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I. Introduction

In *Washington v. Davis,*[1] the United States Supreme Court established the principle that public acts and laws having a racially disproportionate impact[2] violate the equal protection clause only when discriminatory intent is found.[3] By the age of the precedent marshalled in support of its decision,[4] the Court implied that the intent requirement was not new to the equal protection area, but rather that a long-existing rule[5] merely had been clarified. Although use of the intent rule is now firmly established, the Court has yet to articulate its purpose.[6] While discussion continues concerning what

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1. 426 U.S. 229 (1976). While the Court used the term "purpose" rather than "intent" in *Davis,* the words have been used interchangeably since the Court's reference to both in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), as distinguishing de facto from de jure segregation. *Id.* at 208.

2. Disproportionate impact should be understood as that condition that occurs when a greater portion of one identifiable group is burdened or is more greviously burdened than another identifiable group. The term "disproportionate impact" is preferable to its cognate, "discriminatory impact," because the latter is conclusionary in presuming that discrimination has occurred. The Court in *Davis,* to the contrary, held that a discrimination is not implied routinely from disproportionate impact. 426 U.S. at 240-41.

Discriminatory impact is also said to carry a perjorative connotation that confuses the issue of whether an action has a disproportionate impact or effect, with whether a disproportionate impact is justifiable. *See* Vulcan Soc'y of N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 391 n.4 (2d Cir. 1973).

3. First the Court states the rule negatively as: "[O]ur cases have not embraced the proposition that a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact," 426 U.S. at 239, and then affirmatively refers to: "[T]he basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240. See generally Brest, *The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1 (1976).

4. *See* Akins v. Texas, 325 U.S. 398 (1945), and Strauder v. West Virginia, 100 U.S. 303 (1879), *cited in* Washington v. Davis, 426 U.S. 229, 239 (1976).

5. *See* O. HOLMES, THE COMMON LAW 3 (1881) (author traces the use of intent to Anglo-Saxon law predating the reign of William the Conqueror).

6. *See The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 174 (1977).

is necessary to constitute discriminatory intent,[7] little attention has been directed to the impact of intent analysis on equal protection jurisprudence.

The Supreme Court's insistence on intent as an essential component of equal protection violations suggests that the Court has infused the law of equal protection with common-law attributes. More specifically, the scope of the remedies the Court will grant to redress an equal protection violation appears limited by the common-law aspects of intent analysis. This constraint on the Court's exercise of remedial power is significant in understanding the Court's treatment of equal protection claims in areas ranging from school desegregation and land use to legislative districting and jury selection. The Court's use of intent analysis may explain how its posture differs with each kind of equal protection claim.

II. The Jurisprudence of Intent

A. Common-Law Intent

Intent is a psychological concept. When characterized as the mental state essential to voluntary action, intent has behavioral significance.[8] It functions as an element in rules of criminal and tort law upon which culpability and liability often depend.[9] In both fields, intent performs two services. First, it links someone to a particular wrongful act, identifying him as a wrongdoer. Second, intent measures the amount of wrongdoing by assessing how much someone was at fault.

1. Role of Intent in Identifying the Wrongdoer.—Intent is important in establishing a nexus between cognition and the act. In the classic case of *Garrat v. Dailey,*[10] for example, a boy who pulled away a chair just as plaintiff attempted to sit down was held liable for battery because he knew that she was substantially certain to fall to the ground. The court inferred the intent that gave rise to liability from the boy's knowledge of the likelihood of the impending fall. Proof that the boy expected or should have expected the fall established his responsibility for the act of pulling away the chair and causing the plaintiff injury.[11] Absent proof of the nexus between the boy and the act causing the injury, the boy would have been free

7. *See, e.g.,* Note, *Finding Intent in School Segregation Constitutional Violations,* 28 CASE W. RES. L. REV. 119 (1977).

8. O. HOLMES, *supra* note 5, at 91; Cook, *Act, Intention and Motive in the Criminal Law,* 26 YALE L.J. 644, 646 (1917).

9. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 197 (1972); W. PROSSER, THE LAW OF TORTS 31 (4th ed. 1971).

10. 46 Wash. 2d 197, 279 P.2d 1091 (1955).

11. *Id.* at 202, 279 P.2d at 1094.

from any liability for injury to the plaintiff. The boy's knowledge of the impending fall linked him legally to the act causing the fall. The relationship between the defendant's mental state and the act, as measured by the element of intent, created the boy's liability for the consequences of the act. Thus, intent is useful to ascertain the fault of the actor.

It must be noted, however, that the court recognized that without knowledge of the imminence of plaintiff's fall, defendant would not have committed a wrongful act.[12] Below a certain threshold level of intent, the act may be sufficiently remote from the actor's volition to not warrant liability or culpability. In this first capacity, intent serves to measure an actor's mental proximity to an act the consequences of which violate a law.

2. Role of Intent in Measuring the Degree of Fault.—As part of the assessment of an actor's responsibility for an injury, the element of intent may determine if the actor is to be subject to burdensome sanctions. Because of the harsh sanctions that may be imposed upon a finding of fault, intent operates in its second capacity as a method of assessing the magnitude of the fault.[13] Different degrees of willfulness correspond to differing levels of intent and grades of wrongdoing.[14] Usually the greater the degree of intent proved, the more severe the punishment imposed.[15] In this second capacity, the determination of intent ensures that the sanction is commensurate with the degree of wrongdoing; that those whose acts are most heinous are most severely punished.[16]

B. Analysis in Equal Protection Jurisprudence

Specific consequences follow from a finding of intent in common law. Well-defined modes of analysis for ascertaining intent have evolved in criminal and tort law, yielding results that also are well detailed.[17] In contrast, neither the use of intent analysis nor the consequences of finding intent are clear in the equal protection area. The equal protection clause has been interpreted as mandating that

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12. *Id.*

13. L. FULLER, THE MORALITY OF LAW 167 (1964).

14. *See* Bauer, *The Degree Of Moral Fault As Affecting Defendant's Liability,* 81 U. PA. L. REV. 586 (1933).

Murder, for instance, differs from manslaughter largely in the extent to which intent is proved. *Compare* W. LAFAVE & A. SCOTT, *supra* note 9, at 534, *with id.* at 571. For exceptions, see *id.* at 572.

15. *Id.* at 21-24.

16. *Id.* at 252.

17. Nonetheless, much discretion remains in the decision to charge, and evaluation of evidence proving the commission of crimes and torts has not achieved scientific certainty. *See* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE chs. 11, 12 & 14 (1971); W. PROSSER, *supra* note 9, at chs. 6 & 7. The procedures for the pursuit of a claim or charge, however, are well defined and the outcomes are clearly categorized.

people similarly situated be treated similarly under the law.[18] The language of the clause implies no norm of equality to which courts may look for guidance.[19] Yet violations of the equal protection clause are defined in terms of deviation from this indefinite standard of equality.[20] The crux of equal protection analysis lies in determining how much deviation constitutes a denial of equal protection.[21]

Any law or official act that does not apply to all people invites a classification. Inevitably, the benefits and burdens of the law are apportioned among those within and without the class. Equal protection analysis is an evaluation of the legitimacy of the differing treatment accorded by the law or act.[22]

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18. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

19. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880). Since people are not equal in all respects, they need not always be treated equally. It is necessary to determine in what respects people are similar and which of these respects are relevant to the treatment they should receive under the law. The courts, in their determination of relevant similarities, have resorted to "empirical realities" in adopting a value system that ranks similarities and differences in order of their importance to the court's jurisprudence. *See* J. WILSON, EQUALITY 188-89 (1880). The Supreme Court adopted such a value system in Brown v. Board of Educ., 347 U.S. 483 (1954), for example, when it determined that "education is perhaps the most important function of state and local governments." *Id.* at 493. Because the Court concluded that "[s]eparate educational facilities are inherently unequal," it found that the plaintiffs had been "deprived of the equal protection of the laws . . . ." *Id.* at 495.

20. Dandridge v. Williams, 397 U.S. 471, 485 (1970). The absence of a standard of equality arises in part from the influence of Locke's thoughts on the early development of our law. Flatham, *Equality and Generalization, A Formal Analysis,* in EQUALITY, IX NOMOS 38, 49 (1967). Locke posited that equality existed in a state of nature in which mere survival is the objective. Thus, equality exists as the status quo, and the impact of civilization causes aberrant inequalities. No theory of equality is necessary; it just exists *a priori.* As an early statement of this natural equality perspective in American culture, see *Declaration of Independence:* "We hold these truths to be self-evident, that all men are created equal . . . ." Equality, the theory portends, would exist in the absence of government. *See* Note, *Developments—Equal Protection,* 82 HARV. L. REV. 1065, 1165 (1969) [hereinafter cited as *Developments*].

21. *Developments, supra* note 20, at 1172.

In Alexander v. Louisiana, 405 U.S. 625 (1972), for example, the Court found a prima facie case of discrimination because "the opportunity for discrimination was present and [it cannot be said] on this record that it was not resorted to by commissioners." *Id.* at 632 (quoting Whitus v. Georgia, 385 U.S. 545, 552 (1967) (brackets in original)). This "opportunity for discrimination," coupled with the marked disproportionate impact of the selection procedure of excluding blacks from the jury, created a heavily burdened presumption of invidious discrimination that the state failed to rebut. *Id.* at 630-32. Intent was established by the racial designation required by both the interview questionnaire and the filed information card, which together "provided a clear and easy opportunity for racial discrimination." *Id.* at 630. Strict scrutiny was therefore appropriate. The statistical improbability of a racially neutral selection process yielding an all white grand jury in a city in which twenty-four percent of the population was black created the prima facie case of invidious discrimination. *Id.* at 629.

The Court, in overturning the conviction, did not dispute the Louisiana Supreme Court's finding that the all white jury resulted from coincidence and not purposeful exclusion. 225 La. 941, 951, 233 So. 2d 891, 894 (1970). Instead, the Court found that the use of racial indicia was sufficient to constitute evidence of discriminatory intent. Evidence sufficient to satisfy the Louisiana Supreme Court that no pattern of exclusion of blacks from juries existed, *id.*, and testimony by the trial court clerk that the jury selection was made without consideration of race, *id.* at 952, 233 So. 2d at 895, failed to rebut the presumption that strict scrutiny was required.

22. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

1. Strict Scrutiny or Rational Relationship.—Differences in the rigor of a court's evaluation between mere rationality[23] and strict scrutiny[24] depend on the presence of evidence that stricter scrutiny is warranted. When, for example, racial considerations are implicated in the passage of a law or in an official act, stricter scrutiny is justified.[25] In *Washington v. Davis,*[26] a police qualifying examination was challenged as a denial of equal protection based on evidence that a greater proportion of blacks than whites failed to perform satisfactorily on the exam. The *Davis* decision is significant because it held that the mere disproportionate impact of a law on a class of people of a certain race is not sufficient to warrant strict scrutiny. Discriminatory intent must also be shown.[27]

The intent rule serves to allocate the burden of proof in a case concerning an alleged equal protection violation. Judicial inquiry may be prompted by a claim that a law operates to the "comparative disadvantage" of the class of claimants.[28] After the decision in *Washington v. Davis,* however, discriminatory intent must be shown in order for a court to invoke strict scrutiny.[29] Although the quantum of rigor by which strict scrutiny exceeds normal scrutiny is unclear, the former clearly warrants much closer examination.[30]

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23. Legislation is constitutional when the differential treatment accorded by the law bears a rational relation to a permissible objective. Ferguson v. Skrupa, 372 U.S. 726, 732-33 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955).

24. When "suspect classes" of people are the subject of legal classification or a "fundamental interest" is abridged by the impact of a law, a closer relationship is required between a compelling state interest and the purpose of the statute. McLaughlin v. Florida, 379 U.S. 184, 196 (1964); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

25. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

26. 426 U.S. 229 (1976).

27. *See* text accompanying notes 1-3 *supra.*

28. Brest, *Palmer v. Thompson: An Approach To The Problem Of Unconstitutional Legislative Motive,* in 1971 SUP. CT. REV. 95, 107 (P. Kurland ed.). While a court will review a law or act that disproportionately affects one group, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Dandridge v. Williams, 397 U.S. 471, 485 (1970).

29. 426 U.S. at 241-42. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *Cf.* Brest, *supra* note 28. Professor Brest suggests that strict scrutiny is self-operating. "The extraordinary justification required in these and similar kinds of cases is not contingent upon a finding of illicit motivation . . . . [T]he criterion [of race for example] itself initiates the demand for an extraordinary justification." *Id.* at 108 (footnotes omitted). He notes, however, that laws which do not facially affect a suspect class or infringe a fundamental interest may still trigger strict scrutiny if race plays an operative role, *id.* at 109, as it sometimes does in a showing of intent.

While Professor Brest's analysis of the operation of strict scrutiny may be theoretically accurate, *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), it fails to account practically for the problem of proving that race, for example, entered into the formulation of a law or motivated a public act. Indeed, in the absence of a showing of discriminatory intent, the Court in Washington v. Davis found the standard of strict scrutiny inapplicable and that no prima facie case or invidious discrimination existed. Washington v. Davis, 426 U.S. 229, 241 (1976). The Court then, if not before, held evidence of discriminatory intent requisite to the application of strict scrutiny. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

30. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Plaintiffs are more likely to successfully challenge the constitutionality of a law or act when a court applies strict scrutiny than when it does not.[31]

In theory, strict scrutiny merely causes the burden of proof to shift.[32] In practice, strict scrutiny nearly assures victory to the plaintiffs by heavily burdening the state's defense of its law or act. Since the presence of intent *vel non* dictates the level of scrutiny to be applied, a finding of intent is almost determinative of the result.

2. Motivation and Nexus.—Although the disposition of a case may hinge on proof of discriminatory intent, it remains unclear what evidence of discrimination suffices to establish this intent. Two major hurdles arise in ascertaining intent. The first is finding discriminatory motivation. The second is establishing a nexus between discriminatory motivation and an official act or law. Once these two requirements are satisfied, discriminatory intent is proved and strict scrutiny invoked. While the meaning of "motive" and "intent" differ little in common parlance,[33] they are considered distinct in equal protection analysis.

(a) Motivation.—Motivation, suggests one commentator, satisfies the question: "Why did the decisionmaker make a particular decision?"[34] Thus, motivation "focuses on the process by which a rule was adopted . . . ."[35] In contrast, intent serves as a term of art and is conclusory. In practical terms, the *Davis* decision and its progeny[36] use the word "intent" to indicate a knowing or deliberate state of mind that, because of its manifestation in a law or public act,

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31. The significance of strict scrutiny, as noted in the *Davis* opinion, 426 U.S. 229, 241 (1976), was established by the Court in Alexander v. Louisiana, 405 U.S. 625 (1972), in which the conviction of a black man was overturned because grand jury selection procedures were determined to have been discriminatory. The *Alexander* Court stated that when applying strict scrutiny, the "burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id.* at 632.

32. The mere "rationality" requirement imposed under minimum scrutiny, in contrast, amounts to judicial deference to the state and presents a hurdle that plaintiffs are unlikely to overcome. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); *Developments, supra* note 20, at 1078-81. The extent of judicial deference under minimum scrutiny is illustrated by an early statement of Chief Justice Warren:

> [T]he States [are permitted] a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

33. Motive is defined as "something within a person . . . that incites him to action . . ." while intent is "the state of mind or mental attitude with which an act is done." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1970).

34. Brest, *supra* note 28, at 111.

35. *Id.*

36. *E.g.*, Massachusetts v. Feeney, 434 U.S. 884 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

triggers strict scrutiny.[37] Concern over discriminatory intent is based on the assumption that this invidious intent will eventually taint the content of the law.[38] Thus, the detection of discriminatory motive prompts the question whether the resulting official act or law was improperly influenced. A link between the discriminatory motive and a law or act creating a suspect classification amounts to proof of impermissible intent and answers the question of improper influence. Under present Court interpretation, the proscribed intent might better be described as "unconstitutional" intent rather than "discriminatory" intent.[39]

Proof of discriminatory motivation, however, requires detection of the wayward motivation. Although some laws may be facially discriminatory and some public acts bristle with discrimination, most purport to work neutrally.[40] Discriminatory motivation is usually established by deduction. If only permissible factors were considered in enacting the law, the act would not exist in its present form. Only the introduction of impermissible motives can account for the legislative action. Therefore, the Court deems the law to be motivated by these impermissible considerations. For example, the Court in *Griffin v. County School Board of Prince Edward County,*[41] found a denial of equal protection when county public schools were closed following a desegregation order, but tuition grants and tax concessions were provided to support children in private segregated schools. While the state defended its action on nonracial grounds, the Court found that "the record . . . could not be clearer that . . .

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37. 426 U.S. 229, 240-41 (1976).

38. For a description of Professor Brest's four reasons for judicial invalidation of laws motivated by discriminatory purposes, see *Brest, supra* note 28, at 116-18.

39. A similar characterization was briefly proposed in 1968 in the application of equal protection analysis to eminent domain. *See* Note, 81 HARV. L. REV. 1568 (1968). Resolution of the discrepancy between motivation and intent might be achieved if the terms were recognized as conclusory. *Id.* at 1571. When evidence of state action is not sufficiently clear from the circumstances to warrant strict scrutiny, the impetus behind an act having a racially disproportionate impact should be called "motive"; when state action is clear, the impetus should be deemed "intent" and thus reviewable as a violation of the equal protection clause. *Id.*

40. Rarely will discriminatory motivation appear as blatantly as in the case of Congressman William Tuck, who represented not only Southside, Virginia, but also the devout segregationists. In 1958, he explained his posture toward efforts of neighbors to desegretate: "We cannot allow Arlington or Norfolk to integrate. If they won't stand with us, I say make them stand." J. PELTASON, FIFTY-EIGHT LONELY MEN 45 (1961) (citing articles that appeared in the Washington Post and Times Herald, Nov. 15, 1978).

Senator Sam Englehardt, Jr., an Alabama Councilman and legislative spokesman, was even less subtle in exclaiming that "desegregating the schools will lead to rape! . . . The nigger is depraved!" *Id.* at 38.

Present-day segregationists are not nearly as visible when setting official policy.

The Second Circuit Court of Appeals, in recounting how difficult the detection of discrimination has become, observed that most citizens "would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor." Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975). *See also* United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded per curiam sub nom.*, Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976).

41. 377 U.S. 218 (1964).

[the] schools . . . closed . . . for one reason, and one reason only: to ensure . . . that white and colored children . . . would not, under any circumstances, go to the same school."[42]

(b) Nexus.—Proof of impermissible motivation, however, does not suffice to prove discriminatory intent.[43] The bulk of an investigation into intent requires the establishment of the nexus between the discriminatory motive and the official action.[44] The nexus is, at best, tenuous because it requires the finding of a connection between the two independent events of personal impulse and official action. According to one commentator, establishment of nexus "depends more on intuitive and impressionistic inferences" than on systematic analysis.[45] In addition, any unreliability present when an actor's motives are associated with his support of a public act is compounded when the inquiry shifts to a group of actors. Most laws are the product of collegial bodies. The collective will of such bodies, known anthropomorphically as "legislative intent," has long been distinguished from the motives of their members.[46] Individual motives are naturally mixed and rarely professed.[47]

The decision in *Washington v. Davis* cast further doubt on the acceptability of inferring legislative intent from legislators' motives. By decreeing discriminatory intent to be a necessary element in establishing an equal protection violation, the Court was forced to reconsider its decision in *Palmer v. Thompson,*[48] which explicitly rejected motivation as an element in equal protection analysis.[49] In *Palmer,* the Court held that the discriminatory motives of individual city councilmen of Jackson, Mississippi, could not justify invalidation of an ordinance closing municipal swimming pools in the face of

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42. *Id.* at 231. *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion,* the Alabama legislature had altered the shape of Tuskegee "from a square to an uncouth twenty-eight-sided figure," *id.* at 340, with the effect of removing nearly all the black voters and no white voters from the city limits. The Court set aside the change, finding the facts in the record "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town . . . ." *Id.* at 341. *But see* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (Justice Black interpreted *Griffin* and *Gomillion* as focusing on "the actual effect of the enactments" rather than on the motivation of those who created them).

43. Private individuals may engage in discriminatory acts provided they neither directly thwart governmental efforts to eliminate discrimination nor infringe common-law or statutory rights generally granted to all citizens. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). When no federal or state action is evident, no constitutional violation exists.

44. This is the fundamental precept of the equal protection clause; "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

45. Brest, *supra* note 28, at 114 n.104.

46. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130-31 (1810).

47. A. BICKEL, THE LEAST DANGEROUS BRANCH 214 (1962).

48. 403 U.S. 217 (1971).

49. *Id.* at 224.

a desegregation order.[50] The *Davis* decision reconciled adoption of the discriminatory intent rule with *Palmer* by interpreting *Palmer* as holding "that the legitimate purposes of the ordinance . . . were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations."[51] Thus, discriminatory intent is necessary to establish a violation of the equal protection clause, but actual motivations of officials are not considered appropriate evidence of that intent. It can only be concluded that the intent relevant for equal protection analysis "differs from the motivation of individual decisionmakers."[52]

The problem of establishing the legal nexus between the discriminatory motive and the official action is further complicated because discriminatory intent need not result from the "dominant motive" behind a law or official act. Instead, invidious discrimination need only be one of the factors that motivated the legislature's decision.[53] This general rejection of the dominant motive test creates the risk that any individual's illicit motives might be held to invalidate a governmental decision otherwise permissible. As Justice Stevens warned in his concurring opinion in *Davis*: "It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalid because an atheist voted for it."[54]

Furthermore, it is unclear whose discriminatory motives are relevant to the analysis. The discriminatory motives of school board members, superintendents, assistant superintendents, and parents have all been held determinative of the validity of official acts.[55] Thus, it may be too easy or too difficult to invalidate laws by relying on a nexus between the decisionmakers' motives and the substance of the official act.[56]

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50. *Id.*

51. 426 U.S. at 243.

52. *See* A. BICKEL, *supra*, note 47, at 208-16; Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use?,* 28 CASE W. RES. L. REV. (1977); Note, *Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction,* 86 YALE L.J. 317, 327 (1976). *But see* Brest, *supra* note 28, at 99-102, 134 (author urges that motivational analysis not be totally abandoned).

53. McGinnis v. Royster, 410 U.S. 263, 276-77 (1973).

54. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J. concurring).

55. *Compare* United States v. School Dist. of Omaha, 521 F.2d 530, 540 n.20, 544 n.30 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975) *with* Amos v. Board of School Directors, 408 F. Supp. 765, 809, 819 (E.D. Wis. 1976).

56. The inconsistencies evident from the use of such behavioral inquiries prompted Professor Ely to formulate his famous "Case Against Considering Motivation." *See* Ely, *Legislative And Administrative Motivation In Constitutional Law,* 79 YALE L.J. 1205 (1970). Rather than a motivational analysis, Ely prefers his "disadvantageous distinction model" in which a challenged law or act that creates a certain pattern of impact triggers strict scrutiny. *Id.* at 1208. Inquiry into motivation is only useful when the decisionmaker has made either a "random" or a "discretionary choice" so that no pattern exists from which motivation can be inferred. *Id.* at 1261-75, 1281-84. It is questionable, however, how well Ely's model has

Since the nexus between discriminatory motive and invidious result is frequently difficult to establish, affirmative proof of the effect of discriminatory motivation is rarely available.[57] Consequently, a finding of intent generally must be inferred from circumstantial evidence.[58] Plaintiff's case, however, is difficult to establish from circumstantial evidence; unless discriminatory motivation is pronounced, nothing mandates a court's search for illicit motivation.[59] Such motivation is difficult to detect, and any reliance on proof of improper motivation in equal protection analysis is risky and inconclusive.[60]

3. Tort Law Principles in Equal Protection Intent.—An effort to avoid reliance on motivational inquiries by utilizing tort law concepts was rejected by the Supreme Court in *Austin Independent School District v. United States*.[61] The Fifth Circuit Court of Appeals had adopted the tort law premise that an actor intends the forseeable results of his actions.[62] The circuit court decided that discriminatory intent would be evidenced by a showing that racial imbalance is the natural, probable, and forseeable result of the poli-

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withstood the *Davis* requirement of discriminatory intent. 426 U.S. at 240. The *Davis* Court, which made the distinction between disproportionate impact and discriminatory intent, would likely find Ely's reliance on any pattern of impact unpersuasive.

Other theories have been posited as alternatives to imputing intent to a legislature or official. *See, e.g.,* Note, *supra* note 52, at 332-55 suggests a shift in focus from the intent of individual decisionmakers to "institutional intent," the finding of which turns on an identification and evaluation of institutional priorities and policies.

57. United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976). "Rather than announce his intention of violating anti-discrimination laws, it is far more likely that the state official 'will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive - for we deal with an area in which " 'subtleties of conduct . . . play no small part.' " " *Id.*

58. *Id. See also* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 231 (1964); Brest, *supra* note 28, at 120-21.

59. *See, e.g.,* Higgins v. Board of Educ. of City of Grand Rapids, 508 F.2d 779, 793 (6th Cir. 1974) ("While it is true that a court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory").

60. Language in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), acknowledged that the difficulty of isolating the intent of a legislature from the individual opinions of its members causes courts to "refrain from reviewing the merits of their decisions . . . ." *Id.* at 265. Nonetheless, the Court maintained that "racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.* at 265-66. This statement may be sound constitutionally, but it is of little merit behaviorally. No evidence suggests that racially discriminatory motives are more readily detected than are other motives fashioned by biases lacking constitutional significance. Thus, the Court's assertion that when there is "proof of discriminatory purpose . . . judicial deferrence is no longer justified" begs the evidentiary issue. The constitutional and evidentiary significance of a fact should not be confused with each other.

61. 429 U.S. 990 (1976).

62. United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976). *See* W. PROSSER, *supra* note 9, at 31, in which the rule of intent was thus stated: "Intent . . . extend[s] not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does."

cies the decisionmakers adopted.[63] The intent is inferred from the act, resulting in the drawing of a nexus. Use of the tort law rule eliminates the need for a nexus between motives of the decisionmakers and the decision. In *Austin,* for example, the court found that segregation that resulted from the neighborhood assignment of pupils in a school district having ethnically segregated residential patterns was forseeable and thus unconstitutional.[64] Rather than search for the motivation behind the evidence of segregation, the court of appeals reasoned that "[w]hen [tort law-based] policy is used, we may infer that the school authorities have acted with segregative intent."[65] The operation of the tort law rule bypasses the invocation of strict scrutiny by creating a presumption of unconstitutionality. When plaintiffs establish that segregation is a forseeable result of a public act or law, an affirmative duty is created in the defendants to eliminate the segregation "root and branch."[66]

The Supreme Court, however, vacated the judgment and remanded *Austin* for "reconsideration in light of *Washington v. Davis.*"[67] The Fifth Circuit, upon remand, understood the Supreme Court to disapprove of inferring discriminatory intent "solely" from policies disproportionately affecting people of a suspect class.[68] While the court of appeals did not construe the vacate and remand order as entirely "banishing" the tort rule from equal protection law,[69] the Supreme Court's action effectively led to the abandonment of the tort rule as a means of enhancing the sensitivity of equal protection analysis to discrete discriminatory practices. Indeed, in his concurrence in *Austin,* Justice Powell expressed concern that the circuit court was too ready "to impute to school officials a segregative intent far more pervasive than the evidence justified."[70] The effect of the Supreme Court's action in *Austin,* despite the Fifth Circuit's ef-

63. 532 F.2d at 388. The United States Court of Appeals for the Second Circuit in Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975), first articulated this tort rule. The court interpreted the *Keyes'* references to motivational analysis as dicta, *id.* at 49, and concluded that a finding of de jure segregation may result from "actions taken, coupled with omissions made . . . which have the natural and foreseeable consequences of causing educational segregation." *Id.* at 50.

64. 532 F.2d at 392.

65. *Id.*

66. *Id.* Strict scrutiny is unnecessary because it is useful only in evaluating facially neutral acts or laws.

In describing the racially divided school system as the "natural, foreseeable, and avoidable result of creating and maintaining an ethnically segregated school system," 532 F.2d at 392, the court of appeals suggested that the discrimination was intentional and visible. Since constitutional justifications for discrimination are rare, *see* Korematsu v. United States, 323 U.S. 214 (1944), foreseeable segregation would almost always result in a constitutional violation. Hart v. Community School Bd. of Educ., 512 F.2d 37, 51 (2d Cir. 1975). *But see* United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir. 1975).

67. Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976).

68. United States v. Texas Educ. Agency, 564 F.2d 162, 169 (5th Cir. 1977).

69. *Id.* at 168.

70. Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976).

forts to salvage the tort rule, is to foreclose the use of simpler, non-motivational analysis in the detection of invidious discrimination.

Furthermore, the tort rule has been criticized by commentators as amounting to a proscription of any racial imbalance in public schools.[71] Forseeable segregation that resulted from action as well as inaction could amount to a constitutional violation.[72] Thus, the tort rule implies that any imbalance that disproportionately burdens blacks creates an affirmative duty in the decisionmakers to alleviate the burdens. Failure to adopt policies to alleviate the imbalance is construed as necessarily and deliberately perpetuating the imbalance.[73] This conclusion, inevitably drawn from the use of the tort rule, clearly conflicts with the statement in *Davis* that an affirmative duty to desegretate does not exist unless a prima facie case of invidious discrimination has been made.[74]

Justice Powell in his concurrence, and the Court by its action in *Austin,* indicated that the tort rule proves too much. As it has been interpreted,[75] the tort rule obligates the courts to ensure more than "the prevention of official conduct discriminating on the basis of race," which the *Davis* Court held to be the "central purpose of the Equal Protection Clause."[76] Of the two elements of unconstitutional intent, discriminatory motivation and its nexus to a law that burdens a suspect class, only the former was absent in the tort rule. The nexus between a decisionmaker and the burdening law was clearly present.[77] Apparently, evidence of discriminatory motivation is also necessary.

4. Intent.—Intent remains the threshold requirement that must be satisfied to obtain strict scrutiny from a reviewing court. The behavioral significance of the intent requirement is apparent from the Court's rejection of the tort rule. A nexus must be established between a decisionmaker's motivation and the impact of a law or public act. Intent analysis, however, as it functions in common law, seems ill-suited to constitutional law. The varying contexts in

71. *See* Note, *Second Circuit Review, 1974-75 Term,* 42 BROOKLYN L. REV. 961, 965-67 (1976); Note, *supra* note 7, at 140 n.137; Note, *supra* note 52.

72. *See* United States v. Texas Educ. Agency, 532 F.2d 380, 386 (5th Cir. 1976).

73. *See, e.g.,* Hart v. Community School Bd. of Educ., 512 F.2d 37, 47-49 (2d Cir. 1975) (court approved district court's finding that the school board's inaction "had the natural and foreseeable effect of maintaining and perpetuating severe racial imbalance" in the district schools. The court considered such discrimination, "caused or maintained by state action," to be de jure segregation).

74. 426 U.S. at 241.

75. *See generally* references cited note 71 *supra* and text accompanying notes 72-74 *supra.*

76. 426 U.S. at 239.

77. For the rule from which this conclusion was derived, see Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976), and Hart v. Community School Bd. of Educ., 512 F.2d 37 (2d Cir. 1975).

which intent is evaluated account for much of this difference in the appropriateness of intent analysis.

At common law, intent may be ascertained from circumstantial evidence by inferring from the prohibited act the actor's state of mind. In *Garratt v. Dailey,*[78] for example, the Washington Supreme Court remanded the case for a determination of whether knowledge of the imminence of plaintiff's fall could be ascertained from the circumstances in which the injury occurred.[79] In judging the defendant's liability, the court conducted an evaluation of the relative fault of the plaintiff and defendant.[80] Had the plaintiff in *Garratt* fallen unexpectedly, the defendant might have been absolved of responsibility for his coincidental movement of the chair. Therefore, intent is useful as a means of comparing the parties' mental responsibility for the injury. The dispute over fault is resolved by a court's finding that one party evidenced a state of mind that the law defines as sufficient to warrant responsibility for the injury.[81] The party proved to possess the requisite intent is found to be at fault and is assessed the cost of the injury.

An act that violates the equal protection clause, however, may be the result of a majority vote of a collegial body in favor of a decision that disporportionately burdens a suspect class. A court cannot practically evaluate the state of mind of each member who voted for the discriminatory action. The multiplicity of actors responsible for most public decisions makes the detection of an individual's intent speculative. The actions of school board members, superintendents, assistant superintendents, voters, and parents,[82] in addition to legislators,[83] may all be considered in evaluating the constitutionality of official action. A court, however, will rarely have the opportunity to hear the decisionmaker explain the purpose of an official action. Such judicial inquiry into legislative motivation has been considered a substantial breach of the separation of powers since the decision of *Fletcher v. Peck.*[84] Thus, placing a decisionmaker on the witness stand is usually to be avoided.[85]

Furthermore, the public decisions that collectively burden a suspect class disproportionately are often really a web of events not easily separated for purposes of establishing a legal nexus. The actions

78. 46 Wash. 2d 197, 279 P.2d 1091 (1955).
79. *Id.* at 202, 279 P.2d at 1094.
80. *Id.* at 201, 279 P.2d at 1093.
81. *See* W. PROSSER, *supra* note 9, at 16-20, 139-43, 439-41.
82. *See* note 55 and accompanying text *supra.*
83. *See* A. BICKEL, *supra* note 47, at 208-21; 8 J. WIGMORE, EVIDENCE § 2371 (McNaughten ed. 1961); Tussman & ten-Broek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 356-61 (1949).
84. 10 U.S. (6 Cranch) 87, 130-31 (1810).
85. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

of predecessor school boards, for example, may be considered in determining the cause of the disproportionate impact.[86] In addition to the numerous decisions made by a body of sitting legislators, a court may also consider the legislators' prior actions and those of their predecessors in detecting a nexus between the actors' motivation and the segregation. The number of decisions a court may be required to scrutinize is astronomical. Thus, proof of discriminatory intent by such means is impractical and unlikely to be a sound and accurate guide.

Nevertheless, the holding of *Washington v. Davis* seems to have foreclosed other available avenues for detecting intent. Disproportionate impact alone is insufficient to establish a constitutional violation.[87] Moreover, by its decision in *Austin*, the Court appears to have also rejected the tort standard of inferring intent from what is forseeable to the reasonable person as being overly inclusive.[88] Apparently, only the most egregious instances of discrimination will be sufficiently manifest to satisfy the Court's common-law intent formulation. Consequently, the threshold of intent necessary to constitute a violation of the equal protection clause exceeds that necessary for tort liability or, in some instances, criminal culpability.

Furthermore, proof of intent is necessary to trigger strict scrutiny. Unlike proof of intent at common law, which results in a finding of fault, evidence of intent in constitutional law only initiates stricter scrutiny. The Court's conclusion that only the most apparent forms of discrimination constitute intent, however, obviates the need for strict scrutiny. Such extreme discrimination might be apparent under even minimal scrutiny. Thus, intent analysis serves to establish the state's involvement in an action that, a court concludes, deprived a suspect class of its right to equal protection of the laws. Finding a denial of equal protection, which turns largely on whether strict scrutiny is applied, however, requires sufficient evidence of discriminatory motivation to make strict scrutiny unnecessary. Thus,

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86. Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973). *But see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1970), in which it was suggested that at some point the effect of past discriminatory acts on the present disproportionate impact becomes so attenuated that the former becomes irrelevant in the evaluation of the latter. *Cf.* Keyes v. School Dist. No. 1, 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976), in which Chief Judge Seth, in his concurrence, further belittled the importance of antecedent behavior in detecting discriminatory intent on the present.

> On this intent matter . . . it must be observed that school boards come and go, and there is little if any continuity of policy on any subject as the old members leave and new ones are elected. The records here clearly demonstrates this. School policy cannot be a continuing one over a long period and should not be; this after all is the reason for elections.

Id. at 488.

87. 426 U.S. at 240. *See* notes 67-70 *supra.*

88. *See* notes 61-71 and accompanying text *supra.*

the intent analysis becomes circular since it begs the question of discriminatory motivation that it was designed to ask.

Under the Supreme Court's application in equal protection, common-law intent analysis, which is used to ascertain whether a nexus exists between a mental state and an act, presumes the answer to the question it asks. Therefore, it is of little procedural value to the Court.

III. Use of Intent in Equal Protection Jurisprudence

A. Identifying the Source of Discrimination

Although proof of intent is unsuited for equal protection analysis, the Supreme Court has persisted in requiring evidence of its existence to establish a violation of the equal protection clause.[89] As has been shown, neither discriminatory motivation nor its nexus to disproportionate impact can be readily or accurately proved.[90] Unlike its successful utilization in common law, use of intent in equal protection analysis fails to satisfy the need for a reliable means of ascertaining an actor's relationship to the incidence of the racially disproportionate impact of a law.

Instead of assisting plaintiffs in alerting courts to the nuances of discrimination, the intent rule raises the threshold of a prima facie case to a level at which only the most marked instances of discrimination are actionable. By restricting access to a court's remedial power, however, the intent rule succeeds in fulfilling its second purpose at common law—distinguishing mere adventitious instances of wrongdoing from deliberate wrongdoing. Only discrimination perpetrated by malfeasance is actionable. In this second common-law capacity, the rule of intent profoundly affects the Supreme Court's posture toward equal protection claims, diminishing the Court's role as the primary guardian against deprivations of equal protection under the law without abrogating the Court's avowed commitment to the protection of civil rights.

B. Use of Intent as a Measure of Wrongdoing

The second use of intent in common law arises from what Professor Fuller has called "the morality of law."[91] A law that provides rights for any group of people also creates a duty in the others to

89. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *cited with approval in* Washington v. Davis, 426 U.S. 229, 240-41 (1976).

90. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

91. L. FULLER, *supra* note 13, at 167. *See also* Kanner, *From Denver To Dayton: The Development Of A Theory Of Equal Protection Remedies,* 72 NW. U. L. REV. 382, 389 (1977) (this fault concept is applied to interdistrict remedies and is named the "unclean hands" requirement).

refrain from infringing those rights.[92] Fault is assigned to those who breach the duty and carries with it burdening sanctions. Intent is a measure of that fault.[93]

The Supreme Court in *Morisette v. United States,*[94] for example, reversed a conviction of theft under a statute that did not require intent for culpability on grounds that evidence of criminal intent was nonetheless necessary to convict. The Court maintained that some form of intent is a requisite element of a crime since "wrongdoing must be conscious to be criminal . . . [in order] to protect those who are not blameworthy in mind from conviction of infamous common-law crimes."[95] The intent element in the calculus of culpability or liability proceeds from the assumption that the "wrongdoer" had a choice and with free will chose conduct that had consequences for which he is morally blameworthy.[96]

Proof of intent establishes that an act was more than adventitious. Intent is significant because it leads to the finding of fault and to the burden of a penalty[97] or a judgment to compensate the victim.[98] The threshold level of deliberateness necessitated by the in-

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92. Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning,* 23 YALE L.J. 16, 30-32 (1913).

93. L. FULLER, *supra* note 13, at 167; O. HOLMES, *supra* note 5, at 37, 152-58 (intent is broadly construed to encompass willfulness as well as inadvertance in the presence of circumstances that would put a reasonable person on notice of the imminent danger). *See also* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978), in which fault theory is thoughtfully characterized as the logical outgrowth of a perpetration perspective. "Under the fault idea, the task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm." *Id.* at 1054. Thus, intent is the handmaiden of fault theory; only "intentional" discrimination can violate the equal protection clause.

Fault theory, Freeman observes, nutures complacency about an individual's moral responsibility. People feel "innocent" until they are proved to have engaged in discrimination. Fault theory encourages a flight from social responsibility, which leaves an individual resentful of any burdens that remedies may impose. *Id.* at 1055; Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55, 56 (1933).

94. 342 U.S. 246 (1952).

95. *Id.* at 252. The Court acknowledged that cases exist in which strict liability was imposed, but emphasized that they were regulatory offenses that arose from enforcement of the sovereign's police power to protect the public health, safety, and welfare; *Id.* at 254-56, 260-62. *See also* Perkins, *A Rationale Of Mens Rea,* 52 HARV. L. REV. 905 (1939).

96. F. HARPER & F. JAMES, THE LAW OF TORTS 746 (1956).

97. O. HOLMES, *supra* note 5, at 37. Intent is an actual element in the crime when the act, performed deliberately, causes harm that the act alone would not have caused. As an element of attempt, intent is useful in creating the presumption that an act, innocent in itself, will be followed by other acts accomplishing the crime. *Id.* at 76. The element of intent, however, comprehends more than deliberate acts. Intent may be a component of acts done with such wanton and willful disregard of their foreseeably harmful consequences that a requirement of criminal intent exists that is not an element of the crime. Perkins, *supra* note 95, at 908-14. To the extent that intent is synonymous with a criminally culpable mental state, intent may be equated with mens rea for purposes of the discussion in this article.

98. While the primary philosophical justification for the fault principle is grounded in personal morality, it functions in tort law to compensate victims, not to punish wrongdoers. C. MCCORMICK, DAMAGES §§ 20, 137 (1935). *But see* J. SALMOND, TORTS 21 (1953), in which it is suggested that

[t]he ultimate purpose of the law in imposing liability on those who do harm to others

tent requirement ensures that accidental events over which the actor had no control do not cause him to be burdened by sanctions. In this context, intent serves as a cautionary step in a court's faultfinding process to avoid unjust imposition of penalties.

1. A Limit on Who is Burdened by Remedies.—The Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*[99] reiterated this rule in the context of school desegregation when it noted: "As with any equity case, the nature of the violation determines the scope of the remedy."[100] While the purpose of desegregation remedies is not to punish constitutional violations,[101] nonetheless, burdens are imposed by desegregation remedies. The mere cost of the fees for the services of a special master, two court-appointed experts, and an accounting firm in the Cleveland desegregation case of *Reed v. Rhodes*[102] for example, amounted to $456,428.[103] Changes in school operating procedures are also costly since they may necessitate the purchase of new facilities[104] and the creation of orientation and remedial education programs.[105] Most significantly, desegregation remedies may require massive reorganization of school district management procedures. Teacher and pupil assignment and school site plans, for example, often must be reevaluated and altered.[106] Transportation of students may be necessary, requiring the formulation of routes and the ongoing burden of coordinating busing.[107] Social costs, such as "white flight," may also be considered since they

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is to prevent such harm by punishing the doer of it. . . . Pecuniary compensation is not itself an ultimate object or a sufficient justification of legal liability. It is simply the instrument by which the law fulfills its purpose of penal coercion.

99. 402 U.S. 1 (1971).

100. *Id.* at 16.

101. Milliken v. Bradley, 418 U.S. 717, 764 (1974) (White, J., dissenting).

102. 422 F. Supp. 708 (N.D. Ohio 1976).

103. Gaumer, *Troubles Mounting for City Schools,* Plain Dealer, Dec. 22, 1977, at 12, col. 1.

104. The Detroit-only desegregation plan, which the district court considered and which was favored by plaintiffs in Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich.1972), required the transportation of 82,000 pupils and the purchase of 900 school buses. 418 U.S. at 800 (Marshall, J., dissenting). *But see* A. Cox, The Role of the Supreme Court in American Government 81 (1976) (in which it was noted that *Milliken* is an atypical segregation case because of the huge number of pupils and school districts implicated in the dispute).

105. *See* Milliken v. Bradley, 433 U.S. 267, 271-73 (1977).

106. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-28 (1971); Keyes v. School Dist. No. 1, 380 F. Supp. 673, 685-88 (D. Colo. 1974). Courts have speculated that the reorganizational problems created by interdistrict remedies would be considerably greater than those created by intradistrict remedies. *See, e.g.,* Bradley v. School Bd. of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), in which the court quoted from expert opinion that stated that an optimum size for a school district exists. *Id.* at 1068. Beyond that size, the district becomes "unwieldy," *id.* at 1068 n.9, and parent participation in school management decreases. *Id.* at 1068. The court further noted that interdistrict coordination of school districts is only feasible when the separate tax bases are consolidated. Consolidation, however, threatens the independence of the other functions of local governments. *Id.*

107. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971).

are created by the imposition of the remedy.[108] While no individuals are personally burdened with a monetary judgment or with imprisonment, school desegregation remedies can greatly inconvenience the managers of a school district and financially burden the taxpayers of a school district. Although school districts are generally considered agencies of the state government,[109] courts have recognized that the burden of desegregation remedies falls more heavily on the districts implicated in the remedy.[110]

Judicial remedies designed to abolish discriminatory land use practices are also considered burdensome to the community in which the remedy is imposed. While the remedy itself may constitute little more than invalidation of a zoning ordinance,[111] it disrupts the development plans of those who relied on the ordinance.[112] The cost in these instances may vary with the degree of reliance on, and the amount invested in, the development.[113]

These judicial remedies may alter the basic structure of the local government[114] or the performance of its functions. In addition, they may financially burden the beneficiaries of the government's services.[115]

In the calculus the Supreme Court adopted in *Swann,* requiring the extent of the remedy to be commensurate with the scope of the violation, these burdensome remedies are only warranted by extensive violations.[116] A consequence of this principle will be reluctance

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108. *But see* Milliken v. Bradley, 418 U.S. 717, 801 (1972) (Marshall, J., dissenting) (white flight is not a proper factor for courts to consider in evaluating the validity of a remedy). *See also* Craven, *Further Judicial Commentary: The Impact of Social Science Evidence on the Judge: A Personal Comment,* 39 LAW & CONTEMP. PROB. 150, 155 (1975) (suggests that "the silence" of the majority in *Milliken* with respect to this point, in conjunction with Justice Marshall's dissent, may mean "that white flight can never be a relevant factor in considering the appropriate remedy for dismantling a dual school system . . . .").

109. Milliken v. Bradley, 418 U.S. 717, 726 n.5, 742 (1972); *see generally* I C. ANTIEAU, MUNICIPAL CORPORATION LAW § 2A.22 (1978).

110. Milliken v. Bradley, 418 U.S. 717, 743-45 (1972); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Bradley v. School Bd. of City of Richmond, 462 F.2d 1058, 1067-70 (4th Cir. 1972).

111. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917); Dailey v. City of Lawton, 296 F. Supp. 266, 268-69 (W.D. Okla. 1969), *aff'd,* 424 U.S. 284 (1976) (Court ordered the Chicago Housing Authority to construct integrated housing).

112. *See, e.g.,* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262, 270 (1977).

113. *Compare id.* at 262-63, in which the cost is calculated to include more than economic injury *with* James v. Valtierra, 402 U.S. 137, 143 n.4 (1971), in which the cost is specifically measured in terms of housing rentals and the cost of municipal services.

114. Hills v. Gautreaux, 425 U.S. 284, 296 (1976) (interpreting Milliken v. Bradley, 418 U.S. 717 (1974)).

115. This possibility arises because of the nature of the remedy. *See* Leubsdorf, *Completing the Desegregation Remedy,* 57 B.U. L. REV. 39 (1977).

116. *Compare* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) *with* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). For an alternative formulation, see Fiss, *The Jurisprudence of Busing,* 39 LAW & CONTEMP. PROB. 194 (1975), in which the cost of the remedy is balanced against the extent of the harm, rather than the extent of the violation. The difference between the terms by which the cost of the remedy is judged hinges on the distinction between common-law and public law litigation made by Professor Chayes in his seminal article, *The Role of*

on the part of the Court to grant such remedies unless the people burdened by them are clearly "wrongdoers."

2. A Standard By Which A Remedy Is Fashioned.—The Supreme Court has adopted a second requirement for granting these remedies by its recognition that the standards for determining deprivation of a constitutional right must be clear and the remedy must offer a certain improvement over the policy the local government has followed.

For example, in *San Antonio Independent School District v. Rodriguez,*[117] the Supreme Court upheld as constitutional the Texas school financing system that produced markedly disparate school district expenditures within different districts of the state.[118] Justice Powell, in his opinion for the Court, found no basis for the claim that the classification by residence was based on wealth because evidence was lacking that the poor were generally concentrated in districts with low values of taxable property per pupil.[119] Although the Court's conclusion is plausible, Justice Marshall noted in dissent that the correlation between individual wealth and the property tax base per pupil was much more significant than Justice Powell admitted.[120] While the lack of correlation argument may be of dubious signifi-

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the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976). Common-law disputes are those that arise between private parties about private rights, which are settled by a determination of fault, *see* L. FULLER, *supra* note 13, at 167, while the purpose of public law litigation is to vindicate constitutional or statutory policies, Chayes, *supra* at 1284, without assigning fault regarding who is right or wrong. *Id.* at 1293.

The language of the Supreme Court in Hills v. Gautreaux, 425 U.S. 284, 296 (1976), suggests that the Court has conscientiously avoided the use of the wrongdoer-fault theory of common law in this "public law" litigation.

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

The Court's conclusion, however, indicates that a dignitary interest exists nonetheless. The Court reasoned that those entities to which no wrong is attributed should not be implicated as parties to the dispute. The Court implied that private party status is attributable to local governmental entities that have obligations to provide essential services to people residing within their borders. *See generally* Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court,* 13 HARV. C.R.-C.L. L. REV. 1 (1978).

See also Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583, 596-99 (1968), in which it is suggested that a court's social policy decision based on the equal protection clause must meet at least two of three basic criteria to be effective. First, the constitutional standard by which the decision of the court is made must be simple. Second, the courts must also fashion enforceable decisions. Last, "public acquiescence" of the principle embodied in the decision must exist.

Arguably, the implementation of school desegregation decisions, for example, satisfies the second and third criteria. School desegregation decisions fail the first test of simplicity, however, if they are to be judged by the clarity of the intent rule and the extent of disagreement over its interpretation.

117. 411 U.S. 1 (1973).
118. *Id.* at 15 n.38.
119. *Id.* at 22-23, 25-27.
120. *Id.* at 95 n.56.

cance, Justice Powell went further to buttress the Court's deference to the state legislature by questioning whether the minimum education provided by the state was so inadequate that it created a constitutional violation.[121] He further extended the Court's deference by confessing that "[i]n such a complex arena [as fiscal and educational policy] in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny . . . ."[122] In effect, the Court deferred to the state's school finance system because no standard existed by which to measure the deprivation and there were no "perfect alternatives" with which to eliminate the educational disparity.[123]

Thus, these broad social remedies for violations of the equal protection clause must meet two criteria. First, the degree of the burden imposed by the local government must be commensurate with the extent of the violation. Second, standards must exist by which a violation can be determined and alternatives fashioned.

C. The Behavioral Dimension of Intent

The Supreme Court, in its application of the intent rule, clearly abides by these two criteria in choosing the appropriate remedy. Since the finding of a violation of the equal protection clause requires proof of discriminatory intent, the violation must have a behavioral element. In addition, disparities under the law in treatment of or in access to resources that occur along racial lines but to which

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121. *Id.* at 24.

122. *Id.* at 41. *See also* Washington v. Davis, 426 U.S. 229, 247 n.13 (1976), in which the Court showed deference to the District of Columbia Police Department by admitting its reluctance to scrutinize rigorously the qualifying test since "[i]t appears beyond doubt by now that there is no single method for appropriately validating employment tests . . . ."; Bradley v. School Bd. of City of Richmond, 462 F.2d 1058, 1066 (4th Cir. 1972).

Implicit in this deference is an admission by the Court that the services provided by a local government are unique. The judiciary interferes with the delivery of these services reluctantly. When the method of delivering these services is consistent over a period of years, the presumption is created that the method is nondiscriminatory; because were it discriminatory, it is presumed that the electorate would have altered it previously. *But see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (private suit). *Cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

123. *But see* Yudof, *Equal Educational Opportunity and the Courts,* 51 TEX. L. REV. 411 (1973), in which it is urged that it is inappropriate to create equal protection remedies to equalize the result of schooling. Therefore, standards by which to measure deprivation are irrelevant. Because of the functional limitations of courts in considering matters of broad school policy, *see, e.g.,* McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968). *aff'd sub nom.,* McGinnis v. Ogilvie, 394 U.S. 322 (1969), and because of the intangibility of the relevant social science data, Yudof suggests that measuring equal educational opportunity by educational achievement is speculative. *See generally* Bell, *On Meritocracy and Equality,* 29 THE PUBLIC INTEREST 64-68 (1972). Yudof concluded that the *Rodriquez* Court relied on a variant of equal outcome analysis that placed an undue burden on the plaintiffs to establish that another method of financing would inevitably lead to better-educated students. Instead, Yudof asserted that this approach ignores the "ethical underpinnings of the equal protection clause" that are concerned with assuring rationality in government and freedom from governmental stigmatization. Yudof, *supra* at 504.

no conscious intent can be attributed are not judicially remediable. The absence of intent makes the satisfaction of these criteria impossible. Absent evidence of intent, no assessment can be made and no assurance can be given that the burdens of a remedy are commensurate with the extent of the violation. Furthermore, the lack of proof of intent may deny the court a standard by which to detect the constitutional violation and a guideline for predicting the effectiveness of a proposed remedy. Thus, the element of intent distinguishes not only disparities that are violative from those not violative of the Constitution, but also disparities that are remediable from those that are not.[124] The de facto-de jure distinction,[125] from which a constitutional violation is determined,[126] turns on the existence of discriminatory intent.[127]

The distinction, however, is of limited efficacy since its foundation in intent is an inaccurate measure of a state's complicity in the perpetration of racial disparities.[128] In addition, the distinction between de facto and de jure disparities is a conclusion merely denoting that an instance of discrimination is found in law, and thus prima facie unconstitutional, or exists in fact, and thus merely unfortunate. The distinction reveals none of the considerations a court makes in distinguishing lawful from unlawful discrimination. As a conclusion of an intent analysis that is at best inaccurate, the de facto or de jure label fails to describe a court's thinking or to enlighten the public regarding the state of the law.[129]

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124. This statement is consistent with the observation that the finding of a constitutional violation often follows proof of discriminatory intent, *see* notes 28-32 and accompanying text *supra* and the grant of a remedy almost always follows from the finding of a violation. *See, e.g.,* Milliken v. Bradley (I), 418 U.S. 717, 738 (1974); Milliken v. Bradley (II), 433 U.S. 267 (1977). While the need for a remedy may be established by a finding of a constitutional violation, the extent of the remedy remains a matter of judicial discretion. *See* note 116 *supra.*

125. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971).

126. Washington v. Davis, 426 U.S. 229, 240 (1976). The Court, in Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973), in which the de facto-de jure distinction was first fully articulated, refused to decide the question of whether de facto segregation may also be a constitutional violation under some circumstances. *Id.* at 212. The Court's decision in *Davis,* however, answered that question in the negative. The *Davis* Court interpreted *Keyes* as enunciating the "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S. at 240. After *Davis,* a showing of de jure discrimination appears essential to establish a constitutional violation.

Furthermore, a finding of de jure discrimination actually does no more than shift the burden of proof to the defendants to show that the "monochromatic result" could be caused by nondiscriminatory behavior. *See* notes 30-31 and accompanying text *supra.* The shifting of the burden, however, almost inevitably results in the finding of a constitutional violation. *See* notes 30-32 and accompanying text *supra.*

127. Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

128. *See* notes 86-91 and accompanying text *supra.*

129. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 214-17, 219-36 (1973). Justices Douglas and Powell dissented from the decision to maintain the de facto-de jure distinction. Justice Powell opined that "[t]he results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school authorities . . . —will be fortuitous, unpredictable, and even capricious." *Id.* at 233.

1. An Alternative to De Facto-De Jure Distinction.—The Court's use of intent in equal protection jurisprudence has created a more functional dichotomy. Violations for which remedies can be prescribed by meeting the Court's criteria[130] are distinguished from violations for which remedies cannot be fashioned. The distinction is between what may be called behavioral violations of the Constitution and systemic violations.

Behavioral violations arise as a result of the action of an identifiable decisionmaker. Systemic violations are attributable only to broad economic and social changes within the community or to past decisionmakers whose remoteness in time attenuates their influence on current decisions to a level below constitutional significance. Because behavioral violations that contain the element of intent are caused by volitional acts having an identifiable source, they are more remediable than systemic violations.[131] Behavioral violations resemble the common-law tortious and criminal acts that may be deterred by sanctions or enjoined by injunction.[132] Intent analysis identifies these pronounced instances of discrimination and clearly defines the extent of the discrimination. Remedies can be easily formulated according to the guideline that the proof of intent has delineated.

For example, courts have traditionally recognized a school board's use of certain tactics to be particularly discriminatory and thus evidence of wrongful intent. The use of optional zones, the gerry mandering of student attendance zones, or the excessive use of mobile classroom units readily connotes discriminatory intent to many courts.[133] Indeed, the Court of Appeals for the Sixth Circuit in *Higgins v. Board of Education*[134] recognized the absence of the "more commonly used or classic segregative techniques found in

130. *See* notes 1-3, 116-24 and accompanying text *supra.*

131. This behavioral-systemic distinction may be likened to the dichotomy, articulated by Professor Fiss, of process-oriented versus result-oriented approaches to the interpretation of "antidiscrimination laws." Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education,* 41 U. CHI. L. REV. 742 (1974). The process-oriented approach prescribes purification of the decisionmaking process, "interpreted as a ban against basing a decision on certain forbidden criteria . . . ." *Id.* at 764. Result-oriented remedies seek achievement of a certain result, such as the "improvement of the economic and social position of the protected group." *Id.*

The process-oriented approach, which may be analogized to the behavioral analysis, admits that social and economic changes may occur as an incident to the primary purpose of "purifying the process" by discouraging undesirable behavior. *Id.* at 766. But these changes do not require special justification as they would if they were the primary purpose of a result-oriented remedy. Only elimination of the undesirable behavior must be justified when a behavioral remedy is granted. The justification is readily found in the unfairness of discrimination, judging a person by criteria unrelated to the quality of performance. *Id.* at 767.

132. O. HOLMES, *supra* note 5, at 37.

133. *See, e.g.,* Morgan v. Kerrigan, 509 F.2d 580, 586-97 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 183-85 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); Keyes v. School Dist. No. 1, 303 F. Supp. 279, 290 (D. Colo. 1969), *modified,* 413 U.S. 189 (1973). *See generally* Note, *supra* note 7, at 160-65.

134. 508 F.2d 779 (6th Cir. 1974).

other cases" as significant in finding discriminatory intent lacking in Grand Rapids.[135] Similar land use practices such as racially exclusive zoning,[136] denial of building permits in an area zoned for that construction, or ordinances setting a minimum cost of construction[137] of residential structures[138] have been recognized by courts as evidencing discriminatory intent. Behavioral violations are characterized by specific practices for which no permissible justification can be inferred. They are instances of manifest discrimination that are readily enjoined or altered.

Systemic violations are caused by disparities along racial lines that arise from either countless or unidentifiable sources.[139] A confluence of factors may function over a period of time to precipitate the disparities. Systemic violations are either not attributable to an identifiable and definite source or not subject to any clear remedy.

Recent Supreme Court opinions illustrate this concept of systemic violations. Justice Stewart's concurring opinion in *Milliken v. Bradley,*[140] for example, concludes that the issue before the Court is "the appropriate exercise of federal equity jurisdiction" since the Court affirmed the lower court's findings that a violation of the equal protection clause existed.[141] Justice Stewart maintained, however, that the extent of the violation failed to reach beyond the Detroit city limits.[142] He dismissed as "unknown and perhaps unknowable," factors that he acknowledged contributed to the "growing [use] of Negro schools."[143] Justice Stewart concluded that factors such as "in-migration, birth rates, economic changes, or cumulative acts of

135. *Id.* at 787.

136. *See, e.g.,* Buchanan v. Warley, 245 U.S. 60 (1917) (segregation within residential areas held perpetuated by an ordinance permitting the majority of each block to control its land use in all-white areas); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) (ordinance held discriminatory that prohibited the construction of any new multiple-family dwellings, including a proposed federally subsidized low-to-moderate income integrated townhouse development); Anderson v. Forest Park, 239 F. Supp. 576 (W.D. Okla. 1965) (buffer zone created by unusually severe building requirements struck down). *But cf.* Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill. 2d 132, 137-38, 174 N.E.2d 850, 855 (1961) (condemnation of open housing subdivisions for use as parks with the clear purpose of racial discrimination nonetheless upheld as a legitimate exercise of eminent domain).

137. *See, e.g.,* Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam,* 457 F.2d 788 (5th Cir. 1972).

138. *See, e.g.,* County Comm'rs v. Ward, 186 Md. 330, 46 A.2d 684 (1946); Brookdale Homes, Inc. v. Johnson, 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940), *aff'd,* 126 N.J.L. 516, 19 A.2d 868 (1941) (per curiam); Appeal from Ordinance, Borough of Speers, 28 Wash. Co. 221 (Pa. C.P. 1948).

139. Because the Supreme Court is the final interpreter of the United States Constitution, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), when the Court does not conclude that certain racial disparities violate the Constitution, no violation actually exists. The term "systemic violation" connotes disparities sufficiently gross to rise to the level of constitutional magnitude—*i.e.,* disparities that would amount to a constitutional violation if reason existed to attribute the disparity to discriminatory intent.

140. 418 U.S. 717 (1974).

141. *Id.* at 753.

142. *Id.* at 755-56.

143. *Id.* at 756 n.2.

private racial fears" cannot be addressed by federal courts until evidence exists that the state or its political subdivisions have acted to cause the situation to exist.[144]

The exercise of federal equity jurisdiction to remedy these systemic violations requires evidence of intent as shown by a nexus between official action and the systemic factors. Since the source of these factors is unknown, however, no nexus can be found. The factors are perceived by courts as necessarily operating independently of official action.

The Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[145] also suggested the existence of a behavioral-systemic distinction by the criteria it articulated as necessary to evidence intent. Absent a clear pattern of racial disparity that is unexplainable on grounds other than race,[146] the Court listed such factors as "a series of official actions taken for invidious purposes . . . [a] sequence of events leading up to the challenged decision [and] . . . [any] contemporary statements by members of the decisionmaking body . . ." as having probative value in evidencing intent.[147] These factors, each of which contain a behavioral component, may be contrasted with the Court's reasoning in finding that the Arlington Heights zoning board failed to demonstrate discriminatory intent. The Village was zoned for single family, residential use in 1959. A provision was adopted in 1962 that a buffer zone be maintained between the residential property zoned for single families and any subsequent commercial or multi-family developments. The denial of a zoning change to the Metropolitan Housing Corporation for construction of low and moderate income housing probably bore more heavily on the blacks who would have entered the previously racially homogeneous development. In finding that this denial of a zoning change was not discriminatory, the Court reasoned that the buffer policy was adopted too long ago and applied too consistently for the Court to "infer discriminatory purpose."[148]

Such a calculus recognizes only deliberate acts as evidencing intent and ignores the possibility that policies can become obsolete, perpetuating racial disparities in the changing community. Since systemic violations arise from societal changes over a period of time, they are not considered in the intent analysis.[149] These systemic vio-

144. *Id.*

145. 429 U.S. 252 (1977).

146. *See, e.g.,* Gomillion v. Lightfoot, 364 U.S. 339 (1960). *See also* notes 40-49 and accompanying text *supra.*

147. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977).

148. *Id.* at 270.

149. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court recognized that "growing disparities in population and taxable property between districts were

lations will not be addressed because they lack a behavioral component upon which the Court may focus its remedy. Since the cause of these systemic factors is unknown, the intent necessary to prove a constitutional violation is undetectable. Only behavioral factors serve as evidence of a constitutional violation.

The finding of a violation ultimately turns on whether a remedy can be fashioned to redress the wrong.[150] The common-law remedies of damages and injunctions cannot be applied when the sources of the systemic factors are "unknown or unknowable" since there will be no wrongdoer against whom the damages can be assessed or whose behavior can be deterred or enjoined. Intent functions in constitutional law, as it does in common law, to ensure that only those clearly at fault are burdened by the remedies. By its use of the intent rule, the Supreme Court has essentially provided that a finding of a violation of the equal protection clause turns on the manageability and burdensomeness of the remedies that would be fashioned to redress the wrong.

2. Intent Analysis Applied to Schooling and Land Use as Opposed to Legislative Districting and Jury Selection.—The degree to which the feasibility of the remedy influences the Court's finding of a violation is evident when the Court's posture in the school segregation and land use areas is compared with its stance in the legislative apportionment and juror discrimination areas. The Court has been reluctant to correct racial disparities in the education and zoning areas without evidence of substantial wrongdoing[151] and without clear standards for discerning the violation and fashioning the appropriate

responsible in part for increasingly notable differences in levels of local expenditure for education." *Id.* at 8. Notwithstanding this acknowledgement of the systemic cause of the disparity, the Court refused to remedy inequality, offering as its reason, *inter alia,* that no standards exist by which to prove that a constitutional violation exists and by which a remedy can be fashioned. *See* notes 116-23 and accompanying text *supra.*

150. It is not a recent conclusion that a court's finding of illegality may depend on the existence of a manageable remedy. As Professor Shipman noted of the common-law forms of action: "The general principles of the common law, respecting remedies, rights, and liability for wrongs, have been evolved by inquiring whether the facts of the case were covered by any recognized form . . . of remedy." B. SHIPMAN, COMMON LAW PLEADING 55 (3d ed. 1923). But this thinking has purportedly become obsolete with the adoption and use of the Federal Rules of Civil Procedure. *See also* Chayes, *supra* note 116, at 1293, in which it is suggested that a characteristic of public law litigation, of which desegregation and land use disputes are a part, *id.* at 1284, is that the right asserted and the remedy claimed are disconnected; that "[t]he form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc." *Id.* at 1284-85.

The Court's action in the school desegregation and zoning areas is certainly far more flexible than the pigeonholes of the common-law forms of action. The thesis of this article suggests, however, that the disjunction of right and remedy is not nearly as distinct as Professor Chayes suggests. The recognition of rights continues to be contingent on the existence of remedies. Furthermore, any attenuation of the present connection between right and remedy has reached an institutional limit beyond which the Supreme Court, in apparent fear of acting as a "super legislature," is unwilling to move.

151. *See* notes 99-117 and accompanying text *supra.*

remedy.[152] The Court, however, has demonstrated a greater willingness to remedy disparities arising in legislative representation and jury composition. The difference in the judicial posture toward these areas is coincident with the different types of remedies they warrant and the standards available for detecting a violation and fashioning the remedy. The correlation of the judicial posture to the remedies available may be more than coincidental. It can be explained by the purposes for which the Court seems to have persisted in using the common-law rule of intent.

Reapportionment differs most strikingly from the school desegregation and zoning areas in its application of an easily managed standard by which a court can detect equal protection violations and order a remedy to be fashioned. In its keystone decision of *Reynolds v. Sims,*[153] the Supreme Court first held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[154] The Court nonetheless allowed that some deviation from a strict population standard would be constitutionally permissible,[155] but it ruled out history, geographical considerations, and "economic or other sorts of group interests" as permissible justifications for the deviation.[156]

These systemic factors are cognizable since the calculus for measuring fair and effective representation[157] is guided by a norm of equality: the simple standard of one person-one vote.[158] While debate still rages concerning the extent of the deviation permissible,[159] the standard provides courts with guidelines for detecting constitutional violations and for fashioning appropriate remedies.[160] Given

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152. *See* notes 117-24 and accompanying text *supra.*

153. 377 U.S. 533 (1964).

154. *Id.* at 568.

155. *Id.* at 577-78.

156. *Id.* at 579-80. *See also* Baker v. Carr, 369 U.S. 186, 250 n.5 (1962) (Douglas, J., concurring).

157. Reynolds v. Sims, 377 U.S. 533, 565-66 (1964).

158. *See, e.g.,* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969); Wesberry v. Sanders, 376 U.S. 1, 18 (1964). The standard of "one man-one vote" that echoes throughout the reapportionment cases requires each state to make "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964).

159. For an account of this debate, see Note, *Fair And Effective Representation: Power To The People,* 26 HASTINGS L.J. 190 (1974); Note, *Reapportionment,* 79 HARV. L. REV. 1226, 1250 (1966).

160. Justice Frankfurter, in his dissent in *Reynolds v. Sims,* recognized the significance of the majority's decision, that the "right to vote" was "diluted," "debased," and "impaired" by unequal apportionment, by observing that:

> One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court . . . is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy . . . .

Baker v. Carr, 369 U.S. 186, 300 (1962). *See also* Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value,* in 1964 SUPREME COURT REV. 1, 84-85 (Kurland

the presence of such a standard, an intent rule is unnecessary to guide a court in finding violations that may be remediable. Indeed, until recently, no requirement of intent has been applied to reapportionment claims.[161]

In *City of Mobile v. Bolden,*[162] however, the Supreme Court required that discriminatory intent be shown in support of a claim that at-large election of city commissioners unfairly diluted black voter strength in violation of the equal protection clause of the fourteenth amendment. In his plurality opinion, Justice Stewart suggested that the application of the discriminatory intent requirement to voting cases, apparently including reapportionment cases, is wholly consistent with the Court's precedents.[163]

To reach this conclusion, Justice Stewart found evidence of discriminatory intent in prior voting rights decisions, such as *White v. Regester,*[164] in which the Court based its finding that the equal protection clause had been violated exclusively on "systemic" factors that had restricted access of minority groups to the political process. No finding of discriminatory intent, however, was made in the *White* decision. Justice Stewart's liberal reading of *White v. Regester* further blurs the distinction between discriminatory intent and discriminatory impact. Besides citing precedent of questionable value to support his view that discriminatory intent must be proved in voting rights cases, Justice Stewart provided no other explanation for the Court's judgment.

Justice Blackmun's concurring opinion in *Mobile* may offer some guidance to the direction the Court may take in future voting rights decisions. After assuming that proof of intent is a prerequisite to proving vote dilution, Justice Blackmun concurred in the Court's judgment, reversing the lower court's findings that the Constitution had been violated. He believed the district court's order altering the form of the city's government from a commission to a mayor-council system exceeded the proper bounds of its remedial discretion; "[E]ven a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take."[165] Justice

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ed.). In establishing a standard by which to judge the equality of voting rights, the Court chose a democratic model of government as an ideal against which it could fashion effective remedies. No such coherent model exists in the land use and school desegregation areas that would set a goal for the judiciary toward which manageable and effective remedies may be directed. *See* Yudof, *supra* note 123. In the absence of a theory that envisions how ideal schools and land use would appear, the intent rule functions as a standard to guide the Court's decision-making.

161. *But see* Paige v. Gray, 538 F.2d 1108, 1110 (5th Cir. 1976).
162. 100 S. Ct. 1490 (1980).
163. *Id.* at 1499-1500.
164. 412 U.S. 755 (1973).
165. 100 S. Ct. at 1508.

Blackmun's position would herald a reevaluation of the burden of voting rights remedies.

Justice Stevens also concurred in the Court's judgment, failing to find that the evidence before the district court proved a denial of equal protection. Rather than apply a discriminatory intent standard to judge the constitutionality of the actions of political decisionmakers, however, he would focus on the "objective effects" of the political decisions, looking more to disproportionate impact than discriminatory intent.[166] Justices Brennan, White, and Marshall dissented, each in opposition to the application of a discriminatory intent standard to voting rights claims.

The effect of the *Mobile* judgment on equal protection jurisprudence is uncertain. Because a bare majority of the Justices favor requiring proof of discriminatory intent in voting rights cases,[167] the *Mobile* judgment may mark the introduction of this standard into voting rights cases. This apparent shift in the Court's position may have resulted from a reassessment, as Justice Blackmun undertook to do in his concurrence, of the burden that voting rights remedies place on the functioning of municipal governments. The continued Court interest and particularly that of Justice Blackmun, in the disruptiveness of equal protection remedies suggests that the common-law attributes of an intent requirement remain an active concern in the Court's deliberations.

The extent to which the remedies burden the community on which they are imposed serves to distinguish the Court's treatment of reapportionment from the school desegregation and land use areas. In contrast with school desegregation and land use remedies, which typically disrupt the delivery of services by the local government and are costly to implement,[168]reapportionment remedies require only that district lines be redrawn to meet the one person-one vote standard.[169] Neither reorganization of local government nor costly implementation is necessary.[170] Consequently, it is unnecessary to measure the scope of the remedy by the extent of the wrongdoing since the remedy is not characteristically burdensome, as it is in the school desegregation and land use areas.[171] Reapportionment remedies may have social and political significance to the extent that they alter the proportional representation in local government within a

166. *Id.* at 1512.

167. Justices supporting the present use of the discriminatory intent requirement are Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Stevens. *See* City of Mobile v. Bolden, 100 S.Ct. 1490 (1980).

168. *See* notes 99-115 and accompanying text *supra.*

169. *See* Note, *Reapportionment,* 79 HARV. L. REV. 1228, 1266-83 (1966).

170. *But see* Baker v. Carr, 369 U.S. 186, 327 (1962) (Frankfurter, J., dissenting); Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976).

171. *See* notes 99-115 and accompanying text *supra.*

state or county, but they do not necessarily disrupt the daily activities of a community as may the school desegregation and land use remedies.

These differences between the availability of standards and the burdensomeness of remedies may account, at least partially,[172] for the Court's more active role toward reapportionment than toward desegregation and land use discrimination. This readiness to grant apportionment remedies is most readily illustrated by the Court's disregard for the significance of local government boundary lines, the integrity of which the Court adamantly respected in *Milliken v. Bradley.* Although the *Milliken* Court admonished that "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country,"[173] reapportionment remedies entail the wholesale alteration of local boundary lines.[174] The lines may be

172. The Court's activism in reapportionment may also be attributed to the judicial solicitude accorded the right to enfranchisement that malapportionment was held to abridge in Reynolds v. Sims, 377 U.S. 133, 555-56 (1964). *But see* Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting). Malapportionment challenges a fundamental principle of representative government—that the majority, not a minority, should govern. The injury perpetrated by malapportionment was well described in Gomillion v. Lightfoot, 270 F.2d 594, 612 (5th Cir. 1959) (Wisdom, J., concurring), *rev'd,* 364 U.S. 339 (1960): "[I]n a democratic country nothing is worse than disfranchisement. And there is no such thing as being just a little bit disfranchised. A free man's right to vote is a full right to vote or is no right to vote."

Furthermore, enfranchisement is recognized as a fundamental right in American society, but neither safe housing, Lindsey v. Normet, 405 U.S. 56, 74 (1972), nor education, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973), are recognized as fundamental rights.

Finally, both discrimination in the selection of a jury and the malapportionment of legislative districts directly implicate a governing body, impairing its legitimacy. Neither land use discrimination nor school segregation touch basic governmental institutions so intimately. This distinction may also account, in part, for the differences in the Court's posture toward discrimination in these four areas.

173. 418 U.S. 717, 741 (1974).

174. *See* Note, *supra* note 169. *But cf.* Hills v. Gautreaux, 425 U.S. 284 (1976), in which the Court allowed a metropolitan remedy to be imposed on the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD). CHA and HUD were found to have deliberately selected public housing sites in Chicago that avoided the placement of black families in white neighborhoods. The Court held that a metropolitan remedy was not *per se* impermissible. *Milliken* was construed in *Gautreaux* as merely holding that the federal courts lack the power to interfere with the operation of state political entities not "implicated in unconstitutional conduct." *Id.* at 298. The Court buttressed this interpretation by maintaining that "a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units, *because both CHA and HUD have the authority to operate outside the Chicago city limits." Id.* (emphasis added) (footnote omitted). According to this reasoning, the legal authority to act across city lines creates a presumption that the repercussions of discrimination are coextensive with that authority and that a court's remedy may be equally broad. No consideration is given to the actual extent of the discrimination. The finding of the district court that metropolitan relief was unwarranted because "the wrongs were committed within the limits of Chicago," *id.* at 291, was dismissed, not on the factual ground that it inaccurately assessed the effects of discrimination, but on the reasoning that relief should be as extensive as the potential discriminatory behavior. The area over which CHA and HUD may have actually discriminated includes the entire metropolitan area in which they were authorized to act.

Thus, the Court in *Gautreaux* continued to measure the invidious discrimination by the extent of the behavior that may have caused it. No effort to consider nonbehavioral factors is

merely less significant during reapportionment because their alteration does not necessarily disrupt the functioning of the local government as the Court feared it would, for example, in school desegregation.[175]

The same analysis applies as readily to discrimination in jury selection. Jury selection is accomplished by well-outlined procedures that are administered by a few, identifiable people.[176] The opportunities for discrimination coincide with the points at which the administrators have discretion in managing the selection.[177] Racial disparities are attributable either to the random selection process or to the people who administer the process. In jury selection, unlike school desegregation and land use, racial disparities are easily attributed to an identifiable source. The Court in *Alexander v. Louisiana*[178] was so certain that the range of sources of the racial disparity in jury composition was limited that it arrived at its conclusion by deduction. No discriminatory actions were proved. Because the racial disparity was gross,[179] however, the Court deduced that it was more likely caused by the commissioners than by the random selection process.[180] Discriminatory intent was inferred from the commissioners' opportunity to discriminate by use of a racial designation included on the juror questionnaire.[181]

In the finite jury selection process in which the possibility that systemic factors will cause racial disparities is minimal, the Court more readily infers discriminatory intent from such disparities. In *Arlington Heights,* the Court acknowledged that a lesser burden of proof may be appropriate in the jury selection context.[182] Although

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apparent. The mere authority to act beyond city boundaries implicates the surburban Chicago housing. *Gautreaux* strains the distinction the Court has made between behavioral and systemic violations in order to permit the formulation of a broad remedy to address a dramatic instance of invidious discrimination. *See also* Kanner, *supra* note 91, in which two prerequisites to interdistrict relief are discerned from Milliken v. Bradley, 418 U.S. 717 (1974). An "unclean hands" condition requires proof that both jurisdictions committed invidious discrimination, while a disproportionate impact condition requires only that the discrimination in one district cause a "segregative effect" in another district. Kanner, *supra* at 389.

175. *See* Milliken v. Bradley, 418 U.S. 717, 743 (1974).

176. *See, e.g.,* Castaneda v. Partida, 430 U.S. 482, 491-92 (1977); Alexander v. Louisiana, 405 U.S. 625, 627-28 (1972); Arnold v. North Carolina, 376 U.S. 773 (1964).

177. *See, e.g.,* Castaneda v. Partida, 430 U.S. 482, 492 (1977); Alexander v. Louisiana, 405 U.S. 625, 630-32 (1972).

178. 405 U.S. 625 (1972).

179. *Id.* at 627-28.

180. *Id.* at 630-32.

181. *Id.* at 632.

182. "Because of the nature of the jury-selection task . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

The Supreme Court in City of Mobile v. Bolden, 100 S.Ct. 1490 (1980), dismissed an analogy of the district court between voting dilution and racially exclusionary jury cases. Bolden v. City of Mobile, 423 F. Supp. 384, 398 (S.D. Ala. 1976). The Court observed that jury cases "typically have involved a consistent pattern of discrete official actions that demon-

intent may be readily inferred from the circumstances, the intent rule remains a necessary guide to the courts in their scrutiny of the jury selection process. Unlike the reapportionment area, in which the standard by which to measure a violation and to fashion a remedy is clear, jury composition[183] is not subject to standards that propose an ideal composition.[184] In the absence of that standard, the intent rule guides the Court in its assessment of "wrongdoing" and in its determination of the manageability of remedies to redress the wrong.[185]

The intent rule functions differently in different contexts. When standards by which the Court can discern violations and fashion remedies are minimal or when the remedies are typically burdensome, as in the school desegregation and land use areas, the intent rule functions as a surrogate standard. The use of the intent rule as a standard colors the Court's analysis in its judgment that only those events that have a behavioral component are unconstitutional. In effect, the operation of the intent rule restricts the Court's recognition of constitutional violations to those "wrongs" most remediable. When manageable standards exist to guide the Court's analysis and the remedies do not severely burden local government, as in the reapportionment area, the efficacy of the intent analysis may be so minimal as to make it inoperative. Despite the absence of standards to guide the Court, when the "wrongdoing" is well contained and the remedies are simple, as in the jury selection area, the intent rule operates more flexibly.

While the Court has recognized the failure of the intent rule to accurately discern a nexus between discriminatory motives and racial disparities, it has come to appreciate the effect of the rule in limiting constitutional violations to those actions that are most readily enjoined or deterred. The behavioral-systemic distinction in effect, if not in name, may supplant the de facto-de jure dichotomy that has purportedly guided the Court's reasoning since its formulation in *Keyes v. School District No. 1.*[186] The question remains whether tangible remedies may serve as a more predictable and consistent guide to the Court's thinking than has the intangible element

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strated almost to a mathematical certainty that Negroes were being excluded from juries because of their race." 100 S.Ct. at 1502 n.17.

183. *But see* Alexander v. Louisiana, 405 U.S. 625, 636 (1972) (Douglas, J., concurring), in which it is noted that it is a "federal constitutional criteri[on]" that a grand jury as well as a petit jury must be drawn from a representative cross-section of the community. Justice Douglas further urged that "[t]he requirement that a jury reflect a cross-section of the community occurs throughout our jurisprudence . . . ." *Id.*

184. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (Court acknowledges that mathematical rations are permissible as a "starting point in the process of shaping a remedy, rather than an inflexible requirement.").

185. *See* note 160 *supra.*

186. 413 U.S. 189, 209 (1973).

of discriminatory motivation on which the de facto-de jure distinction rests.

IV. Conclusion

Although intent is useful at common law in identifying a wrongdoer, that function seems to contravene the avowed purpose of equal protection jurisprudence of vindicating public rights.[187] The Supreme Court's persistence in requiring proof of intent for a constitutional violation has infused equal protection analysis with common-law attributes. This limits the recognition of violations to incidents in which identifiable "wrongdoers" exist even though the complexity of equal protection issues makes that identification difficult, if not impossible. The Court's consideration of whether manageable standards are available to guide its formulation of a remedy further compounds the difficulty of establishing an equal protection violation. Consequently, unless a mathematical standard is practicable, as in legislative reapportionment, only clear incidents of official complicity in perpetrating racial disparities are subject to judicial remedy.

The use of the intent rule has restricted the Court's intervention in state activities, leaving primary responsibility for redress of discriminatory acts with the state legislatures. It remains uncertain whether state legislatures will recognize this judicial posture as a mandate for legislative action.

187. Chayes, *supra* note 116, at 1284.