St. John's Law Review

Volume 50, Winter 1975, Number 2 Article 9

Foreseeable Consequence Test for De Jure Segregation (Hart v. Community School Board)

Janis A. Parazzelli

this may be to civil rights advocates, it seems clear that such a result is simply not warranted by the weight of judicial authority. Hopefully, therefore, courts faced with similar circumstances will reject the ill-conceived theories of the *Jackson* and *Weise* opinions. Indeed, they would do better to bear in mind the simple maxim that "[t]he state action, not the private action, must be the subject of complaint."[73]

Thomas P. Wagner

FORESEEABLE CONSEQUENCE TEST FOR DE JURE SEGREGATION

Hart v. Community School Board

Since the 1954 Supreme Court decision in *Brown v. Board of Education,*[1] de jure segregation, *i.e.* that which is a product of intentionally segregative state action, has been held to be unconstitutional.[2] De facto segregation, on the other hand, has been viewed as permissible because of the absence of deliberate state involvement.[3] This very distinction has inevitably led to the problem of determining what types of action by a state will qualify

valuable time of a private institution's personnel in forcing them to repeatedly defend the propriety of their professional decisions.

[73] Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[1] 347 U.S. 483 (1854).

[2] In *Brown,* Negro children sought admission to public schools on a nonsegregated basis. They had been denied admission to schools attended by white children pursuant to various state laws which either required or permitted segregation according to race. In sustaining the state's segregative policies, the lower courts had relied on the "separate but equal" doctrine announced by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). The *Brown* Court, however, concluded that under the equal protection clause of the fourteenth amendment, "the doctrine of 'separate but equal' has no place." 347 U.S. at 495. According to the Court, "[s]eparate educational facilities are inherently unequal." *Id.*

[3] *See generally* Note, *Toward the Elimination of De Facto Segregation in Public Schools,* 20 CATHOLIC LAWYER 60, 61-64 (1974) [hereinafter cited as *Public Schools*]. Where there is no showing of state action, segregation has been upheld as de facto. In Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (5th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967), for example, the segregation of the Cincinnati Public School System was declared constitutional since no state action had been alleged. As the court noted,

> a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution.

369 F.2d at 59.

In some cases, segregation has also been viewed as de facto, and therefore permissible, even when state action was present provided segregative intent did not exist. In Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964), the Seventh Circuit sustained the constitutionality of a Gary, Indiana segregated school system. The court based its holding on a finding that the neighborhood school plan which had caused the segregation was "honestly and conscientiously constructed" by the school authorities. 324 F.2d at 213, *quoting* Bell v. School City, 213 F. Supp. 819, 829 (N.D. Ind. 1963).

as unlawfully segregative. Traditionally, only racially motivated acts or omissions by the state have been considered intentionally segregative and hence unlawful.[4] In *Hart v. Community School Board,*[5] however, the Second Circuit held that racially motivated action by the state is not the sole predicate for a finding of segregative intent. Such intent may also be established, according to the court, by racially neutral acts and omissions of governmental authorities which have as their natural and foreseeable consequence the causing of segregation.[6]

Hart involved a class action brought by schoolchildren against the Community School Board of Brooklyn. Plaintiffs contended that certain actions of the defendant contributed toward the segregation of Mark Twain Junior High School. In particular, plaintiffs contested the Community Board's construction of new schools and changes it had made in school zoning.[7] These actions, combined with the Board's failure to take adequate affirmative steps,[8] were alleged to have caused the decrement of the white student enrollment at the school.[9] Judge Weinstein, of the district

---

[4] *See, e.g.*, Taylor v. Board of Educ., 294 F.2d 36, 39 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961); Sealy v. Dep't of Pub. Instruction, 252 F.2d 898 (3d Cir.), *cert. denied,* 356 U.S. 975 (1958); Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958).

[5] 512 F.2d 37 (2d Cir. 1975), *aff'g* 383 F. Supp. 699 (E.D.N.Y. 1974).

[6] 512 F.2d at 50.

[7] *Id.* at 46. Prior to 1966, two elementary schools with predominantly white populations graduated their students into both Mark Twain Junior High School and another school. By September 1966, due to changes in school zoning patterns as well as the construction of a new junior high school, none of the students in either of these graduating classes went on to Mark Twain. In addition, in 1969 and 1970, grades seven and eight were added to an elementary school which had been opened in 1965. This action drew away even more of the white children who would normally have attended Mark Twain. *Id.*

[8] When the District Superintendent and the Office of School Zoning of the Board of Education submitted a rezoning plan to the Community Board, "it announced that it would not change the *status quo.*" *Id.* at 47. Five months later, the School Chancellor directed the Community Board to formulate a plan " 'to eliminate racial imbalance and improve building utilization' at Mark Twain," and the board did so. *See id.* The plan developed, however, was a so-called "freedom of choice" plan, designed to encourage voluntary transfers to the junior high school. Because of their general ineffectiveness, such plans have been widely criticized. *See, e.g.*, Green v. County School Bd., 391 U.S. 430, 439-41 (1968) (freedom of choice plans not unconstitutional but unacceptable if other methods reasonably available). Indeed, freedom of choice quickly proved unsuccessful in bringing white children to Mark Twain. The Chancellor therefore sent another letter advising the Community Board to adopt a different plan, but the Board refused to do so. It did, however, against the will of a number of white parents, zone nonwhite children from the area adjacent to Mark Twain into the school which had opened in 1965. 512 F.2d at 47.

[9] While in 1962 white students amounted to approximately 81% of the total enrollment, by 1973 they numbered only about 18%, with blacks making up about 43.3% and hispanics 38.6% of the school's population. 512 F.2d at 45. The Board contended that if unlawful segregation existed, it was due to housing patterns maintained by the city, state, and federal governments. Consequently, these authorities were impleaded as third-party defendants. Although the district court made no order with respect to the housing authorities, it reserved the right to do so later and therefore retained jurisdiction over them for the purpose of granting an effective remedy. 383 F. Supp. at 774-75. The Second Circuit,

court, determined that while racial motivation may be relevant in proving that unlawful segregation exists, it is not essential to a finding of de jure segregation.[10] In fact, the district court held that de jure segregation had been established because segregation of the junior high school was the natural and foreseeable consequence of the Board's activities.[11]

The Second Circuit unanimously affirmed the district court's ruling that racially motivated action is not the sole ground on which a finding of unlawful segregation may be based.[12] Mindful that the Supreme Court, pursuant to its decision in *Keyes v. Denver School District No. 1*,[13] still requires intentional state action as an element of de jure segregation,[14] the Second Circuit reasoned that the segregation produced by a state's intentional, though not racially motivated, action may also qualify as unlawful.[15] Hence, Judge Gurfein, writing for the court, concluded that although a state's mere inaction in allowing a school to continue as segregated may only amount to de facto segregation,[16] the segregative intent necessary for a finding of unlawful segregation may be based on "actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation."[17] Applying this test, the Second Circuit found that de jure segregation did exist and ordered implementation of the district court's desegregation plan.[18]

---

however, recommended that the district court dismiss the third-party action, since it could later ask federal, state, and local authorities to voluntarily assist in desegregating the school. 512 F.2d at 56.

[10] Judge Weinstein explained:

> Segregative design is not material in the sense that it is not essential in proving a violation of the Constitution in a case such as this. Nevertheless, it may be relevant in proving that segregation exists on the theory that people are more apt to accomplish something if they set out to do so.

383 F. Supp. at 737.

[11] *Id.* at 734. A collateral issue of "internal segregation" or "tracking" was also raised in *Hart*. According to the Second Circuit, tracking, *i.e.* "grouping of students into classes within a school on the basis of their achievement level," 512 F.2d at 45 n.11, has been used to maintain a segregated policy in schools that have been recently desegrated. *Id.* While the district court emphasized the internal segregation of Mark Twain, 383 F. Supp. at 740, the Second Circuit viewed this as much less significant than the "external segregation." 512 F.2d at 46.

[12] 512 F.2d at 50. The *Hart* court was composed of Circuit Judges Friendly, Timbers, and Gurfein.

[13] 413 U.S. 189 (1973), *rev'g* 445 F.2d 990 (10th Cir. 1971), *rev'g* 313 F. Supp. 61 (D. Colo. 1970).

[14] *See* note 19 and accompanying text *infra*.

[15] 512 F.2d at 50.

[16] *Id.* at 48.

[17] *Id.* at 50.

[18] Having found that de jure segregation did in fact exist, District Judge Weinstein directed that desegregation plans be submitted. Because these plans proved to be insufficient, the court appointed a special master to work with the parties in developing a

Its holding that segregative intent may be based on state actions foreseeably leading to segregation was, in the Second Circuit's opinion, consonant with the spirit of the Supreme Court's ruling in *Keyes* "that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[19] Since *Keyes* involved the narrow issue of the effect of a finding of deliberate racial segregation with respect to a significant portion of a school system on the status of the remaining schools in that system,[20] Judge Gurfein concluded that there was

better proposal. 383 F. Supp. at 758. Ultimately, three plans were submitted for the court's consideration: (1) the Board plan, calling for the creation of a magnet school at Mark Twain, which all gifted and talented children of the district would be free to attend; (2) the special master's plan for another form of magnet school; and (3) the plan of Dr. Dan W. Dodson, an educator and consultant to the plaintiffs, who would have implemented a forced busing program. All of the proposed plans promised desegregation of every middle school in the district, including Mark Twain, by providing for a 70 to 30 ratio of white to minority children in each school. *Id.* at 769-72.

The plan finally adopted was the Board's magnet school plan. It would (1) redraw the feeding patterns of the middle schools so that the incoming grade of each intermediate and junior high school, as well as the seventh and eighth grades of each K-8 school, would reflect approximately a 70% Caucasian and 30% "minority" population, the approximate Caucasian-minority ratio in the district's middle schools; (2) graduate to high school the eighth and ninth grades of Mark Twain; (3) transfer Mark Twain's present seventh grade and zone the graduating pupils of the two predominantly minority elementary schools to middle schools in the district other than Mark Twain; and (4) establish at Mark Twain a district school for gifted and talented children, *i.e.* a magnet school. *Id.* The district court set deadlines for implementation of the plan and accomplishment of its objectives: If 1050 children did not attend Mark Twain by September of 1977, the plan would be considered a failure and an alternative plan "based on 'Model II' of the proposal of Dr. Dodson" would go into effect. *Id.* at 774.

The plaintiffs in *Hart* attacked the plan on several theories. First, they contended that it was merely an elaborate "freedom of choice" program. The Second Circuit responded that this argument was erroneous since the plan required the shutting down of special facilities for gifted children in all other district schools. Parents of talented children would have no choice but to send their children to Mark Twain. 512 F.2d at 54. Second, it was contended that the plan would create an elite class. The Second Circuit answered simply that "[e]litism is not obnoxious if it is color blind." *Id.* Third, the class argued that more black students would be relocated than whites. The Second Circuit here replied that a "somewhat heavier burden" has to fall somewhere and pointed out that even the appellants' plan would allocate more of the burden to minority students. *Id.* at 53 n.6. Fourth, it was asserted that the magnet school would not work, since white parents would not voluntarily choose to send their children to a "negro" school. The Second Circuit countered this contention with evidence of successful magnet schools in other American cities. *Id.* at 54-55.

The court-ordered magnet school plan is in keeping with the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (Supp. IV, 1974), which suggests the establishment of magnet schools as a remedy for the denial of equal educational opportunity. *See id.* § 1713(f). Moreover, Congress has expressly provided that

> no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, *unless the court first finds that all alternative remedies are inadequate.*

Id. § 1755 (emphasis added). Accordingly, the district court ruled that a busing plan would only be implemented if the magnet school plan proved to be ineffective. *See* 512 F.2d at 43.

[19] 413 U.S. at 208 (emphasis in original).

[20] The petitioners in *Keyes* originally sought the desegregation of schools in the Park Hill area of Denver. After obtaining an order for such relief from the district court, they expanded their request to include the desegregation of other schools in the Denver system,

no reason for the *Keyes* Court either to distinguish between racially motivated acts and those having the reasonably foreseeable effect of causing segregation or to decide whether the latter might also constitute unlawful segregation.[21] Moreover, as Judge Gurfein noted, the Supreme Court, in *Wright v. Council of City of Emporia,*[22] had previously employed an objective test of foreseeable effects rather than the subjective racial motivation criterion in determining the permissibility of a school board's desegregation plan.[23]

Justice Powell, concurring in *Keyes,*[24] criticized the majority's reliance on segregative intent, finding it "difficult to reconcile" with the Court's earlier holding in *Wright.* He argued that there is a fourteenth amendment right to integrated schools once the state has assumed responsibility for education.[25] Neutral enrollment

---

particularly those in the core city area. The district court denied the further relief, although it did order the respondents to provide equal facilities for the core city schools. 313 F. Supp. at 97-100. The Tenth Circuit reversed, finding that although deliberate segregation had been established as to the Park Hill schools, similar segregative intent was not demonstrated with respect to the core city schools. 445 F.2d at 1006. This ruling was in turn reversed by the Supreme Court which held that although segregative intent is necessary for a finding of unlawful segregation, if a significant portion of a district's schools has been deliberately subject to segregation, a presumption arises that the other schools in the district are similarly unlawfully segregated. 413 U.S. at 209.

The use of presumptions is prevalent in the area of school segregation. In Swann v. Board of Educ., 402 U.S. 1 (1971), for example, the Supreme Court presumed: First, if a school may be labeled black or white, a prima facie violation of the fourteenth amendment is established; and second, school systems with a significantly disproportionate racial composition and a history of segregation are unconstitutional. *Id.* at 26.

[21] 512 F.2d at 49. In Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court noted that the lower court had employed a foreseeable consequence test in finding unlawful segregation. *Id.* at 725. Although not expressly sanctioning the lower court's test, the Supreme Court did state that the findings of unlawful segregation, viewed with respect to its decision in *Keyes,* appeared to be correct. *Id.* at 738 n.18.

[22] 407 U.S. 451 (1972).

[23] When, in 1967, Emporia, Virginia changed its status from a town to a city authorized by state law to provide its own public school system, it nevertheless decided to continue to use the county school system for the education of its children. Pursuant to a desegregation lawsuit instituted in 1965, the county system operated under a "freedom of choice" plan. Following the decision in Green v. County School Bd., 391 U.S. 430 (1968), which discredited freedom of choice plans, modification of the county plan was sought, and the district court ordered that a more stringent plan be implemented. The city of Emporia thereupon announced its plan to operate a separate school system. Petitioners filed a supplemental complaint seeking to enjoin the Emporia City Council and School Board from withdrawing Emporia children from the county schools since such action would have the effect of increasing the proportion of whites in the schools attended by Emporia residents and decreasing the proportion of whites in county schools. 407 U.S. at 453-66. Finding the city's new plan invalid, the Court held that

> any inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless. . . . Thus, we have focused upon the effect — not the purpose or motivation — of a school board's action in determining whether it is a permissible method of dismantling a dual system.

Id. at 462.

[24] 413 U.S. at 213 (Powell, J., concurring in part and dissenting in part).

[25] *Id.* at 225-26. Justice Powell admitted that the "right" evolving from the *Brown* decision has been an ambiguous one. He continued, however:

policies would, under the Powell doctrine, be unacceptable,[26] and the traditional distinction between de facto and de jure segregation would thus lose meaning. In fact, Justice Powell favors its demise.[27]

Lurking behind Justice Powell's dissatisfaction with the Court's holding in *Keyes* was his concern that one standard of conduct was being imposed on the North while another had been applied to the South.[28] In *Wright,* for example, where unlawful segregation had already been established, the Supreme Court sanctioned the use of a "foreseeable consequence" test to judge the constitutionality of a school board's desegregation plan.[29] Justice Powell regarded this test as one which would be applied primarily in the South.[30] On the other hand, he suggested that in the North courts would follow the *Keyes* directive and employ a segregative intent test, with racially discriminatory motivation presumably remaining a factor.[31] Justice Powell found such a dual standard totally unacceptable.[32] The *Hart*

Although nowhere expressly articulated in these terms, I would now define it as the right, derived from the Equal Protection Clause, to expect that once the State has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts.

Id. (emphasis in original) (footnote omitted).

[26] Justice Powell explained:

[S]chool authorities, consistent with the generally accepted educational goal of attaining quality education for all pupils, must make and implement their customary decisions *with a view toward enhancing integrated school opportunities.*

Id. at 266. (emphasis added).

[27] *See id.* at 218-19, 224. Justice Powell, urging elimination of the de facto-de jure distinction, proposed the adoption of a single standard to govern the entire country. In his view, a prima facie constitutional violation is established when "segregation is found to a substantial degree in the schools of a particular district," *id.* at 224 n.10, at which point the burden would shift to the school authorities to demonstrate that they have in fact operated an integrated system. *Id.* at 224. Mr. Justice Douglas, also concurring in *Keyes,* joined Justice Powell in urging the abandonment of the de facto-de jure distinction. In his opinion, "there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies." *Id.* at 216 (Douglas, J., concurring). For a discussion of the concurring opinions in *Keyes,* see *Public Schools, supra* note 3, at 69-70 & n.63. Criticism of the de facto-de jure distinction has been voiced by others. *See, e.g.,* United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 414 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967), wherein the court declared that "[t]he de jure-de facto doctrine simply is without basis."

[28] *See* 413 U.S. at 231 (Powell, J., concurring in part and dissenting in part).

[29] 407 U.S. at 462. *Accord,* United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. denied,* 413 U.S. 922 (1973).

[30] *See* 413 U.S. at 231-32 (Powell, J., concurring in part and dissenting in part).

[31] *See id.* at 232. Apparently Justice Powell was predicting that courts in the South would be more inclined to find that de jure segregation already existed because of that region's history of statutorily imposed segregation.

[32] Justice Powell commented:

It makes little sense to find prima facie violations and the consequent affirmative duty to desegregate solely in those States with state-imposed segregation at the time of the *Brown* decision. The history of state-imposed segregation is more widespread in our country than the *de jure/de facto* distinction has traditionally cared to recognize.

Id. at 228 (footnote omitted). Citing a survey by Judge Hoffman in Beckett v. School Bd., 308 F. Supp. 1274, 1311-15 (E.D. Va. 1969), *rev'd sub nom.* Brewer v. School Bd., 434 F.2d

court disagreed with Justice Powell's conclusion that there was no longer a meaningful distinction between de jure and de facto segregation[33] and doubted that the *Keyes* majority intended that different standards be applied in the North and in the South.[34] At least insofar as segregative intent was concerned, however, it apparently shared his view that the same standard should be applied nationwide.

Generally, the circuits remain divided on the issue of whether racial motivation on the part of the state is the *sine qua non* of de jure segregation.[35] In *Johnson v. San Francisco Unified School District*,[36] black parents challenged the existence of segregated schools. The lower court held that when school authorities exercise their powers in a manner which leads to racial imbalance, such governmental action, regardless of motivation, constitutes unlawful segregation.[37] The Ninth Circuit vacated and remanded. Declaring that the lower court's standard was erroneous, the court stated that *Keyes* requires a deliberate policy of racial segregation on the part of the state in order to establish de jure segregation.[38]

---

408 (4th Cir.) (en banc), *cert. denied*, 399 U.S. 929 (1970), Justice Powell noted that "all racial segregation . . . has at some time been supported or maintained by government action." 413 U.S. at 228 n.12.

[33] Judge Gurfein described Justice Powell's view as suggesting that "what is sauce for the Southern goose is sauce for the Northern gander." 512 F.2d at 49. In rejecting this approach, Judge Gurfein stated:

> There is no doubt that in the Northern cities without a statutory history of racial school segregation, there is still a valid distinction, in a constitutional sense, between *de facto* segregation, a condition created by factors apart from the conscious activity of government, and *de jure* segregation, caused or maintained by state action.

Id. (footnote omitted).

[34] *Id.* at 49.

[35] Congress seems to imply that segregative intent, if not racial motivation, is necessary for a finding of de jure segregation. In the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (Supp. IV, 1974), Congress provided:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by—
> (a) the *deliberate* segregation by an educational agency of students on the basis of race, color, or national origin among or within schools . . . .

Id. § 1703 (emphasis added).

[36] 500 F.2d 349 (9th Cir. 1974), *vacating and remanding per curiam* 339 F. Supp. 1315 (N.D. Cal. 1971).

[37] 339 F. Supp. at 1319.

[38] The Ninth Circuit quoted an oft-repeated statement in support of its requirement that racial motivation be established to prove unlawful segregation:

> [Since *Keyes*] "it is . . . clear that a finding of de jure segregation has basically *three* prerequisites: (a) school board action; (b) *with a purpose to segregate*; (c) which in fact produces segregation in the system."

500 F.2d at 351 n.1, *quoting* Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 124, 149 (1974) (emphasis added by court).

Earlier, in Soria v. Oxnard School Dist. Bd. of Trustees, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974), *vacating and remanding* 328 F. Supp. 155 (C.D. Cal. 1971),

Other circuits have adopted a standard which may be viewed as encompassing both the traditional requirement of racial motivation and the more liberal *Hart* test. The First Circuit, for example, in *Morgan v. Kerrigan*,[39] held that actions and omissions having foreseeable racial consequences, when accompanied by the school authorities' statements that they did not intend to counter the anti-integration sentiment of the public, evidenced segregative intent and hence constituted unlawful segregation.[40] In *Oliver v. Michigan State Board of Education*[41] and *United States v. School District of Omaha*,[42] the Sixth and Eighth Circuits held that a presumption of segregative intent arises when plaintiffs establish that the natural, probable, and foreseeable result of the action of public officials is the perpetuation or enhancement of school segregation.[43] In *Oliver*, the Sixth Circuit held that this presumption can be rebutted by the State's affirmative proof that its action was the result of racially neutral, as opposed to racially motivated, policies.[44] Similarly, in *Omaha*, the Eighth Circuit ruled that the presumption can be rebutted when the State demonstrates that its policies were not motivated by segregative intent.[45]

---

the Ninth Circuit dealt with a challenge to a school district board of trustees allegedly maintaining a systematic scheme of segregation. In *Soria*, the actions in question included assignments of students to schools, busing policies, and selection of school construction sites. *See* 488 F.2d at 586. The district court, granting plaintiffs summary judgment, held that since segregation in fact existed an inference could be drawn that it was unlawful. 328 F. Supp. at 157. The Ninth Circuit, in vacating and remanding, not only stated that the lower court had employed an improper standard, but also found that there were issues of fact relating to whether the school board had indeed deliberately maintained a policy of segregation. 488 F.2d at 585-88. In the Ninth Circuit, therefore, racial motivation would seem to have already been required by *Soria*.

The Second Circuit attempted to reconcile its decision in *Hart* with the more conservative approach of the Ninth Circuit. In line with its conclusion that the intent that is necessary to establish de jure segregation may be evidenced by the performance of acts which have segregation as a foreseeable consequence, the *Hart* panel considered the Ninth Circuit's remand in *Johnson* as meaning "no more than that the District Court should focus on and, if need be, develop evidence from which [such an] intent or lack of intent could be inferred." 512 F.2d at 51. According to the *Hart* court, the difference between the two approaches is "largely semantic." *Id.*

[39] 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[40] 509 F.2d at 588.

[41] 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[42] 521 F.2d 530 (8th Cir. 1975).

[43] 508 F.2d at 181; 521 F.2d at 535-36.

[44] In the words of the *Oliver* court: "The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." 508 F.2d at 181. Previously, the Sixth Circuit seemed to require racial motivation before segregative intent would be found. In Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), the court stated that no constitutional violation had occurred where racial criteria had not been employed in setting the policies of either the state or any of its agencies. 369 F.2d at 59. Subsequently, in Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974), the court said that while a court may infer segregative intent from state actions having the foreseeable consequence of causing segregation, the inference is permissible and not mandatory. *Id.* at 793.

[45] 521 F.2d at 536, 543.

The Second Circuit's test for segregative intent is more liberal than that employed by the Sixth and Eighth Circuits. Whereas under case law in those circuits state actions and omissions having foreseeable segregative consequences will merely raise a presumption of segregative intent which may be rebutted by evidence of lack of racial motivation, under *Hart* such actions and omissions will conclusively establish segregative intent. The Fifth Circuit, however, has taken a still more liberal approach. In *Cisneros v. Corpus Christi Independent School District,*[46] the Fifth Circuit like the *Hart* court, stressed that the segregation was the inevitable result of the school board's policy.[47] It went beyond *Hart,* however, in recognizing that the de facto-de jure distinction must be abandoned.[48] The court held that racial segregation resulting from the use of a neighborhood school plan in a community that is also racially segregated is unconstitutional, whether the segregation is de facto or de jure.[49] Notably, *Cisneros* dealt with a school system in the "Old South" where, in light of that region's history of statutorily mandated segregation, it is perhaps easier to abolish the de facto-de jure distinction. The Second Circuit was reluctant to take such a stand because in its opinion the distinction is at least arguably valid, "in a constitutional sense," in a northern setting where there is no statutory history of racial segregation.[50]

Whether or not the de facto-de jure distinction still in fact exists, it is clear that the Second Circuit's utilization of a foreseeable consequence test in establishing segregative intent will find the existence of unlawful segregation in many settings which formerly would have been characterized as merely de facto, and hence not constitutionally impermissible. Utilization of an objective standard, it has been suggested, more readily ensures compliance with fourteenth amendment mandates by increasing the likelihood that constitutional violations will be found in segregated schools.[51] Fur-

---

[46] 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. denied,* 413 U.S. 922 (1973).

[47] The *Cisneros* court affirmed the finding of the district court that action by the school board resulted in a segregated system in Corpus Christi. It declared that while discriminatory motive might reinforce a finding of segregation, it is not a necessary ingredient thereof. 467 F.2d at 149. Unlawful segregation was established, the court stated, because "the use of the [school board's] neighborhood school plan [was] the direct and effective cause of segregation in the schools of the city." *Id.*

[48] "We therefore hold that the racial and ethnic segregation that exists in the Corpus Christi school system is unconstitutional — not de facto, not de jure, but unconstitutional." *Id.*

[49] *Id.*

[50] *See* note 33 *supra.*

[51] Justice Powell noted in *Keyes:*

> Having school boards operate an integrated school system provides the best assurance of meeting the constitutional requirement that racial discrimination, subtle or otherwise, will find no place in the decisions of public school officials.

thermore, a test based on racial motivation, an elusive concept in itself, is more difficult to employ than one based purely on foreseeable consequences.[52] It appears, therefore, that the Second Circuit's abrogation of the racial motivation requirement for unlawful segregation not only affords a more comprehensive remedy, but is indeed the more practical approach.

Janis A. Parazzelli

> Courts judging past school board actions with a view to their *general integrative effect* will be best able to assure an absence of such discrimination while avoiding the murky, subjective judgments inherent in the Court's search for "segregative intent." Any test resting on so nebulous and elusive an element as a school board's segregative "intent" provides inadequate assurance that minority children will not be short changed in the decisions of those entrusted with the nondiscriminatory operation of our public schools.

413 U.S. at 227 (Powell, J., concurring in part and dissenting in part) (emphasis in original).

[52] One commentator has noted:

> If the courts are indeed prepared to inquire into motive, thorny questions will arise even if one assumes that racial motivation is capable of being proven at trial. What of the case in which one or more members of a school board, but less than a majority, are found to have acted on racial grounds? What if it appears that the school board's action was prompted by a mixture of motives, including constitutionally innocent ones that alone would have prompted the board to act? What if the members of the school board were not themselves racially inspired but wished to please their constituents, many of whom they knew to be so? . . .
> [It] may well be that the difference between any of these situations and one in which racial motivation is altogether lacking is too insignificant, from the standpoint of both the moral culpability of the state officials and the impact upon the children involved, to support a difference in constitutional treatment.

Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 284-85 (1972). *See also* Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, in DE FACTO SEGREGATION AND CIVIL RIGHTS 28, 38-39 (O. Schroeder & D. Smith eds. 1965).