> store the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.[27]

Thus the end result of *Bradley* is to place limits on a court's discretion to order a metropolitan-wide busing remedy when no finding of discrimination has been made against the suburban communities ordered to participate in that remedy. But the above quotation from *Bradley* illustrates that disparate treatment, a classical form of de jure discrimination, was at issue—not de facto discrimination. As Justice Powell did in his concurring opinion in *Keyes*, the majority in *Bradley* affirmed the strong interest of a political subdivision in maintaining neighborhood schools. Powell was with the majority in *Bradley*, and that opinion no doubt reflects the concerns he voiced in *Keyes* that massive busing is a measure ill-suited to remedy societal segregation.

II. De Facto Discrimination in the Housing Market

In *Clark v. Universal Builders, Inc.*, plaintiffs, black homeowners, filed a complaint alleging that a dual housing market existed in the Chicago metropolitan area and that defendants had exploited this situation by building and selling homes in black areas to plaintiffs in excess of the amounts paid and on terms more onerous than those imposed on white buyers for comparable homes in white areas. The defendants moved to dismiss, contending that plaintiffs' exploitation theory failed to make out a claim for relief under the Civil Rights Act of 1866.[28] The motion was denied, affirmed on appeal, and remanded for trial.[29] At the close of plaintiffs' case, presented on the theory of exploitation under 42 U.S.C. § 1982, the court directed a verdict for the defendants which formed the basis of the appeal in the instant case.[30]

The trial judge based his direction of the verdict on the grounds that economic, not racial, exploitation had been practiced by the defendants and that plaintiffs had failed to prove that defendants had offered to sell the same or similar houses to whites at lower prices or on less onerous terms than they were offered to blacks. In other words, defendants contended, and plaintiffs

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27. *Id.* at 3128 (footnote omitted).

28. That Act is now codified at 42 U.S.C. §§ 1981-83, 1985 (1970).

29. The case at that time was entitled Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd on other grounds sub nom.* Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

30. The opinion of the trial judge, Joseph Sam Perry of the Northern District of Illinois, is unreported.

made no effort to refute, that they would extend the same terms to a prospective white buyer who wished to buy a house in a black neighborhood.

On appeal, the Seventh Circuit framed the issues before it as

> [w]hether section 1982 covers only the so-called traditional type of discriminatory conduct, or whether a claim may be stated under section 1982 by proof of exploitation of a discriminatory situation already existing and created in the first instance by the action of persons other than defendants. If we determine that section 1982 is violated under the latter theory, we then must determine whether the evidence . . . is such that it can be found that plaintiffs have made out a *prima facie* case.[31]

Thus the court of appeals explicitly considered whether private de facto discrimination is actionable under section 1982.[32] It answered the question in the affirmative. In doing so, it recognized that it was imposing liability on the defendants for exploiting the consequences of discrimination by others.

The *Clark* court did not speak in terms of de jure discrimination versus de facto discrimination; rather, it used the terms "traditional" discrimination and "exploitative" discrimination. But the two sets of terms are synonymous, because the Court defined traditional discrimination as that which is intentionally discriminatory and exploitative discrimination as that which is discriminatory in its effects. *Clark* rejected the notion that plaintiffs were required to show that defendants were treating whites differently than blacks and held that even though whites and blacks are treated in the same manner, if the effect is to disadvantage blacks, then the treatment is illegal. Thus, when defendants claimed that ghetto housing would be offered to blacks and whites on the same terms as it was offered to the black plaintiffs, the court responded that "[i]t is no answer that defendants would have exploited whites as well as blacks."[33]

The court of appeals found support for the proposition that disparate effects are as actionable as disparate treatment both in prior judicial constructions of section 1982 and a common sense application of the facts. It explored the expansive reading given section 1982 by the Supreme Court in *Jones v. Alfred H. Mayer Co.*[34] and, employing a similarly expansive read-

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31. 501 F.2d at 328.

32. It was not until 1968, with the decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that § 1982 was held to encompass private as well as state discrimination. Of course, since § 1982 does provide a remedy for discriminatory acts of governing bodies, *see* Hurd v. Hodge, 334 U.S. 24 (1948), the *Clark* holding is equally applicable to public de facto discrimination, even though *Clark* itself involved no public defendants.

33. 501 F.2d at 331.

34. 392 U.S. 409 (1968).

ing, concluded that the Act should be construed to encompass the type of activity the plaintiffs alleged.

The second and more significant basis for the abolition of the distinction between disparate treatment and disparate effect is the court's statement that it

> need not resort to a labelling exercise in categorizing certain activity as discriminatory and others as not of such character for section 1982 is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination. *Indeed, there is no difference in results between the traditional type of discrimination and defendant's exploitation of a discriminatory situation.*[35]

Thus, what defendants and the trial court had chosen to characterize as an unfortunate economic situation unrelated to race becomes an illegal practice when viewed as a problem of *effects*, not causes. The defendants may not have played any part in creating the dual housing market, but their actions did "prolong and perpetuate a system of racial residential segregation, defeating the assimilation of black citizens into full and equal participation in a heretofore all white society."[36]

Finally, *Clark* set up the standard of reasonableness as the measure of a violation of section 1982 by a realtor. In doing so, the court recognized that a strict standard requiring that blacks be sold houses on exactly the same terms available to whites would preclude a conclusion that "[r]easonable differentials due to a myriad of permissible factors can be expected and are acceptable. But the statute does now [*sic*] countenance the efforts of those who would exploit a discriminatory situation under the guise of *artificial* differences."[37] The standard of reasonableness had the added virtue, the court reasoned, of being a long accepted judicial measure of real estate transactions.[38]

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35. 501 F.2d at 330 (emphasis added).

36. *Id.* at 331.

37. *Id.* at 333 (emphasis added). One can easily imagine other practices which would fall within the ambit of unreasonableness because of their artificial, exploitative nature. For example, realtors often refuse to take the income of both spouses into account when making sales or rental decisions on the basis of minimum income. Other forms of discrimination for which the realtor is not responsible have produced a situation in which female spouses of minority group members are required to work more often than white females to make up the income differential between whites and blacks. Thus, a refusal to take the income of both spouses into account in determining whether a house is within the couple's financial reach has a racially discriminatory impact, even though it is applied equally to both minority and white couples.

38. *See, e.g.*, A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

Having determined that plaintiffs had alleged a violation of section 1982, the *Clark* court then turned to the evidence presented at the trial by plaintiffs to determine whether a prima facie case had been made out which would compel reversal of the verdict directed for the defendants.

Plaintiffs had sought to establish the existence of a dual housing market through expert testimony. One expert, Dr. Karl E. Taeuber, had testified about the results of his research on the housing market in metropolitan Chicago. He had found (1) a high degree of residential segregation; (2) despite white flight from the city, a larger supply of new housing available to whites than to blacks; and (3) suburban housing unavailable to blacks, due to discrimination, when the suburbs were expanding. Dr. Taeuber, it will be recalled, is the same expert Justice Powell relied on in *Keyes* to show that private prejudices operated to produce racial separation.[39] Yet, given the same basic data, the *Clark* majority and Justice Powell used it in totally different ways: the *Clark* court saw it as establishing the existence of a dual housing market which defendants allegedly exploited; Powell used it to justify —not the imposition of liability—but the limits of relief which can be ordered of defendants who are not themselves responsible for the dual housing market. In short, in *Clark* the concept of the necessity of personal responsibility for the conditions which gave rise to the exploitative situation was rejected.[40]

After deciding that a prima facie case of residential segregation was established by the plaintiffs, the court then turned its attention to whether a prima facie showing of an unreasonable differential of price and sale terms of housing sold to blacks and whites had been made. Plaintiffs' proof on this point was extensively set forth by the court of appeals[41] and can be summarized as follows: (1) evidence established that blacks were charged approximately twenty per cent in excess of the fair market value of their homes; and (2) data on the plaintiffs' financial condition showed they were in a position to finance their new homes by mortgages, but that defendants required a contract method of sales and disallowed mortgaging. From this evidence, the court concluded, it could be inferred that exploitation had been practiced; the contract sales method, which hid the sale price from review and certain

39. *See* p. 191 *supra.*

40. While the court found that expert testimony established a prima facie case of residential segregation, it also noted it was not "beyond the strictures of judicial notice to observe that there exists in Chicago and its environs a high degree of racial segregation." 501 F.2d at 334-35. A 1973 study by the Council on Municipal Performance, indicating that Chicago was the second most segregated of the thirty largest United States cities, was also cited. *Id.* at 335, *citing* COUNCIL ON MUNICIPAL PERFORMANCE, 1 MUNICIPAL PERFORMANCE REPORT 16-18 (1973).

41. 501 F.2d at 334-37.

disclosure by lending institutions who would otherwise finance the mortgage, facilitated defendants' sales of homes above their fair market value. Moreover, this method resulted in a profit to defendants which was almost twice that of the industry on the ordinary sale of a home.[42]

Thus, the inference of unreasonable dealings solely on account of race could be drawn from plaintiffs' offer of proof. That defendants had arrived on the scene after other forces and agents of discrimination had produced a dual housing market which greatly inflated demand for housing by blacks did not exonerate defendants from liability. As Chief Judge Swygert wrote, "We find repugnant to the clear language and spirit of the Civil Rights Act the claim that he who exploits and preys on the discriminatory hardship of a black man occupies a more protected status than he who created the hardship in the first instance."[43] Such conduct, the court observed further, was no less an imposition of a badge of slavery.[44] Moreover, the exploitation had the effect of draining the black family's resources, resulting in a reduction of disposable income available for other necessities of life, and subjecting it to an inescapable cycle of social inequality.[45]

III. De Jure Discrimination and Metropolitan-Wide Housing Plans

Gautreaux v. Chicago Housing Authority,[46] a post-*Bradley* decision, involved the scope of remedial action necessary to remove the effects of de jure discrimination in publicly assisted housing. In essence, the Seventh Circuit opinion by Justice Tom Clark held that none of the reasons which prevented the imposition of a metropolitan-wide remedy in *Bradley* were present in the case before it, and further, that compelling reasons existed in *Gautreaux* which warranted the reversal of the trial judge's failure to impose such a remedy.

The case name should have a familiar ring, because the *Gautreaux* cases have been wending their way up and down the federal courts since plaintiffs filed their complaints in 1966.[47] In fact, the decision in *Gautreaux* under

42. *Id.* at 335-39.
43. *Id.* at 331.
44. *Id.*
45. *Id.*
46. 503 F.2d 930 (7th Cir. 1974).
47. The history of the two cases is as follows:
A. *Gautreaux v. Chicago Housing Authority* (CHA)
1. Defendant's motion to dismiss as to standing and class action denied; motion to dismiss for failure to allege intentionally discriminatory acts granted. 265 F. Supp. 582 (N.D. Ill. 1967).
2. CHA found to be discriminating in tenant assignment policies (by quotas) and in site selection practices (unrebutted statistics permitted in-

discussion here is consolidation of two actions originally filed separately

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ference of intent). 296 F. Supp. 907 (N.D. Ill. 1969).

3. CHA ordered to use its best efforts to (a) construct 700 units in predominantly white areas, and (b) construct 75 per cent of all future housing in such areas. 304 F. Supp. 736 (N.D. Ill. 1969).

4. After a year and a half elapsed and CHA had failed to propose new housing for approval by the city council, the district court modified its order by requiring CHA to submit sites for 1,500 units to the Chicago City Council by September 20, 1970. Unreported decision. This was appealed by CHA and affirmed. 436 F.2d 306, 310 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

5. When the city council failed to act on proposed site selections, the district court suspended the requirement of local governmental approval and ordered CHA to submit a list of sites to HUD. 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd*, 480 F.2d 210 (7th Cir. 1973).

B. *Gautreaux v. Romney*

1. The district court dismissed the complaint, but the Seventh Circuit reversed, finding HUD had spent $350 million "in a manner which perpetuated a racially discriminatory housing system in Chicago" in violation of the fifth amendment. 448 F.2d 731, 739 (7th Cir. 1971).

2. Plaintiffs sought to enjoin HUD from granting Model Cities funds to Chicago until it had submitted site selections to the Chicago City Council for approval. The district court issued the restraining order, but the court of appeals reversed on the grounds that no discrimination had been found on the part of the Model Cities program and that that program had only minimal involvement with public housing. 457 F.2d 124 (7th Cir. 1972), *rev'g* 332 F. Supp. 336 (N.D. Ill. 1971).

C. *Gautreaux v. Chicago Housing Author. & Romney*

1. On remand from the court of appeals' reversal of the injunction against HUD's grant of Model Cities funds, the district court consolidated the two cases, entered summary judgment against HUD, and ordered the plaintiffs and local and federal defendants to submit proposed orders to desegregate public housing in Chicago. The court specifically solicited alternative orders which were not to be confined to the geographical limits of the city of Chicago. 363 F. Supp. 690 (N.D. Ill. 1973).

After a hearing in which plaintiffs urged the adoption of a metropolitan-wide plan, the district court adopted HUD's proposed order which confined the remedy to the city limits. *Id.*

2. In the decision which is the focal point of the discussion here, the court of appeals reversed the district court's order and imposed a metropolitan-wide plan. 503 F.2d 930 (7th Cir. 1974).

3. The Seventh Circuit denied the defendants' petition for a rehearing, reemphasized its approval of metropolitan-wide relief, and noted that the record supported that remedy and that the remedy was squarely within the holding of Milliken v. Bradley, 94 S. Ct. 3112 (1974). 503 F.2d 939 (7th Cir. 1974).

4. The district court appointed a master to identify the causes of the delay in construction of housing pursuant to prior orders and to draw up a plan for future construction. 384 F. Supp. 37 (N.D. Ill. 1974), *petition for writ of mandamus denied sub nom.* Chicago Housing Author. v. Austin, 2 CCH Pov. L. Rep. ¶ 20,347 (7th Cir. Jan. 24, 1975).

against the Chicago Housing Authority and federal defendants. Briefly, the history of the cases is that plaintiffs alleged, and the district court found, that the Chicago Housing Authority (CHA) had violated 42 U.S.C. §§ 1981 and 1982 and the fourteenth amendment by maintaining existing patterns of segregation in public housing through its tenant assignment and site selection policies and practices. A separate suit against the United States Department of Housing and Urban Development (HUD) successfully alleged that the federal government had assisted CHA in achieving these discriminatory results.

Four years and four appeals later, the district court entered a remedial order in the consolidated cases requiring CHA to select sites for future public housing in nonblack areas, but confining the site selection to the geographical bounds of the city of Chicago, and only requiring HUD to use its "best efforts" to assist CHA.[48] Plaintiffs had urged a remedy similar to that affirmed by the Sixth Circuit in *Bradley*, but the trial judge denied the motion and adhered to his original order which placed certain limitations on the construction of public housing in census track areas in which the black population exceeded thirty per cent.[49] Even though plaintiffs pointed out that by the year 2000 all of Chicago would fall within that limitation because of the city's ever-increasing black population and rapidly decreasing white population,[50] the district court rejected a metropolitan plan because "the wrongs were committed within the limits of Chicago and solely against residents of the City" and because CHA could too easily escape what it considers a "politically distasteful task" by "passing off its problems onto the suburbs."[51]

Thus, the district court, after considering a remedy proposed by plaintiffs that would require either mixed suburban and inner city participation or solely suburban participation, rejected these proposals and ordered a "Chicago-only" plan because (1) there was no allegation and no evidence that the suburbs participated in the discrimination; and (2) guided by a sense of retributive justice, it decided that Chicago alone should undo that which it had done. Although at the time of the district court order the Supreme Court had not yet decided *Bradley*, the first ground for the district court's

48. Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

49. Gautreaux v. Chicago Housing Author., 304 F. Supp. 736 (N.D. Ill. 1969).

50. This is essentially the same argument that persuaded the Sixth Circuit in *Bradley* but was rejected by the Supreme Court. In Detroit, at present, a Detroit-only busing plan would produce minimal racial balance and, worse, would exacerbate the steadily increasing "white flight" from the city. Justice Marshall's anguished dissent in *Bradley*, 94 S. Ct. at 3145, rightly contends that the majority failed to come to grips with these realities.

51. Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

rejection of a metropolitan-wide remedy in *Gautreaux* is identical to the Court's rationale for reversing the metropolitan remedy in *Bradley*.

By the time *Gautreaux* reached the Seventh Circuit on appeal, *Bradley* had been decided by the Supreme Court, and the court of appeals was compelled to take *Bradley* into account. In holding that a metropolitan plan was appropriate on the facts of the case before it, the Seventh Circuit analyzed and distinguished *Bradley*'s prohibition of a metropolitan plan.

The essence of the holding in *Bradley*, according to Justice Clark, is that deeply rooted legal traditions concerning the control and administration of schools by local communities which have not been shown to be in violation of the law are sufficient interests to limit a court's equitable power to obtain compliance with the fourteenth amendment by ordering a remedy which disregards the boundary lines of those local political subdivisions. The general proposition that political subdivision lines may not be held up as an impediment to the vindication of constitutionally guaranteed rights was, in Justice Clark's opinion, merely qualified and not overruled.[52]

The *Gautreaux* majority emphasized that *Bradley* simply dealt with appropriate remedies for de jure school discrimination and that, as such, it should be limited to its facts. The majority also relied heavily on Justice Stewart's concurring opinion in *Bradley* as authority for that construction because, as the swing vote in *Bradley*, Justice Stewart felt constrained to state explicitly the boundaries of the majority view in light of the forceful and critical dissents. Stewart's statement of the majority holding is that "the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction."[53] Accordingly, the appellate court in *Gautreaux* reasoned that while an equity court's powers have always been broad and flexible, equity necessarily functions on a case-by-case basis. The task before the *Gautreaux* court was thus to analyze the facts of the case before the Supreme Court in *Bradley* and to determine whether the similarities were so great as to compel a decision in accord with *Bradley*'s prohibition on a metropolitan-wide remedy, or whether sufficient differences existed to warrant a freer exercise of equitable powers.

52. The proposition derives from two remedial principles. First, unconstitutional discrimination requires a remedy designed to achieve effective and immediate results. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968). Second, where political subdivision lines are drawn for the purpose or with the effect of denying constitutional rights, they may be ignored. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

53. 94 S. Ct. at 3131 (footnote omitted).

The obvious difference between *Bradley* and *Gautreaux* is the subject matter of the constitutional right being vindicated: public education opportunities versus public housing opportunities. *Gautreaux* pointed out that both the majority opinion and Justice Stewart's concurring opinion in *Bradley* "implied that the results as to schools might be different if housing discrimination were shown."[54] That appears to be a reference to Justice Stewart's remarks that

> [n]o record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity, and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.[55]

Indeed, Justice Stewart had earlier commented that the remedy proposed "might well be appropriate" if the state had contributed to the segregation "by purposeful racially discriminatory use of state housing or zoning laws . . . ."[56] But *Gautreaux* may have given an overly optimistic interpretation of the majority opinion's fleeting reference to housing-related discrimination. In a footnote, the majority simply stated that "in its present posture, the case does not present any question concerning possible state housing violations."[57] But certainly Justice Stewart's comments do indicate that an allegation and finding of housing discrimination by the government would introduce sufficiently new elements to warrant separate consideration.

In addition, the *Gautreaux* court noted that school boards, as a class of defendants, have been accorded special treatment in the past by the courts in the course of remedying discrimination. The Supreme Court itself recognized this difference in *Watson v. City of Memphis*,[58] when it refused to permit any further delays in desegregating Memphis' public recreational areas and pointed out that the holding of *Brown II*,[59] which countenanced

54. 503 F.2d at 936 (citation omitted).

55. 94 S. Ct. at 3133 n.2.

56. *Id.* at 3132.

57. *Id.* at 3119 n.7. The Court's footnote is to a textual description of the participation by the state board of education in the discriminatory results of Detroit's school system. The district court had found that other state and federal programs and private persons likewise contributed to that result, including government-subsidized housing programs. The Sixth Circuit expressly did not rely on these findings in affirming the district court's opinion and order. Thus, the Supreme Court was simply noting that the housing issue was not before it, because the sufficiency of the court of appeals' findings had not been attacked by the defendants.

58. 373 U.S. 526 (1963).

59. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*). The first *Brown* decision, 347 U.S. 483 (1954), found the "separate but equal" doctrine, *see* Plessy

certain delays due to the practical difficulties in desegregating school systems, had not been extended beyond school situations. The *Watson* Court observed that "cognizable difficulties" inhered in remedying school desegregation, but that these difficulties had not presented themselves in areas such as higher education, racial zoning, transportation, union representation, and voting rights.[60]

Justice Clark examined the "equitable factors" which attach to public education, and which accordingly limit the relief for de jure school segregation, and the attributes of public housing. He found that the two special attributes of public education emphasized in *Bradley* are (1) the "deeply rooted tradition of local control [over] public education"[61] and (2) the difficulty in administering a massive metropolitan-wide busing program. The court then found that these attributes did not obtain in the area of public housing. Public housing, the court wrote, unlike public education which has always been a local concern, derives from federal statutory authority. Federal law has prohibited housing discrimination for over one hundred years, and, moreover, ordering the construction of housing is more easily accomplished than "restructuring school systems."[62] All three of these distinctions were made without further comment, and the first and last may be too facile an approach to the problem of distinguishing the two areas.

The first distinction between public education and public housing—that the former is a traditionally local concern and the latter traditionally federal—overlooks the fact that the housing legislation in effect at that time explicitly granted local community control over the decision to construct federally assisted public housing.[63] It is unfortunate that the *Gautreaux* court did not

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v. Ferguson, 163 U.S. 537 (1896); note 14 *supra*, constitutionally defective, but deferred the question of relief until hearing further arguments. The second *Brown* decision laid down the general guidelines that desegregation proceed with "all deliberate speed" tempered by leeway for reasonable delays which might justify less than immediate desegregation. The abuse by school boards and certain district courts of what might have been the intent of *Brown II* most likely prompted the Court to refuse to extend it to other areas. *Cf.* Green v. County School Bd., 391 U.S. 430, 439 (1968) ("[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now"). Therefore, it may not be that schools are a special case, but that judicial experience with countenancing or sanctioning *any* delay has proved so disastrous that it was not to be repeated. If this is the case, it is not a good enough reason to distinguish schools from housing or to rely on *Watson*.

60. 373 U.S. at 532 & n.4.

61. 503 F.2d at 936.

62. *Id.*

63. United States Housing Act of 1937, § 15, 42 U.S.C. § 1415(7)(a)(ii) and (b)(i) provides:

> (7) In recognition that there should be local determination of the need for for low-rent housing to meet needs not being adequately met by private enterprise—

delve into the issue of the local consent requirement of the Housing Act. The existence of the requirement is not even noted, and the court simply stated that "while voluntary cooperation [of suburban Chicago] is not indicated, a Court order directing that those not volunteering were to be made parties might help."[64]

If the Supreme Court had granted certiorari in *Mahaley v. Cuyahoga Metropolitan Housing Authority*,[65] it would have had the opportunity to decide whether the local consent requirement may be suspended in order to effectuate compliance with the Constitution. In *Mahaley*, the Sixth Circuit reversed a decision holding that the failure of Cleveland, Ohio's suburbs to construct public housing violated the black plaintiffs' constitutional and statutory rights by perpetuating suburban housing discrimination. The district court had acknowledged that the United States Housing Act of 1937[66] required the consent of a local community before a housing authority could act, but it held that the failure of the suburbs to enter into such an agreement with the Cuyahoga Housing Authority had the *effect* of discriminating against the plaintiffs. The district court's opinion, then, rested solely on a finding of de facto discrimination. The federal law authorizing local consent was not held invalid,[67] but the suburban defendants were held to have acted illegally in using the consent requirement "as a tool to perpetuate segregation."[68] The Sixth Circuit, in reversing the trial judge in *Mahaley*, dashed hopes and speculations about the implications of the finding that suburban inaction could be illegal.[69] The thrust of the reversal appears to be twofold.

> (a) The Authority shall not make any contract with a public housing agency for preliminary loans . . . (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and
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> (b) The Authority shall not make any contract for loans . . . or for annual contributions . . . (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter . . . .

64. 503 F.2d at 936.

65. 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3401 (U.S. Jan. 13, 1975), *rev'g* 355 F. Supp. 1257 (N.D. Ohio 1973).

66. 42 U.S.C. §§ 1401-36 (1970).

67. Since a three-judge court had earlier declared that provision of the Housing Act valid in the same case, *see* Mahaley v. Cuyahoga Metro. Housing Author., 355 F. Supp. 1245 (N.D. Ohio 1973), it was the single judge's task to determine whether the defendants were in violation of § 1983.

68. 355 F. Supp. at 1259.

69. *See* 4 L. Proj. Bull. 1 (June 15, 1974) for an imaginative but, unfortunately, pre-

The court concluded that (1) the Supreme Court has held that de facto discrimination is not actionable; and (2) the Court has upheld the Housing Act's local community control provision.

The problem of local consent, however, will not loom as so large a barrier in situations arising after the effective date of the Housing and Community Development Act of 1974.[70] The new Act permits HUD to overrule the local consent agreement in certain instances, including a community's failure to construct needed housing.[71]

As its third basis for distinguishing public housing from public education, the *Gautreaux* court stated that "the administrative problems of building public housing outside Chicago are not remotely comparable to the problems of daily bussing thousands of children to schools in other districts run by other local governments."[72] The court was probably referring to the fact that some form of "super" school board would have to be created and monitored by the court to administer a metropolitan-wide school remedy. This newly created school board has no functional analogue and would force a court into strange waters. Moreover, the local community, which finances its schools through local property taxes, would no longer have exclusive control over those funds. However, a metropolitan-wide remedy in the public housing realm would not necessitate the creation of a super body with interdistrict control; rather, local housing authorities could construct and manage local projects. Additionally, since public housing is federally financed, the loss of local control over locally raised revenues is not an issue.

In considering the ease of judicial administration of the remedy in public

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mature treatment of *Mahaley*. That article discussed another decision, Lawrence v. Oakes, 361 F. Supp. 432 (D. Vt. 1973), which held that the local consent requirement for leased public housing, as applied, could operate discriminatorily, and that a local community could be called upon to justify its refusal to engage in leased public housing.

70. Pub. L. No. 93-383, §§ 101-822 (Aug. 22, 1974) (U.S. CODE CONG. & AD. NEWS 3243-3374 (1974)).

71. The Act, while continuing local approval requirements for conventional public housing in § 201(a)(5)(e) and for other subsidized programs in § 213(a), exempts projects where twelve or fewer units are subsidized or where the project is state financed in § 213(b). More importantly, however, there is provision for the Secretary of Housing and Urban Development to overrule the local community's refusal to provide approval. The Secretary may overrule the community's denial of approval where the project proposal conforms to that community's housing assistance plan submitted under Title I of the Act, Pub. L. No. 93-383, §§ 101-18 (Aug. 22, 1974) (U.S. CODE CONG. & AD. NEWS 3243-67 (1974)). The legislative history indicates that such exercise of authority by the Secretary must be based upon substantial reasons. *See* H.R. DOC. NO. 1279, 93d Cong., 2d Sess. (1974). *See generally* note 107 *infra*. Such conditional right of local approval may be read to support the *Gautreaux* analysis that public housing is less of a traditional local entity than public schools.

72. 503 F.2d at 936.

housing, the Seventh Circuit was heavily influenced by the fact that HUD had, by public statement, regulation, and representations made in the proceedings, advocated metropolitan-wide relief.[73] Certainly, if the federal agency responsible for administering public housing saw no difficulties, the court could act with greater confidence that the administrative burden was feasible.

After distinguishing public housing from public education, *Gautreaux* set up what may be considered an alternative ground for ordering metropolitan-wide relief by deciding that the criteria established in *Bradley* for a de jure violation permitting metropolitan-wide relief were satisfied. First, the court found that ten of the twelve suburban housing projects were located in black areas in those suburbs. Presumably, this evidence established an interdistrict violation consisting of discriminatory conduct by both suburban and city housing authorities. Secondly, the court relied on *Clark*, decided earlier that term, and the fact that judicial notice was taken in *Clark* of the existence of discriminatory housing patterns in the metropolitan Chicago area. This segregation, Justice Clark said, produced "discriminatory effects throughout the metropolitan area."[74] In the denial of defendants' petition for a rehearing this latter point was amplified. There the court said:

> The requested relief does not go "far beyond the issues of this case," as the trial judge suggests. Rather, it is reasonable to conclude from the record that defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the "white flight" phenomenon which has exacerbated the problems of achieving integration to such an extent that intra-city relief alone will not suffice to remedy the constitutional injuries. The extra-city impact of defendants' intra-city discrimination appears to be profound and far-reaching and has affected the housing patterns of hundreds of thousands of people throughout the Chicago metropolitan region.[75]

Therefore, even though *Clark* concerned purely private de facto racial discrimination, the Seventh Circuit was willing to draw the inference that Chicago's segregated housing policies fed on racial fears and perpetuated the separation of the races on a metropolitan-wide basis. Because of its metropolitan-wide effects and because the discrimination practiced by CHA had been of the de jure type, the facts satisfied the *Bradley* requirement. The order denying the petition for rehearing in *Gautreaux* made no mention of

73. *Id.* at 937-38. HUD had represented to the trial court that metropolitan-wide relief was "desirable."

74. *Id.* at 937.

75. *Id.* at 939-40 (footnote omitted).

the fact that some suburbs and housing authorities had also practiced racial discrimination, and it is probably fair to say that this factor is of minimal importance.

IV. The Collective Impact of *Clark* and *Gautreaux*

Simply confined to their own facts, it is apparent that *Clark* and *Gautreaux*, if applied to other cities, define a new class of victims to be compensated for housing discrimination and could make significant inroads in breaking down segregated housing patterns. Dual housing markets, such as those described in *Clark*, are the rule, not the exception; builders and realtors prey upon the disparities daily. Most public housing authorities find themselves unable to build in white areas, and to desegregate housing projects effectively would require access to suburban land. But the possible limitations are equally obvious. Unless a large builder is discriminating in a particular city, the beneficial results of suits are simply not satisfactory in light of the use of limited legal resources and the considerable investigatory time necessary to sue many small unrelated builders.[76] Limited to its facts, *Gautreaux* may similarly present problems on a city-by-city basis. The Chicago Housing Authority presents a study of especially egregious, de jure discriminatory behavior; Justice Clark was moved to say that there was "a callousness on the part of appellees towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension."[77] Plaintiffs were able to prove a total refusal to admit blacks to certain projects, a quota imposed on black occupancy of others, and a catering to the prejudices of the city council members in offering site selections for approval, which continued even after the district court's findings of discrimination. This is not to suggest that only outrageously discriminatory conduct is remedial, but to point out that, using a de jure formulation as the measure of violation, plaintiffs must show a policy which is discriminatory on its face or is deliberately or purposely discriminatory. Many housing authorities' practices have since taken on a more sophisticated bent than the neanderthal practices of Chicago's. Moreover, de jure proof may not be as easily discoverable as de facto proof of discrimination.[78]

76. In *Clark* it is not clear how many homes the defendants had built and sold. One builder, Universal, entered into joint ventures with a handful of land companies that also assumed sales responsibilities. *See* 501 F.2d at 327 n.1. The court also disregarded corporate veils where the corporations were owned and managed by the same persons who owned and managed defendants. *Id.* at 336-37.

77. 503 F.2d at 932.

78. For example, the failure to seek and utilize available resources aggressively (where the waiting list is disproportionately black), the refusal to enter into a cooperation agreement and to publicize proposed sites in integrated areas, thus inflating land costs to the point where it is impossible to formulate an economically feasible project, are common acts of de facto discrimination. It would be impossible to prove intent

But the major significance of these two cases lies not in their impact on cases involving duplicate fact patterns. Their real importance is contained in *Clark*'s rejection of any legal distinction between de jure and de facto discrimination and *Gautreaux*'s willingness to distinguish metropolitan-wide remedies in housing cases from metropolitan-wide remedies in school desegregation cases. Taken together, they indicate that where it can be proven that a private or public policy has had the effect of discriminating, either by creating or perpetuating residential segregation, metropolitan-wide remedies may be necessary to provide effective relief.

Moreover, the extremely pragmatic but strategically essential lesson to be learned from the cumulative effect of *Keyes, Bradley, Gautreaux*, and *Clark* is that meaningful remedies in school litigation have an uncertain future, while housing litigation stands a much better chance of evoking a favorable response from the courts. In fact, pressing future school litigation on this point may force the Supreme Court into unfortunate positions. Thus far it has assiduously avoided—most notably in *Keyes* and *Bradley*—deciding whether de facto discrimination violates the federal Constitution. Justice Powell's dissent in *Keyes* and the majority opinion in *Bradley* are indicia of the Court's hostility towards extensive busing. If the issue of de jure versus de facto discrimination is met head-on in the context of school litigation, the spectre of busing as a remedy could produce disastrous results on the substantive question of the measure of a violation. But two Justices who could make all the difference, Justices Powell and Stewart, may be willing to abolish the distinction between de jure and de facto discrimination in the housing context and to order metropolitan-wide relief.

This is not to say, however, that, within the confines of the de jure mold, school desegregation suits may not continue to break new ground. The *Bradley* Court's requirement that an interdistrict violation be shown in order to grant metropolitan-wide relief has not yet been fleshed out. In denying the petition for rehearing in *Gautreaux*, the court emphasized that its decision was squarely within that requirement. It also noted that the public housing authority's practices had reinforced the ghetto and had caused whites to flee from the city to the suburbs. Thus the discriminatory practices of the city did have a suburban effect and constituted an interdistrict violation. Certainly de jure city-school discrimination could have a suburban effect as well. Segregated classes also reinforce ghettos, exacerbate urban problems, and ultimately cause whites to leave for the suburbs. These are the long-range effects. Segregated housing projects and classrooms may, in

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on most of these issues, and in all cases it is the effect of the discriminatory action or inaction that matters.

the short run, encourage some whites to stay in the city; but in the long run the effects of that very segregation cause them to leave. There have been metropolitan-wide school remedies ordered since the *Bradley* decision, and these cases will ultimately determine the contours of an interdistrict violation.[79]

A. The Concept of Shared Liability

The key issue in breaking down legal distinctions between de jure and de facto discrimination—and one which is present with varying degrees of emphasis in all four cases—is the concept of shared liability. De facto discrimination necessarily involves policies and practices of a particular defendant or class of defendants which reflect the larger society's discrimination. A neutral or even well-intentioned policy may produce discriminatory results because of prior circumstances beyond the control of the policymaker.[80]

In *Keyes*, for example, the majority gave a new twist to the definition of de jure discrimination by permitting presumptions to attach in order to avoid the issue of shared liability. There, it will be recalled, the allegations were that schools in two sections of Denver were unlawfully segregated. The outlying area of the city had been purposely or deliberately segregated; the core city, which contained racially segregated neighborhoods, suffered from school segregation by virtue of the imposition of the neighborhood school policy. Thus the segregation of the two sections could be respectively characterized as de jure and de facto. But the Supreme Court instead held that de jure discrimination practiced in one area may infect other areas of a school system as well, thus finding a basis upon which to provide relief for both sections.[81] Justice Powell's dissent intimated that the majority's avoidance technique was intellectually dishonest.[82]

The shared responsibility of the state and local school boards was explicitly acknowledged by the majority in *Bradley*, but it was narrowly restricted in its scope by a finding that the evidence failed to demonstrate de jure acts,

79. *See* Newburg Area Council, Inc. v. Board of Educ., No. 73-1403 (6th Cir. Dec. 11, 1974); Haycraft v. Board of Educ., No. 73-1408 (6th Cir. Dec. 11, 1974), two cases in which the court of appeals remanded orders of metropolitan-wide remedies to the district court for reconsideration in light of *Bradley*. It is not entirely clear whether these decisions hold that an interdistrict violation was established or whether the facts constitute an exception to *Bradley*. In any event, the district court ordered metropolitan-wide busing in both. *See also* Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974), and United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), two post-*Bradley* cases holding that the state was sufficiently implicated in the discrimination.

80. *See, e.g.*, Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS 63 (1973).

81. 413 U.S. at 208.

82. *Id.* at 217.

either on the part of the state board of education or by suburban school districts, sufficient to justify interdistrict busing. In fact, the majority felt constrained to comment to dissenting Justices White and Marshall "that it is not on this point that we part company."[83] But while the doctrine of shared liability is recognized, it has no substance if, in order to be held liable, the state agency or suburban school districts must first be shown to have committed de jure discriminatory acts. The concepts of de jure discrimination and shared liability are, in fact, antithetical.

In *Gautreaux*, one of the bases for ordering metropolitan-wide relief implicitly involved the shared liability of suburban public housing authorities. The widespread private residential segregation shown in *Clark* was used as support for the proposition that there was evidence of suburban discrimination. Thus public agencies were held liable for policies which perpetuated private discriminatory acts.[84] This is the same type of reasoning that was rejected by the Sixth Circuit in *Mahaley v. Cuyahoga Metropolitan Housing Authority*.[85] The trial judge in that case had found that the failure of suburban housing authorities to voluntarily request federal aid for public housing was discriminatory. Accordingly, what would ordinarily have been viewed as a neutral policy decision was, when its effect was to perpetuate private discriminatory actions, sufficient to hold the public agency liable. But the Sixth Circuit's reversal, based upon the absence of evidence of discrimination directly practiced by the housing authority, is a rejection of the shared liability theory.

Finally, of course, *Clark*, more so than any of the other cases discussed, explicitly and thoughtfully recognized and affirmed the shared liability theory. It is worth noting that, in the process of breaking down the distinctions between de facto and de jure discrimination, the decision avoided resort to those labels and instead focused on the applicability of the rationale of shared liability to the case before it.[86] Since the court relied on few extrinsic

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83. 94 S. Ct. at 3128.

84. In its denial of the petition for rehearing in *Gautreaux*, 503 F.2d at 939, the Seventh Circuit focused on the actions of the housing authority itself and their effect on racial separation between city and suburbs. But it in no way suggested that the blame for residential segregation rests solely on the housing authority, or that the other contributing factors noticed in *Gautreaux*, *see id.* at 936-39, and cited in its full decision are to be disregarded. *See id.* at 939-40.

85. 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3401 (U.S. Jan. 13, 1975), *rev'g* 355 F. Supp. 1257 (N.D. Ohio 1973).

86. Defendants in *Clark* protested that the plaintiffs would make them vicariously liable for the discriminatory acts of others. *See* 501 F.2d at 329. But the language of the court quoted above, *see* p. 195 *supra*, clearly indicates that the defendants were held equally, and not vicariously, liable.

aids and used a common sense approach, it may be worthwhile to examine whether the *Clark* decision represents a departure in judicial thinking, or whether it is simply a logical application of a theory already recognized by the Supreme Court.

One of the most striking examples of the Supreme Court's recognition of shared liability can be found in *Griggs v. Duke Power Company*,[87] a unanimous decision involving Title VII of the Civil Rights Act of 1964. In *Griggs*, the defendant utility company's use of a written test and its requirement of a high school diploma were held to be racially discriminatory and in violation of Title VII. The company had instituted the test as a means of upgrading its work force, and there was no evidence that this was done with any intent to keep blacks out of the work force. But the Court found that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[88] In other words, the Court explicitly held that the private employer is under an obligation to ensure that the discrimination practiced by other parts of society, for which he is in no way personally responsible, is not reflected in his hiring practices. Inferior educational opportunities have resulted in lower test scores for blacks and in a lower proportion of blacks with high school diplomas. Therefore, the use of these employment devices has the effect of discriminating. They cannot survive attack even if they can be shown to be related to job performance. They must be compelled by business necessity. The test is akin to the compelling state interest test and is about as difficult to meet.[89]

There is nothing in the statutory language of Title VII which compelled the result reached in *Griggs* or which could not be found in the 1866 Civil

87. 401 U.S. 424 (1971).

88. *Id.* at 431.

89. Following *Griggs*, a host of employment practices which reflect the larger society's discrimination against minorities and females have been declared unlawful. For example, where national arrest record statistics showed that a higher proportion of blacks than whites are arrested, an arrest inquiry of job applicants was deemed unlawful. *See* Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972). In Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971), a company that discharged a black employee because his wages were too frequently garnished was ordered to rehire that employee and to cease using garnishment as a reason for discharge, because statistics showed that minorities were more likely than whites to have their wages garnished. In these cases the private employer was not responsible for either the discriminatory police practices which led to a higher arrest rate for blacks or the discriminatory lending institution policies which forced blacks to seek other less reputable and more costly methods of financing. Nevertheless, the employers were held liable for employment practices which had the effect of perpetuating the discrimination.

Rights Act. Title VII is an extremely detailed statutory scheme, while sections 1981 and 1982 are bare skeletal mandates. But, if anything, Title VII's elaborate scheme would appear to militate against the expansive interpretation given it by the federal courts. It contains, for example, a prohibition on preferential treatment solely on account of racial imbalance,[90] protects bona fide occupational qualifications,[91] seniority systems, and the "professionally developed" test.[92] Notwithstanding this carefully drawn statute, the courts have aggressively enforced Title VII.[93] Thus there are no differences in the underlying statutory schemes of the 1866 Civil Rights Act and the 1964 Act which would require different results.

In the housing field, the Supreme Court's opinion in *James v. Valtierra*,[94] holding that a state may require an affirmative vote at a local referendum before authorizing low-rent housing projects, appears to have left open for future decision the question whether a de facto policy is unconstitutional. The precise meaning of the Court's holding in *Valtierra* may prove to be significant because the Sixth Circuit, in reversing the lower court's finding in *Mahaley* that the suburban housing authorities' failure to build public housing was de facto discrimination and actionable, cited *Valtierra* as support for the proposition that because the Housing Act grants local communities the power to make initial decisions about the need for public housing, there is "no basis to infer discrimination upon the part of a municipality for doing what it has a lawful right to do under the express provisions of the housing [*sic*] Act."[95] There is no doubt that the inference would be impermissible in the absence of more facts tending to show discrimination. But the Court in *Valtierra* expressly reserved its opinion of the legality of a refusal to construct public housing where a showing of racial discrimination is made when it noted that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."[96]

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90. 42 U.S.C. § 2000e-2j (1970).

91. *Id.* § 2000e-2e.

92. *Id.* § 2000e-2h.

93. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (race, job qualifications); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (race, tests); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (race, seniority); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (sex, bona fide occupational qualification); *cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (sex, bona fide occupational qualification). *But see* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (national origin).

94. 402 U.S. 137 (1971).

95. 500 F.2d at 1092.

96. 402 U.S. at 141, *citing* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

It is significant that *Valtierra* cited *Gomillion v. Lightfoot*[97] when it distinguished the facts before it and discussed the possibility of a different result in a case where there was racial discrimination. In *Gomillion*, the Court held that the unlawful effect of redistricting on black plaintiffs could be inferred from its statistical impact unless defendants could rebut the inference. Thus, proof of discrimination rested on the effect of the legislation, not the legislators' intent. The Sixth Circuit in *Mahaley* did not choose to discuss *Gomillion*. Instead, it referred to *Palmer v. Thompson*,[98] decided a year after *Valtierra*, as authority for the proposition that "a neutral policy which had a greater impact on a minority was not invalid on that basis."[99] Even though the suburban Cleveland defendants' inaction may have disproportionately affected blacks, the Sixth Circuit construed *Palmer* as precedent for finding no constitutional violation on those facts. This construction is unwarranted even upon a casual reading of *Palmer*. The crux of the Supreme Court's decision in *Palmer* is that there was no evidence that the city of Jackson, Mississippi, by closing down its pools, took "state action affecting blacks differently from whites."[100] Since the effect of the closing was to deny the public service to both blacks and whites, the Court upheld the city's decision. In doing so, it rejected any evidence as to the motive of the city council and reiterated that *Gomillion* stood for the proposition that the Court will look only to the effects of legislative decisions, not the motivation behind them. Thus, the *Mahaley* panel was not justified in relying on either *Valtierra* or *Palmer* in denying relief where it was shown that blacks were disproportionately affected by a government action. Finally, the Sixth Circuit, because it had chosen to define a constitutional violation in this restricted manner, had to conclude that the record before it was bereft of evidence of any discrimination by suburban defendants. The district court had, in fact, found that the suburbs in question were nearly all white; that 87% of the blacks in the county lived in Cleveland; that 73% of the persons on the waiting list for public housing in Cleveland were black; and that the metropolitan area was in need of approximately 50,000 additional units of public housing.[101] But these facts were necessarily irrelevant to the Sixth Circuit's reading of constitutional law.

B. Implications for the Future

The implications of an expansive reading of *Gautreaux* and *Clark* are quite broad. The authors would like to suggest some possibilities as merely

97. 364 U.S. 339 (1960).
98. 403 U.S. 217 (1971).
99. 500 F.2d at 1093.
100. 403 U.S. at 225.
101. 355 F. Supp. at 1260.

tentative rather than exhaustive.

First, in the context of public housing, it would appear to be of no consequence whether or not majority-white suburbs have established public housing authorities, if there is a finding of metropolitan-wide residential segregation in the *Clark* mold. If there are established public housing authorities, *Gautreaux* provides precedent for their inclusion in a metropolitan-wide remedy, regardless of their willingness to build housing for low-income families. If the suburban area has failed to establish housing authorities, this inaction is as much a policy as action and operates to perpetuate the private prejudices which led to the segregation in the first instance. *Clark* could be easily interpreted to disallow such discrimination.

Similarly, land use policies which serve to perpetuate discriminatory practices, but which are neutral on their face, may also be held to be de facto discriminatory. The effect of exclusionary land use policies has been well documented,[102] although courts have been less than unanimous as to their actionability.[103] Yet under the broader concept of shared liability, governmental policies—no matter how benign or whether promulgated in the inter-

102. *See generally* Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment*, 6 SW. L. REV. 88 (1974); Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

103. *See* James v. Valtierra, 402 U.S. 137 (1971) (state constitutional requirement of local referendum for low-rent housing projects upheld); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (constitutionality of large-lot zoning ordinance upheld); Mahaley v. Cuyahoga Metro. Housing Author., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3401 (U.S. Jan. 13, 1975) (United States Housing Act's requirement of local governing body consent as applied does not violate 42 U.S.C. § 1983); Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974) (abandonment of plans for low-income housing does not violate fourteenth amendment or Title VIII of Civil Rights Act of 1968); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970) (refusal to enjoin referendum on spot zoning ordinance rezoning twenty acres from single family lots to low-rent townhouse and apartments affirmed); Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), *rev'd mem.*, No. 74-1401 (6th Cir. Oct. 22, 1974), *petition for cert. filed*, 43 U.S.L.W. 3417 (U.S. Jan. 22, 1975) (No. 74-900) (plaintiffs unable to challenge city building code and referendum requiring voter approval of publicly-assisted housing due to lack of justiciable controversy); United States v. City of Black Jack, 372 F. Supp. 319 (E.D. Mo. 1974), *rev'd*, 2 HOUSING & DEV. L. REP. 846 (8th Cir. Dec. 27, 1974) (zoning ordinance excluding all apartments, including federally subsidized apartments, upheld in absence of evidence of racially discriminatory intent); Citizens' Comm. v. Lindsay, 362 F. Supp. 651 (S.D.N.Y. 1973), *aff'd*, 2 HOUSING & DEV. L. REP. 866 (2d Cir. Dec. 5, 1974) (failure of city to process applications for low-income housing upheld in absence of evidence of purposeful racial discrimination).

ests of "no growth"—can be evaluated by their effects rather than their purposes.

A land use case which was recently granted certiorari by the Supreme Court, *Warth v. Seldin*,[104] is illustrative. In *Warth*, black and Puerto Rican residents of Rochester, New York complained that the neighboring town of Penfield had enacted a land use regulation (large-lot, low-density zoning ordinance) which prohibited the construction of multi-unit, low-income housing and that the town had failed to authorize zoning variances to permit the construction of certain proposed multi-unit, low-income developments. The Second Circuit affirmed the district court's denial of standing to all plaintiffs, who consisted of taxpayers of the city of Rochester, individual black and Puerto Rican residents of Rochester, nonprofit corporations concerned with housing discrimination, and a homebuilders' association. The individual black and Puerto Rican plaintiffs present the most interesting case for the purposes of this discussion.[105] These plaintiffs alleged that Penfield's zoning ordinance has the effect of excluding them from the town. The fatal defect, according to the Second Circuit, was the lack of any "concrete adverseness," which it defined as a nonresident's interest in specific land or in a specific proposed development. The defect was illustrated, the court thought, by the fact that the plaintiffs sought a declaratory judgment rather than an order mandating the construction of a proposed development.

The Supreme Court may have granted certiorari simply to resolve the split in the circuits regarding the standing issue;[106] it may, however, take this opportunity to state its views on acceptable means of achieving integration. The Court's reluctance in *Bradley* to permit busing on the facts before it, along with Justice Stewart's concurring opinion, may simply mean that the Court considers the integration of just our children a poor substitute for total

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104. 495 F.2d 1187 (2d Cir.), *cert. granted*, 95 S. Ct. 40 (1974).

105. The standing of the city of Rochester taxpayers is perhaps the most difficult issue. They allege Rochester has more than its "fair share" of tax-abated housing projects, causing a shrinkage of the tax base and resulting higher taxes to meet fiscal needs. Penfield's supplying of low-income housing would allegedly ease the Rochester taxpayers' burden.

106. *Compare, e.g.*, Warth v. Seldin, 495 F.2d 1187 (2d Cir.), *cert. granted*, 95 S. Ct. 40 (1974) (no standing for non-residents), *with* United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972), *aff'g* 332 F. Supp. 382 (N.D. Ga. 1971); Shannon v. United States Dep't of Housing & Urban Dev., 436 F.2d 809 (3d Cir. 1970); *and* Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (cases granting standing to a variety of resident and non-resident plaintiffs).

societal integration. It may view the issue of a nonresident's standing as a key to the achievement of that more meaningful form of integration.

The Court will be aided in *Warth* and other land use cases in reaching a decision favorable to plaintiffs by the 1974 housing legislation. The new omnibus law declares that dispersal of housing opportunities for lower income and minority families is part of the national housing policy and addresses the goal of achieving a community's "fair share" of such housing.[107]

In any event, because it implicitly involves the doctrine of shared liability, *Warth* is a case to be closely watched. The public officials of Penfield are reinforcing private discriminatory prejudices by means of their zoning ordinance. Lower income whites are also affected, but the unconstitutional result is that lower income blacks and other minorities are disproportionately affected.

V. A Strategy for Future Litigation

De jure and de facto have never been useful labels to describe either the causes or the effects of discrimination. But, more importantly, these fine legal distinctions deserve no place in what Judge Wright in *Hobson v. Hansen*[108] called "our maturing concept of equality."[109] At present, minorities are being denied the right to share in housing, job, and educational opportuni-

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107. Housing and Community Development Act of 1974, Pub. L. No. 93-383 (Aug. 22, 1974) (U.S. Code Cong. & Ad. News 3243 (1974)). Title I, containing the community development provisions, establishes as a primary purpose the "reduction of the isolation of income groups within communities and geographical areas and 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.* § 101(c)(6). The Act requires each recipient of community development funds to develop as part of its application a housing assistance plan showing how it will solve its community's housing needs. The needs of the community must be developed in accordance with area development planning. *Id.* § 104(a)(1). Thus, where a metropolitan area has adopted a "fair share housing distribution plan," each recipient must include not only the needs of the community's residents but also the needs generated by the dispersal policies contained in such a plan. This is strengthened by legislative history indicating that the needs of those who can be expected to reside there must also be considered, including present employees and future employees of proposed facilities. H.R. Rep. No. 93-114, 93d Cong., 2d Sess. 17 (1974).

Future litigation might be aimed at assuring that receipt of community development funds is conditioned upon adequate consideration of regional housing needs, concrete planning to fulfill these needs, and actual implementation of the plans. *See generally* J. Brooks, Lower Income Housing: The Planners' Response (June 16, 1972) (examining fair share distribution system); 4 L. Project Bull. 1 (Oct. 15, 1974).

108. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

109. *Id.* at 497.

ties in the suburbs; it seems unthinkable that the denial can be justified on the grounds that the policies which perpetuate the exclusion cannot be proved to be intentional or willful. Legislative remedies may be forthcoming, and indeed the 1974 housing legislation is a large step forward. But there is no constitutional barrier preventing the judiciary from putting its power and talents to the task.

Plaintiffs' lawyers may encounter a more willing Court, however, if a busing program is not their sole remedial goal. Similarly, the provision of housing by suburban communities need not be the only remedy sought. If the de facto/de jure distinction is broken down, plaintiffs may wish to introduce evidence of residential segregation (caused by public or private discrimination or both) to support an allegation of discrimination by a school board and a remedy encompassing both housing and busing plans.[110] For example, the remedy might include requiring suburban communities to construct a certain number of racially mixed, low-income housing units. Until the housing goals are met, however, the community would be required to participate in an interim busing program. Other mixed uses of housing and busing remedies may be possible; the purpose here is simply to suggest that it may be tactically better not to promote busing as an end in itself.

Certiorari has been granted in *Warth*,[111] and denied in *Clark*[112] and *Mahaley*.[113] It is more likely than not that when the final order in *Gautreaux* is entered, certiorari will also be sought.[114] If the Seventh Circuit's views prevail, we will know that *Keyes* and *Bradley* are not the final word on the definition of constitutionally prohibited discrimination nor the bounds of permissible remedies. Our segregated classrooms reflect the deeper evil of our segregated society, and *Keyes* and *Bradley* may not be a retreat from aggressive enforcement of constitutional mandates if the Court chooses instead to address the underlying problem.

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110. Evidence of residential racial discrimination was used to support a finding against a school board in Hart v. Community School Bd., 42 U.S.L.W. 2428 (E.D.N.Y. Jan. 28, 1974), *appeal dismissed for lack of a final order*, 497 F.2d 1027 (2d Cir. 1974). Similarly, in Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973), the trial judge used such evidence to support a metropolitan-wide busing plan.

111. Warth v. Seldin, 495 F.2d 1187 (2d Cir.), *cert. granted*, 95 S. Ct. 40 (1974).

112. Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3349 (U.S. Dec. 17, 1974).

113. Mahaley v. Cuyahoga Metro. Housing Author., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3401 (U.S. Jan. 13, 1975).

114. It has been reported that HUD has decided to petition the Supreme Court for certiorari despite requests of civil rights leaders to Secretary Lynn that the decision go unchallenged. *See* 2 HOUSING & DEV. L. REP. 784 (Dec. 30, 1974).