Case Note

Díaz v. San José Unified School District

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I.
INTRODUCTION

On May 17, 1954, the United States Supreme Court in *Brown v. Board of Education (Brown I)*[1] unanimously held it unlawful for a school district to racially segregate white and African American children in state public schools.[2] Segregation on the sole basis of race and pursuant to statutes permitting or mandating racial segregation was found to constitute a denial of African American children's right to equal protection as guaranteed by the fourteenth amendment.[3] Through the *Brown* decision, the Supreme Court initiated a new period of judicial intervention in the area of race relations.[4]

In *Díaz v. San José Unified School District*,[5] a district court implemented the *Brown* mandate and applied the Court's remedial powers in ways that the original authors of *Brown* could not have foreseen. *Díaz* is significant in that it illustrates: 1) how contemporary courts respond to the challenge of desegregating diverse population groups in a modern context; and 2) how they utilize a growing body of social science findings in the process of formulating a remedial decree.

This paper analyzes the desegregation order passed down in *Díaz*. The *Díaz* case exemplifies the culmination of a trend in desegregation law. The court's use of expert testimony in *Díaz* illustrates how federal courts in drafting their remedial decrees are increasingly guided by social science findings regarding the adverse effects of white resistance on the effectiveness of particular desegregation remedial decrees. In a broader context, *Díaz* represents a milestone in the continuing development of the federal courts' capacity to grant injunctive decrees which effectively restructure public institutions in accordance with what are asserted to be the commands of the United States Constitution. Further discussion of

1. 347 U.S. 483 (1954).

2. *Id.* at 494.

3. *Id.* at 495; *See also Judicial Evolution of the Law of School Integration Since Brown v. Brown v. Board of Education*, in THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION 7 (B. Levin & W. D. Hawley ed. 1977) [hereinafter *Judicial Evolution*] referring to "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. *Judicial Evolution*, *supra* note 3, at 7.

5. 633 F. Supp. 808 (N.D. Cal. 1985). The memorandum and order regarding the desegregation remedy proceeded upon a finding by the Ninth Circuit Court of Appeals, after plaintiffs' second appeal and a rehearing en banc, that the San José Unified School District engaged in de jure segregation of its schools in violation of the fourteenth amendment. Díaz v. San José Unified School District, 733 F.2d. 660 (9th Cir. 1984), *cert. den.*, 471 U.S. 1065, 105 S. Ct. 2140 (1985).

the role of federal courts in "institutional suits"[6] and of the nature of the problems posed by desegregation law will help to place *Díaz* within a broader context.

In desegregation cases, courts are challenged to resolve questions which are not traditional "legal" questions.[7] As will be further explained below, desegregation cases tend to involve both legal and nonlegal "polycentric"[8] problems.

As Professor William A. Fletcher explains, legal polycentricity exists in a suit where numerous claimants all assert legal rights to share in limited resources.[9] In such a case "there are various legally protected 'centers' each with interests that must be protected by the judge."[10] Non-legal polycentricity involves a case in which no claim of legal rights is involved.[11]

Professor Fletcher names four difficulties faced by courts responsible for formulating remedial decree in institutional suits which involve polycentric problems. First, courts, in contrast to the other branches of government, have less capacity to effectively acquire and access "legislative facts."[12] Second, after a final decree has been issued, courts have a restricted ability to modify or reverse their decrees until a satisfactory final solution is attained.[13] In contrast, the legislature or an administrative agency may repeal or amend a prior policy and thereby improve a

6. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). Institutional suits are suits in which plaintiffs seek an injunctive decree directing defendants who are typically state officials to effectively restructure public institutions so that they operate in a constitutional manner.

7. In traditional areas of law, courts decide legal questions once and for all by means of one final court decree. For example, in a business transaction, the court may declare a breach of contract and set damages. Usually, later adjudication will be neither allowed nor necessary. Resolution of the legal issues will not result in later court decision-making as to additional legal or resource allocation questions pertaining to the original transaction. However, the questions for resolution in a desegregation case, do not fit very well into this standard model of judicial decision-making.

8. Fletcher, *supra* note 6, at 645. A polycentric problem is one which has a number of subsidiary problem "centers" each of which is related to the others, such that the solution to each depends on the solution to all the others.

9. *Id.* Professor Fletcher explains that the "classic metaphor for a polycentric problem is a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web such that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern." *Id.* Hence, when a governmental decision maker attempts to solve one aspect of a policy problem, the unexpected and undesirable result may instead be a new and more complex set of problems.

10. *Id.* at 646.

11. *Id.* at 645-46.

12. *Id.* Legislative facts are those which have relevance to legal reasoning in the lawmaking process as in the enactment of a legislative body. Adjudicative facts, in contrast, are facts which normally go to the jury and concern the immediate litigating parties: who did what, where and how and with what motive and intent. *See* Schneider v. Whaley, 417 F. Supp. 750, 757 (S.D.N.Y. 1976); *see also*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

13. *Id.*

previously enacted legal remedy when new information is received about unintended effects of the prior policy.[14] Third, the discretion which trial courts exercise is not controlled nor guided by any higher authority. Appellate review, the primary means of external control over the trial court, is virtually useless in the context of institutional suits.[15] Appellate courts cannot legally control the exercise of judicial discretion at the trial court level.[16] Yet, trial courts exercise a great amount of discretion in drafting remedial decrees in institutional suits. Finally, courts are not authorized to evaluate the desirability of possible solutions to complex policy problems.[17] No authority furnishes trial courts with guidelines for the exercise of such authority.[18] Hence, trial court judges act largely according to their own norms and political institutions without external controls.[19]

Díaz is relevant to Professor Fletcher's first concern regarding the court's limited ability to appraise itself of non-fact-specific, "legislative facts." In part, *Díaz* shows how federal courts are more willing and are becoming better able to appraise themselves of legislative facts through the presentation of social science evidence.[20] On the other hand, *Díaz* reveals federal courts' limited capacity, or in some cases, unwillingness to apply the more complex yet more accurate models developed by social scientists for ascertaining the potential effects of remedial options.[21] The difficult question is whether the courts can eventually develop the capacity to utilize social science findings to the extent necessary for an adequate and accurate understanding of a complex phenomenon such as white flight.

With respect to Professor Fletcher's second concern that courts have inadequate opportunities to solve and re-solve complex polycentric problems, *Díaz* illustrates how the courts can establish a process by which the polycentric problems of achieving desegregation and avoiding resegregation can be continuously re-solved after the court's final remedial decree has been entered. In *Díaz*, the court ordered that a mandatory desegregation back-up plan be phased-in if triggered by lower than expected integration statistics[22] indicating that the initially adopted voluntary plan was not being effective. The court, through this creative mechanism, established a process by which the polycentric problems

14. Fletcher, *supra* note 6, at 649.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Díaz*, 633 F. Supp. at 814-16.
21. *Id.* at 828.
22. *Id.* at 827.

could be re-solved as better data and feedback regarding remedial effectiveness after initial implementation became available.

Finally, this article's study of desegregation development to the *Díaz* case illustrates how far from the initial, relatively simple fact-situation encountered in *Brown I* the modern desegregation case's factual setting has actually come. This progression towards increasingly complex facts and polycentric non-legal problems has spawned conflicting lower court approaches to the application of the vague principles enunciated in *Brown I* and *Brown II*.[23] For example, the lower courts have evolved two different approaches to dealing with social science data regarding a phenomenon unaccounted for in *Brown*: white flight.[24]

Another complicating factor has been the emergence of non-African American groups as claimants to *Brown* desegregation rights. The presence of these groups creates a new social context in which the *Brown* Court's various assumptions must be tested. The conflicting demands of African American and non-African American claimants of *Brown* desegregation rights lead to new questions for the courts to address regarding the value of integration relative to other needs of such non-African American groups.

A substantial part of desegregation law, however, has developed as a function of judicial assumptions regarding the nature of the injury, the needs, and the predispositions of African American school children.[25] To the extent that these assumptions cannot reasonably be made applicable to bilingual minority groups with *Brown* rights, the district courts must engage in a process of re-learning relevant "social" facts and of re-determining the proper decisional rules for applying desegregation law to these instances.

To some extent, the social setting in *Díaz* exemplifies the tension between seeking to achieve one means of social integration, the *Brown* desegregation remedy, and attempting to accommodate demands for access to other means of social and economic integration. As the *Díaz* case makes clear, that other means to social and economic integration, at least

23. Two conflicting views have developed over the use of social science data regarding the phenomenon of white flight. One view was set forth by the First Circuit in Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976), *cert. den.*, 426 U.S. 935 (1976). A contrary view developed from general principles stated in Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

24. Following the *Monroe* approach, some courts hold that evidence regarding the nature of white flight may not influence the form of remedial decrees. These courts reason that, otherwise, the court will fail to uphold the *Brown* mandate that courts not accommodate white resistance. Courts following the *Morgan v. Kerrigan* view find it proper to evaluate the "practicalities" of imposing a *Brown* remedy, including social science research explaining the risk of re-segregation through white flight.

25. Examples of milestone desegregation cases which involved only African American children include: Brown v. Board of Educ., 347 U.S. 483 (1954); Brown v. Board of Educ. *(Brown II)*, 349 U.S. 294 (1955); and Green v. County School Board, 391 U.S. 430 (1968).

from the point of view of Latino litigants, is the preservation of a viable bilingual education program.[26]

Part II describes the development of desegregation law pertinent to resolution of the issues in *Díaz v. San José Unified School District*. Part III discusses the social science literature which has some bearing on these issues as they arise in *Díaz*. In part IV, the *Díaz* case is analyzed against the backdrop of case law and social science findings.

II.
LEGAL BACKGROUND

In *Díaz*, the court directly and indirectly dealt with several central desegregation issues: 1) the nature of the *Brown* mandate and the limits of the equitable power which courts have to implement that mandate; 2) the extent to which courts may take into account evidence of white resistance (*i.e.*, white flight) in fashioning the *Brown* remedy; and 3) the proper definition of a desegregated school.[27] In the following, the nature and limits of the *Brown* mandate, past and present, will be described.

A. Development of the Brown *Mandate*

In *Brown I*, the Supreme Court was called upon to decide whether plaintiff African American children had a constitutional right to attend public schools in their community on a nonsegregated basis.[28] The Supreme Court answered in the affirmative and held that the Equal Protection Clause of the fourteenth amendment prohibited state-imposed segregation in the public schools solely on the basis of race: "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[29]

In response to inadequate enforcement by the lower courts of the newly established *Brown* right to desegregation, the Supreme Court passed down several major implementation decisions. In the following sections, several of the major implementation decisions following *Brown I* are described.

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26. *Díaz*, 633 F. Supp. at 826-27. Not withstanding popular misconceptions to the contrary, the primary motivation of bilingual education proponents in the desegregation context is not the mere preservation of Hispanic cultural unity. It is the effective implementation of an educational program which has been convincingly shown to reduce the high rates of Latino fuctional illiteracy and student drop-outs, which otherwise certainly occur in the absence of such programs. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, BILINGUAL EDUCATION: A NEW LOOK AT THE RESEARCH EVIDENCE (1987).

27. *See Díaz*, 633 F. Supp. at 811.

28. *Judicial Evolution, supra* note 3, at 8.

29. *Brown*, 347 U.S. at 495; *see also Judicial Evolution, supra* note 3, at 8.

1. Brown II *and* Briggs

Brown II was the Supreme Court's desegration implementation decision.[30] The Supreme Court stated several guidelines for the lower federal courts:

> 1. Local school authorities have the primary responsibility for implementation.
>
> 2. The function of the federal court is to decide whether a local school board's response constitutes good faith implementation.
>
> 3. The district court is to be guided by equitable principles "characterized by practical flexibility" in shaping remedies, with the pointed reminder that the principle of equal educational opportunity espoused in *Brown I* is not to yield simply because of disagreement with that principle.
>
> 4. Although the district court should take into account the practical problems of implementation, the local school authorities must make a "prompt and reasonable start," and thereafter the court should insure the desegregation proceeds "with all deliberate speed."[31]

The most important early decision after *Brown II* was *Briggs v. Elliot*.[32] The district court in *Briggs* stated that the Constitution did not require integration, but instead merely forbade discrimination.[33] This case signaled to the Supreme Court that the Court could not rely so heavily on local school authorities and federal district court judges to fully implement its mandate.[34]

Briggs raised a fundamental question about the extent of a court's equitable power to restructure public schools so that they conform with the dictates of the Constitution. Initially, district courts that were called on to enforce the *Brown* desegregation right adopted "the preferred judicial posture — courts ordering that certain things not be done."[35] Given the obstructionist practices of many states and local school boards at that time, it was possible to imagine that the cessation of officially sanctioned segregative practices was remedy enough.[36] The holdings in these cases correspond more closely to resolutions of unicentric, as opposed to

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30. Brown v. Board of Educ., *(Brown II)* 349 U.S. 294 (1955).

31. *Judicial Evolution, supra* note 3, at 10 (citing *Brown II*, 349 U.S. 300-01 (1954)).

32. 132 F. Supp. 776 (E.D.S.C. 1955) (three judge court), on remand from, *Brown II*, 349 U.S. 294.

33. "[The Supreme Court] has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states . . . must require them to attend schools or must deprive them of the right of choosing the school they attend. What it has decided . . . is that a state may not deny to any person on account of race the right to attend any school it maintains. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination." *Briggs* 132 F. Supp. at 777.

34. *Judicial Evolution, supra* note 3, at 10.

35. Fletcher, *supra* note 6, at 675.

36. *Id.*

polycentric problems: "the Constitution prohibited the challenged behavior, and the Court therefore required that it cease."[37]

The eventual repudiation of the *Briggs* dicta "desegregation not integration,"[38] in effect, shifted the focus of the federal courts away from the unicentric problem of desegregation, the predominant task of courts in the fifties, and moved it towards the polycentric problem of achieving integration in the later decades. The rejection of *Briggs* clearly signaled the willingness of the federal courts to go beyond traditional notions of equitable protection so as to more effectively enforce *Brown* rights in the public schools.

Briggs also illustrates how the courts' willingness to intervene is partly dependent on the definition of legal rights. In *Briggs*, the district court judges sought to define the legal right narrowly, possibly for obstructionist reasons. In response, the Court later clearly defined a broader, affirmative *Brown* right.[39]

Some of the judicial conservatism encapsulated in the *Briggs* dicta "desegregation not integration" can be discerned in at least one recent Supreme Court pronouncement.[40] As Professor Fletcher has noted, in recent years the Court's willingness to sanction remedial decrees in institutional suits increasingly depends on a definition of the legal right that substantially reduces the possibility of continuing judicial involvement.[41] The Court also has tended to intervene only if the district court's remedial discretion is sufficiently reduced.[42]

2. *The* Green *Case: Racial Balancing and Use of Integration Statistics*

During the sixties, the Supreme Court grew increasingly impatient

37. *Id.*

38. As stated in *Judicial Evolution*, *supra* note 3, at 3 n. 26, the *Briggs* case was a major stumbling block to the development of desegregation law after *Brown II* until it was finally repudiated in 1966 in light of the subsequent evolution of desegregation implementation. The later view was expressed in *United States v. Jefferson County Board of Educ.*, 372 F.2d 836 (5th Cir. 1966) (en banc) (holding that the board and officials administering public schools are obligated under the fourteenth amendment to bring about an integrated, unitary school system). Expressions in our earlier opinions distinguishing between integration must yield to this affirmative duty we now recognize.

39. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

40. *See* Allen v. Wright, 468 U.S. 737 (1984), where the majority held that plaintiffs, parents of African American public school children, had no standing to bring suit against the Internal Revenue Service (I.R.S.) for not adopting sufficient standards to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. In determining whether the plaintiffs' children's *Brown* right (to desegregation or integration) was "fairly traceable" to unlawful IRS grants of tax exemptions, Justice O'Connor in the majority and Justice Stevens and Justice Blackmun dissenting, referred only to the right to attend desegregated schools. In his dissent and analysis of "causation," Justice Brennan alone clearly referred to a right to receive an education in a racially integrated school and wrote of the difference the grant of exemptions made on "public school integration."

41. Fletcher, *supra* note 6, at 674.

42. *Id.*

with the slow pace of desegregation in the South. In May, 1968, the Supreme Court, in *Green v. County School Board,*[43] initiated a major new emphasis on immediate integration and marked the end of freedom-of-choice plans as a judicially sanctioned method of desegregation.[44]

In *Green*, the Court stated that *Brown* had charged school authorities with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system [as opposed to a dual, segregated system] in which racial discrimination would be eliminated root and branch."[45] By the "affirmative duty" term, the Court meant to place an emphasis on immediate integration: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[46] "The standard, therefore, was effectiveness . . . [of the remedy as] a means to a constitutionally required end — the abolition of the system of segregation and its effects."[47]

In *Green*, a freedom-of-choice plan for the New Kent County School system in Eastern Virginia was held ineffective essentially because it produced integration of only 15 per cent of its African American students in an all-white school.[48] As a result of *Green*, later federal courts focused their attention on the percentage of race-mixing achieved, or that would result if a particular school board plan were approved.[49]

3. *The* Swann *Mandate to Eliminate All Vestiges of State Imposed Segregation*

The Court in *Swann v. Charlotte-Mecklenburg Board of Education*[50] reaffirmed its opinion in *Green* and considered the kinds of remedies, including busing and enrollment ratios, that might be employed to achieve integration.[51] The Court reaffirmed *Green*'s concepts of "affirmative duty" and "root and branch" elimination of segregation in its statement that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[52]

While the Court reaffirmed *Green*, it also delimited the power of the district court in formulating remedial decrees:

> the task of the district court was to balance individual and collective

43. 391 U.S. 430.
44. *Id.*
45. *Id.* at 437-38 (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)).
46. *Id.* at 439 (emphasis in original).
47. *Judicial Evolution, supra* note 3, at 29.
48. *Id.*
49. *Id.* at 29-30.
50. 402 U.S. 1 (1971) (suit to compel the desegregation of the Charlotte North Carolina public school system).
51. *Swann*, 402 U.S. at 15; *Judicial Evolution, supra* note 3, at 35.
52. *Swann*, 402 U.S. at 15.

> interests, and to develop a remedy that repaired the denial of constitutional rights. The power of school boards in desegregation matters was plenary, while the power of federal courts was limited to correcting constitutional violations where they existed.[53]

These statements implied that, despite its reaffirmation of *Green*, the Court preferred that trial courts adopt the traditional judicial posture — that courts order only "that certain things not be done."[54] The Court's requirement that individual and collective interests be balanced provided a basis for later courts to conclude that courts could and should accommodate white resistance and weigh the greater majority collective interest against the interests of individual plaintiffs asserting a *Brown* right.

The Court held that racial balancing was not required by the Constitution; however, the Court qualified that holding and stated that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."[55] Whether the Court's pronouncement meant that every school must reflect the district-wide African American/white ratio was left unanswered in *Swann*. The Court held that there was a presumption against one-race schools, but it refused to hold that the existence of one-race schools constituted a per se violation of the Constitution.[56]

The Court in its conclusion seemed to indicate that involvement of the lower courts in resolving desegregation problems ended once "the affirmative duty to desegregate had been accomplished and racial discrimination through official action was eliminated from the system."[57] However, the Court, did not define when and how a unitary school system would be determined.[58] It apparently assumed that the definition of a desegregated school system adopted by a court to remedy a segregated school system would remain a constant over the implementation years.

4. Keyes: *Remedying De Facto Segregation*

Keyes v. School District No. 1[59] raised the issue of the district court's power to mandate desegregation in areas where no de jure segregation had been proved.

In *Keyes*, African American and Latino plaintiffs alleged that the local school board had effectively segregated the district by manipulating attendance zones, by selecting school sites which would separate the

53. *Judicial Evolution*, *supra* note 3, at 35 (citing *Swann*, 402 U.S. at 17-18).
54. Fletcher, *supra* note 6, at 675.
55. *Swann*, 402 U.S. at 25.
56. *Id.* at 28.
57. *Id.* at 31-32.
58. *Id.* at 28.
59. 413 U.S. 189 (1972).

races, and by superimposing a neighborhood school policy on existing residential segregation.[60] The Court held that the affirmative duty set forth in *Green* would not be limited to school authorities that had established segregation through statutory enactment, but would apply to systems which had been intentionally segregated through such administrative practices.[61] The Court also determined that proof of intentional segregation in a "meaningful" portion of the school system was sufficient to support a finding of system-wide segregation unless school authorities could prove otherwise.[62]

After *Keyes*, governmental actions, both related and unrelated to education, could more readily be shown to be the actual cause of racial imbalance in a particular school system.[63]

5. Milliken v. Bradley: *Use of Interdistrict Remedies Limited*

In *Milliken v. Bradley*,[64] the Supreme Court limited the use of interdistrict remedies as a means of redressing prior de jure segregation.[65] The Supreme Court held that a trial court improperly ordered a multidistrict remedy in a case where a single school district, Detroit, was the only district found to have violated the fourteenth amendment.[66] Because the Detroit district was predominantly African American, some sort of multi-district remedy was necessary to achieve a truly effective desegregation.[67] Nevertheless, the Court did not allow application of the more effective multi-district remedy. The Court felt judicial restraint was warranted because a multidistrict remedy would infringe upon the important value of local autonomy.[68]

6. *Conclusion*

The court's definition of remedial goals in school desegregation cases is clearer today than at the time of *Brown II*. Where system-wide de jure or de facto segregation is found, the courts may generally order a race-conscious remedy to eliminate one-race schools, with busing often used as a remedial tool.[69]

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60. *Id.* at 191.

61. *Id.* at 201.

62. *Id.*

63. *Judicial Evolution*, *supra* note 3, at 42.

64. 418 U.S. 717 (1974).

65. Comment, *Desegregation and the Meaning of Equal Educational Opportunity in Higher Education*, 17 HARV. C.R.-C.L. L.REV. 563 (1982) [hereinafter Comment, *Desegregation*].

66. Comment, *Desegregation*, *supra* note 65, at 563; (citing *Milliken*, 418 U.S. at 745).

67. Id.

68. *Id.*

69. *See* Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585, 628 (1983).

B. Racial Balancing and White Flight

Although the Supreme Court through various milestone cases has delineated the limits of the courts' remedial powers in desegregation cases, the Court has left unclear one major issue: whether and to what extent the courts must take into account present or probable future acts of white resistance (*e.g.*, white flight) in fashioning a desegregation remedy. *Green* established that *Brown II* created an affirmative duty to integrate and that the standard for an acceptable desegregation plan was effectiveness.[70] White flight, a primary mode of white resistance to *Brown*, may undercut implementation of an order to such an extent that the standard of effectiveness cannot be met. Yet, *Brown II* stipulates that while a district court may be guided by equitable principles "characterized by practical flexibility," it may not allow the *Brown* mandate to yield because of disagreement with or resistance to that mandate.[71] These conflicting dictates regarding the extent to which courts may accommodate white resistance to desegregation has led to two views about how lower courts may respond to reasonable fears that white flight may result from a plan of racial balancing. These two judicial approaches are the *Morgan v. Kerrigan* view and the Context-Specific view.

These two views relate in some ways to two remedial approaches that have emerged from Supreme Court decisions regarding the following question: may, and to what extent do, courts approve injunctive remedies that are less than completely effective in achieving the remedial goal? The first approach takes the viewpoint of the victims alone, with no limits on the corrective goal.[72] For example, the Supreme Court has stated that desegregation remedies must remove "all vestiges" of the violation.[73] The second approach involves "Interest Balancing," and consideration of other social interests.[74] Courts following the latter approach focus on Supreme Court cases which have qualified the "remove all vestiges" goal by either stating that remedies must eliminate the violation's effects only to "the greatest possible degree,"[75] or by commanding that there be a comprehensive balancing and "reconciling [of] public and private needs."[76]

1. Morgan v. Kerrigan *View*

Several Supreme Court cases which have dealt indirectly with the

70. Green v. County School Board, 391 U.S. 430, 435 (1968).

71. *Brown II*, 349 U.S. 294, 300.(1954).

72. Gerwitz, *supra* note 69, at 589.

73. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Gerwitz, *supra* note 69, at 590.

74. Gerwitz, *supra* note 69, at 589.

75. *Id.* at 590 (citing Davis v. Board of School Comm'rs, 402 U.S. 33-37 (1971)).

76. *Id.* (citing *Brown II*, 349 U.S. at 300).

white flight problem suggest that district courts may never limit a remedy for a constitutional violation in order to avoid the consequences of white flight.[77] In *Monroe v. Board of Commissioners*,[78] the Court (invoking *Brown II*) said, "We are frankly told in the Brief . . . that white students will flee the school system altogether [if the free transfer plan is not adopted]. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' "[79]

In *Morgan v. Kerrigan* the First Circuit held that "resegregation" as a product of white flight after a desegregation order was of no legal significance, and it thereby implied that the Constitution precludes courts from taking white flight into account at all.[80]

2. *Contra Context-Specific Approach*

In the absence of a thorough discussion from the Supreme Court regarding the question of white flight, several lower courts have sought to limit the Supreme Court's statements to their context.[81] These courts attempt to distinguish cases where the Supreme Court has rejected white flight as a reason for limiting a desegregation remedy as special cases where the school boards used white flight as a reason for proposing extreme steps and in circumstances suggesting the defendant's bad faith.[82]

Courts adopting the context-specific approach suggest that white flight itself limits the effectiveness of the remedy.[83] In certain situations, these courts formulate their decrees with the objective of preventing flight, sometimes using racial ceilings to achieve this goal.[84] Once a court follows the approach of accommodating white resistance into its desegregation remedies, the court is bound to include in its remedial decree features designed to induce whites to voluntarily stay and help desegregate the school system. Consequently, these courts may often adopt a definition of a desegregated school less demanding than the district-wide proportion, favor voluntary desegregation plans over mandatory plans, or provide for magnet schools.

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77. *Id.* at 636 (citing *Monroe*, 391 U.S. 450; United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972), and Bradley v. Milliken, 402 F. Supp. 1096, 1130 (E.D.Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977)(*Milliken II*)).

78. *Monroe*, 391 U.S. at 450.(1968).

79. Gerwitz, *supra* note 69, at 636 (citing *Monroe*, 391 U.S. at 459 [quoting *Brown II*, 349 U.S. at 300]).

80. *Id.* at 639 (citing *Morgan*, 530 F.2d at 401).

81. *Id.* at 637 n. 134.

82. *Id.* at 636 n. 133.

83. *Id.* at 637 n. 135.

84. *Id.* at 638 n. 136.

C. Definition of a Desegregated School

As indicated above, the Supreme Court in *Green* and *Swann* permitted, but did not require, racial balancing by use of integration statistics. Today, lower courts emphasize the use of such statistics to define the desegregated school.[85]

Courts have used a wide range of percentage bands in defining the appropriate enrollment levels at desegregated schools. A settlement agreement defining a desegregated elementary school as one that was 25%-60% African American (45% range), and a desegregated high school as one that was 20%-60% African American (40% range), was upheld on appeal.[86] Definitions including schools that are 30-65% students of color (35% range) or 10-80% African American (70% range) have also been upheld.[87]

III.
SOCIAL SCIENCE RESEARCH

Some social science researchers have sought to determine the effectiveness of court-ordered remedies in achieving the objectives of the *Brown* mandate. Many studies have examined the differential effects of voluntary versus mandatory pupil reassignments and the extent to which desegregation orders have induced white flight.

Courts order pupil-assignment plans in order to reduce or eliminate unconstitutional segregation among schools.[88] Social science research has shed light on the social and educational implications of various types of pupil-assignment strategies. This research should be considered by judges, lawyers and school administrators in their decision-making because it often refutes widespread beliefs which influence the formulation of desegregation remedies.

A. Mandatory versus Voluntary Plans

Contrary to popular belief, several studies indicate that court orders requiring transportation of students to or attendance at public schools other than the one closest to their residences are effective remedies in achieving unitary school systems.[89] Court-ordered mandatory school desegregation tends to lead to greater declines in African American-white

85. *Id.* at 636 n. 136.

86. *Id.* at 638 n. 136.

87. *Id.*

88. *See* R. CRAIN, R. FERNANDEZ, W. HAWLEY, C. ROSSELL, J. SCHOFIELD, M. SYLIE, W. TRENT, M. ZLOTNIK, STRATEGIES FOR EFFECTIVE DESEGREGATION 25 (1983). [Hereinafter EFFECTIVE DESEGREGATION].

89. W. HAWLEY & C. ROSSELL, THE CONSEQUENCES OF SCHOOL DESEGREGATION 5 (1983) [Hereinafter THE CONSEQUENCES].

racial isolation than voluntary desegregation plans.[90] Voluntary desegregation strategies usually include open enrollment or freedom-of-choice policies, voluntary majority-to-minority transfers, and magnet schools.

When districts implement mandatory student assignment plans, the result tends to be a significant increase in racial balance among schools and in interracial contact among students.[91] In districts over 30 percent minority, voluntary desegregation plans tend to be ineffective, particularly in the short term, in achieving any substantial reductions in racial isolation.[92] In districts using mandatory and voluntary strategies, very little desegregation is attributable to the voluntary components.[93]

Several factors account for the relative ineffectiveness of voluntary plans: (1) insubstantial numbers of white students voluntarily transfer to minority schools; (2) insubstantial numbers of non-African American, minority students volunteer to attend white schools; and (3) participating African American students are disproportionately secondary-school students.[94] During their implementation years, voluntary desegregation plans do tend to be effective in minimizing the level of white flight and community protest; in contrast, higher levels of white flight and community protest are observed in districts with mandatory student-assignment plans.[95]

In magnet-only desegregation plans, designated "magnet" schools serve to desegregate the school system by attracting and inducing students of different racial or ethnic groups to attend uniracial schools.[96] When compared to magnet programs operating as one component of a larger mandatory plan, magnet-only programs in districts with over 30 percent minority enrollment tend to be ineffective in achieving any substantial desegregation.[97]

Voluntary plans may foster implementation of bilingual education programs. Because mandatory plans tend to undermine bilingual programs by scattering limited-English proficiency (LEP) students among schools that do not have these programs, voluntary plans tend to protect bilingual programs by limiting this scattering of LEP students.[98] On the other hand, because magnet schools tend to be small in size and specialized, exclusion of students in need of bilingual education may result from

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 5-6.
94. EFFECTIVE DESEGREGATION, *supra* note 88, at 28.
95. *Id.*
96. *Id.* at 30.
97. *Id.* at 31.
98. *Id.* at 28. Small numbers of LEP students in any one school tend to make bilingual-education programs in such schools economically impractical.

the implementation of magnet schools, unless racial compositions of these schools are specially set to avoid such a result.[99]

B. White Flight and Public Support

Contrary to popular belief, court orders requiring mandatory desegregation do not frequently result in greater racial imbalance and diminished public support for the public school systems.[100] While white flight may result from mandatory school desegregation, the magnitude of white flight which results is generally overstated.[101] In school districts above 35 percent African American, the average court-ordered desegregation plan, which reassigns about 30 percent African American and 5 percent white students, reduces segregation 30 percentage points but also results in an additional enrollment loss of 8 to 10 percentage points in the year of implementation.[102] However, there are a number of factors that account for much variation in implementation-year losses among districts: whether the plan affects only the central city or includes the entire metropolitan area,[103] the size of the student of color population,[104] the proportion of the white student population assigned to schools outside their neighborhoods,[105] and busing distance.[106]

Phase-in plans involve plans in which desegregation is implented in parts, "over two or three years, either by grade level or geographic level."[107] Results in several studies tend to refute the assumption that such a phase-in plan will enable a smoother implementation with less white resistance and less white flight than if the entire school system were required to desegregate in one year.[108] By "alerting parents to their child's impending reassignment, phase-in plans give parents more time to "flee" from a district, that is, more time to locate alternative schooling, housing, or jobs outside of the desegregating school district."[109]

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99. *Id.* at 34.

100. THE CONSEQUENCES, *supra* note 89, at 6.

101. *Id.*

102. *Id.* at 28 (in the average big city school system above 35 percent minority, 35 to 50 percent of white students reassigned to minority schools will not show up).

103. *Id.* at 32 (metropolitan or county-wide plans tend to have less white flight in response to school desegregation than city-only plans).

104. *Id.* at 31 (the greater the proportion African American and the greater the desegregation, the more white flight there is, and the rate of white rejection in the year of implementation increases at a specific percentage minority (30 and 50 percent African American respectively, or 35 percent) but not after that threshold level).

105. *Id.* at 30 (white flight is greater when whites are reassigned to minority schools than when minorities are reassigned to white schools).

106. *Id.* at 34-35 (greater busing distances, leads to greater levels of white flight, but this relationship is observed only in the implementation year).

107. *Id.* at 32.

108. *Id.*

109. *Id.*

The research indicates that reductions in school segregation have been followed by reductions in racial intolerance in both North and South.[110] No backlash against the principle of racial integration has resulted from school desegregation despite the racial confrontation and controversy surrounding school desegregation; however, whites, in the aggregate, are opposed to busing for desegregation.[111] Despite strong parental fears about the effect of school desegregation on academic performance,[112] most African American and white parents report satisfactory experiences with desegregation and the quality of the schools their children attend.[113] Evidence suggests that African American parents continue to support school desegregation even when they bear the brunt of the burden of court-ordered pupil-assignment.[114] Most studies comparing the effects of riding the bus to schools versus the effects of attending neighborhood schools show no effect, either positive or negative, on student achievement and attitudes toward schools.[115] However, desegregation, whether voluntary or mandatory, tends to improve minority academic achievement and does not harm white achievement, and the greatest gains in achievement tend to occur when students are first desegregated in the early elementary grades.[116] In addition, disruption in schools because of desegregation has had some but measurably little negative impact on student achievement.[117]

C. Neighborhood Schools as Preferred Method of Attendance

The widespread belief that most parents prefer that their children attend schools near their homes is supported by social science research, but unsupported is the perception that this finding implies: "that attending schools not closest to students' homes is undesirable because students' experiences in these schools in fact have been unsatisfactory."[118] In addition, "when black and white parents [become] directly involved with school desegregation, . . . they express more support for desegregation and express a higher opinion of the quality of desegregated schools than people not involved with desegregation."[119]

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110. *Id.* at 6, 40.

111. *Id.* at 6, 41, 44.

112. *Id.* at 43.

113. *Id.* at 6, 44.

114. *Id.* at 44.

115. *Id.* at 7.

116. *Id.*

117. *Id.*

118. *Id.* at 8 (both white and black parents who send their children to desegregated schools, presumably outside their neighborhoods, are overwhelmingly satisfied with the experience.).

119. *Id.*

D. Conclusion

The available empirical evidence refutes many popularly held beliefs and myths regarding the consequences of desegregation.[120] "These myths help to justify opposition to desegregation and to legitimize the widely held view that desegregation is desirable in principle but unworkable in practice."[121]

IV.
CASE ANALYSIS

In *Díaz v. San José Unified School District*,[122] plaintiffs filed a class action on behalf of all Spanish-surnamed students enrolled in the district and their parents. The complaint alleged that defendants were operating an unconstitutionally segregated public school system. Plaintiffs sought injunctive relief to effect desegregation. Only after plaintiffs' second appeal of the district court's decision did the Ninth Circuit find that the School District had acted with segregative intent in maintaining imbalanced schools.[123] In August 1985, the district court rejected a District proposal to implement a voluntary magnet program because the plan only partially addressed the Ninth Circuit's mandate to desegregate, and might prove counterproductive in future desegregation efforts.[124] On September 30, 1985 the District submitted a proposed desegregation plan.

A. The Proposed Plans

The District's original desegregation plan submitted in September 1985 was based largely upon a voluntary approach to student reassignment including the establishment of four district-wide "dedicated" magnet schools and sixteen magnet "programs" to attract students from segregated neighborhood attendance area schools.[125] In their plan, the plaintiffs also emphasized the role of voluntary student reassignments from racially isolated to desegregated schools, but their plan involved more mandatory desegregation components than that proposed by the District.[126]

The District suggested a definition of a desegregated school within plus/minus 20 percent of the district-wide proportion of majority students, and its goal was to have 75 percent of the students within desegre-

120. *Id.* at 8.
121. *Id.*
122. 412 F. Supp. 310, 334 (N.D. Cal. 1976).
123. *Díaz*, 733 F.2d 660.
124. *Díaz*, 633 F. Supp. at 810 (N.D. Cal. 1985).
125. *Id.*
126. *Id.*

gated schools by 1990-91 school year.[127] Besides the use of magnet schools to relocate students, the District's plan would (1) close or convert several minority-dominant schools to magnets and change the attendance areas of the students in these schools so as to relocate these students to white-dominant schools; and (2) transfer students from a school in which his or her ethnicity is in the majority to any school in which his or her ethnicity is in the minority ("M[ajority] to M[inority]" transfers).[128] In response to plaintiffs' alternative plan, the District modified its original plan to include the establishment of a mandatory backup provision in the event that voluntary reassignments via magnets and M to M transfers were not sufficient to desegregate the district's schools.[129] This mandatory provision consisted of enrollment caps that would be placed on specific schools to limit the enrollment of new students who could cause the ethnic balance of the school to be outside the necessary range for a desegregated enrollment.[130]

The plaintiffs' plan would result in 100 percent of the students being placed in desegregated schools in the first year of the implementation of their plan. The plaintiffs proposed to eliminate the existing neighborhood attendance areas and to divide the district into three vertical attendance zones, each not to differ by more than plus or minus one-third of the system-wide proportion of majority students from the district-wide ethnic composition of the district.[131] If students chose not to attend a city-wide magnet school, they would have to choose a school contained in their attendance zone. Through a process labelled "controlled choice," the students in each attendance zone would be placed in each of the schools in a manner ensuring that the ethnic composition of each school would differ by no more than 5 percent from the zone-wide minority or majority composition for schools at that level. If after student ranking of preferences, a school became oversubscribed in terms of space available for either majority or minority students, then a lottery would be held to determine which students would receive their designated school. Those students who could not be placed in their selected schools would be mandatorily assigned to a school in their zone where their enrollment would maximize desegregation goals.[132]

The court adopted the plan proposed by the district, but in light of the partial failure of the district to come forward with what the court considered to be an appropriate remedy, the court altered the plan in

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 811.

several important respects.[133] I will further describe the court-modified desegregation plan and critically assess the plan against the backdrop of social science research and legal precedent.

B. Definition of a Desegregated School

The court defined a desegregated school as a school with at least 20 percent minority students, that is, as either: (1) a district-wide school with a majority enrollment with +/− 5 percent of the district-wide proportion of majority students at that school level (K-5, 6-8, or 9-12); or (2) an attendance-area school with a majority enrollment within +/− 20 percent of the district-wide proportion of majority students at that school level.[134] The court based its 20 percent floor for representation of majority or minority students at a desegregated school on plaintiffs' expert testimony that an ethnic group would risk continued isolation if it did not represent at least 20 percent (a "critical mass") of the student body at a given school.[135]

The 20 percent floor comports with social science findings described earlier indicating that student of color achievement gains are greater in schools where there is a critical mass of about 15 to 20 percent student of color enrollment. Noting past legal precedent allowing a 40 percent range, the court correctly rejected plaintiffs' assertion that the +/− 20 percent deviation from the district-wide ratio of whites to students of color in attendance area schools would be unconstitutional and that only a minimum of 10 percent deviation would be appropriate.[136]

The court adopted a novel self-adjusting formula with respect to district-wide schools: the definition of a desegregated school was phrased in terms of the percent (5 percent) by which enrollment may deviate from the district-wide proportion of majority and minority students at each school level to allow the definition to self-adjust as the overall proportion of minority students increases or decreases. The court agreed with plaintiffs' expert that the District's proposed 50 percent majority and 50 percent minority student enrollment would be inequitable because it would reserve a disproportionate share of seats in the best schools for majority students as the district became predominantly minority.[137]

One advantage to using the self-adjustment formula is that as demographic changes occur, subsequent litigation aimed at adjusting the definition of desegregated schools to account for such changes would be avoided. Also, the burden on white students will lessen to the extent that

133. *Id.* at 812.
134. *Id.* at 813.
135. *Id.*
136. *Id.* at 814.
137. *Id.*

they need not be reassigned to schools that are majority (for example, 60 percent) African American or Latino. Under the self-adjusting formula, if in a subsequent year the district-wide proportion of African Americans/Latinos to whites is 60 to 40 percent, then a 60 percent African American/Latinos school would qualify as a desegregated school which no longer needs to receive white pupils to achieve a constitutionally permitted status. The decreased burden on whites would lead to less white resistance to desegregation because, as described earlier, when greater proportions of white students are reassigned to minority schools, the result is increased white resistance and white flight.

C. *Interim Goals and White Flight*

The court rejected plaintiffs' request to mandate desegregation in one year. The court was persuaded by expert testimony that such a requirement would be counterproductive because it would lead to increased white resistance and white flight,[138] and such a rapid decline in white enrollment could defeat the purpose of desegregating the district. Although not explicitly stating so, the court evidently followed the context-specific approach which is contrary to the *Morgan v. Kerrigan* view that white flight producing "resegregation" after the entry of a desegregation decree has no legal significance. The court explicitly balanced the concerns regarding white resistance against the plaintiffs' interest in an immediate and pervasive remedy, and determined that a moderate course was appropriate.

The District's expert testified that a one-year plan would necessarily involve a higher number of mandatory reassignments, increasing the likelihood that the community will react with bitterness and resistance to desegregation efforts.[139] Dr. Christine Rossell indicated that: (1) such bitterness could be divisive, creating resentment and preserving racial isolation even as schools became more racially balanced; and (2) severe mandatory measures could result in a higher enrollment loss of majority students.[140]

On balance, the court's accommodation of white resistance by choosing a more voluntary desegregation plan was appropriate. Based on some of the factors which affect implementation-year losses, the expert's predictions with respect to the San José Unified School District had a reasonable basis. The greater proportion of white students assigned to schools outside their neighborhoods resulting from the plaintiffs' plan would trigger greater reductions in white enrollment and white flight. The 43 percent racial/ethnic minority population in San José is

138. *Id.*
139. *Id.*
140. *Id.*

well past the 35 percent threshold point at which white flight has been observed to increase dramatically in other school districts.

On several other relevant factors, however, it would appear that less white flight might be expected to result in San José. For example, the desegregation plan affects not only the central city, but also San José suburbs in which the white population is concentrated. The social science research pertaining to metropolitan plans would suggest less white flight. The theory is that in districts governed by such metropolitan plans, there are no suburbs exempt from a desegregation order to which affected whites may flee. This is particularly true in a district like San José's which is 16 miles in length and one-half to four miles in width. In the case of San José, however, there are neighboring cities and suburbs to which whites may flee, so the findings based on studies of metropolitan plans are not completely analogous. Another factor is busing distance. The busing distance that would be involved in reassigning students in San José is rather low (from one-half to 16 miles), thereby leading to less white flight.

There are three other social science findings that are relevant to the San José School district and the issue of white flight and interim goals. One finding is that overall, desegregation has had a positive effect on white enrollment loss in county-wide and suburban school districts. "[A]nalysis of the long-term effect in a sample of 113 school districts indicates that the effect in the year of implementation is offset in postimplementation years by lower-than-normal white enrollment losses."[141] Desegregation still has a negative effect by the fifth year of desegregation in large, central-city school districts, but San José is not such a school district. To the extent that there are suburbs available to San José whites to which they can flee, however, mandatory desegregation will lead to a long-term negative effect on white enrollment in the San José District with its over 20 percent student of color population.[142]

These social science findings do not support the court's blanket statement that "a rapid decline in white enrollment could defeat the purpose of desegregating the district."[143] It may be that the court only took into account the short-term effect of white flight without regard to post-implementation lower-than-normal white enrollment losses observed in districts similar to San José.

The second set of social science evidence relevant to the District's plan indicates that phased-in plans that include mandatory white reas-

141. THE CONSEQUENCES, *supra* note 89, at 36.

142. *Id.* at 37 (Study of court-ordered, mandatory central-city and county school desegregation showed long-term negative effect on white enrollment in school districts where there is at least 20 percent minority and suburbs are available).

143. *See Díaz*, 633 F. Supp. at 814.

signments may cause greater white flight than plans that are implemented in their entirety in one year, as the plaintiffs had requested.[144] The San José plan contained a mandatory back-up plan which would become operative if the District determined that voluntary desegregation was not achieving the yearly desegregation goals.[145] The literature reveals, however, that voluntary desegregation plans, including those that rely on magnet schools as the sole desegregation technique, are for the most part ineffective, at least in the short term, in achieving any substantial district-wide reductions in racial isolation in districts like San José which are over 30 percent student of color. Hence, the court, in believing that "the plan will be more successful if its voluntary aspects are given a chance to take effect[,]" was gambling that the San José experience will not accord with the usually negative results seen in other districts nationally. If the San José experience replicates that of these other districts, however, then the mandatory back-up mechanism will become operative and more white flight will result than if the mandatory component had been operative from the initial implementation year as plaintiffs requested. Like the districts in the phase-in district plans sample, the San José phased-in plan would probably publicize the desegregation expansion planned for the next stages, particularly the potential use of a mandatory component to achieve such expansion. This would alert parents to their children's impending reassignment and give them more time to locate alternative schooling, housing, or jobs outside the San José School District.

The results of the phase-in plan studies, however, may not be readily analogous to the San José case. The studies involved desegregation plans which phased in mandatory components which were integral parts of the plans from the implementation year onward. In San José, however, only a potential use of mandatory desegregation is involved. Nevertheless, the theory that under a phase-in plan parents become more aware of and have more time to actively resist or undercut impending mandatory student assignments, probably holds true in the San José case. To the extent white parents believe voluntary desegregation will probably not lead to a substantially desegregated school system (and therefore the mandatory components will become operative), one would expect parents in San José to perceive that their children stand as great a chance of being mandatorily assigned in the future as if mandatory assignments were an integral part of the plan from the start and were being phased-in. This apprehension would provide an opportunity and an incentive for these families to prepare for full-scale white resistance in the form of white flight.

144. THE CONSEQUENCES, *supra* note 89, at 32.

145. *Díaz*, 633 F. Supp. at 827.

The third set of social science findings suggests that greater racial tensions are more likely to result from desegregation involving low-socioeconomic whites than desegregation involving middle-income whites.[146] This factor was not explicitly applied to the San José case. Another factor not explicitly considered was the income level of whites in San José: "greater white flight can be expected when the families being desegregated have the means to enroll their children in private schools or to relocate their residences in suburban school districts."[147]

With respect to interim goals, the court rejected the District's modest objective to enroll only 75 percent of its students in desegregated schools in 4 years.[148] Instead of adopting the District's interim goals of 55% in 1986-87, 65% in 1987-88, 70% in 1988-89, and 75% in 1989-90, the court adopted 60%, 70%, 80% and 90% respectively. Apparently rejecting any concept of racial ceilings as applied by some non-*Morgan v. Kerrigan* courts, the court stated that the San José Unified School District will be a unitary system when *all* of its students are enrolled in desegregated schools.[149]

D. Voluntary Desegregation Plan Components

The voluntary desegregation plan of the District is not only subject to the predictably low effectiveness generally observed in districts which have implemented such plans, but also is subject to lower effectiveness based on one specific factor particularly relevant to San José. In San José, the largest minority group is Latino, composing 30.9 of the 43.0 percent student of color population, yet students of color who volunteer to attend white schools in voluntary plans tend to be mostly African Americans — few Latinos participate. Therefore, San José can expect less minority participation in the District's voluntary plan. Plaintiffs may have had good reason for supporting a voluntary plan in principle although the prospects that effective desegregation would result were not very good. Concerned with ensuring quality education for the LEP students in the Latino student population, plaintiffs may have supported the concept of voluntary desegregation because bilingual-education programs in the district would thereby be protected.[150]

The San José plan broadened the alternatives available to voluntary student movement to desegregated schools to include magnet schools, schools with specialty enrichment programs, and schools with "programs

146. EFFECTIVE DESEGREGATION, *supra* note 88, at 45.

147. *Id.*

148. *Díaz*, 633 F. Supp. at 815.

149. *Id.*

150. *Id.*

of excellence."[151] One unintended consequence of instituting magnet schools as the primary desegregation technique may be to stigmatize as inferior non-magnet schools, particularly if magnets include schools for the academically gifted, admission by selection or examination programs, or if advanced instructional programs are centralized in the magnets.[152] There is also the danger that "selective magnet schools may resegregate the school system by socioeconomic status and thus partly diminish the positive academic effects of socioeconomic desegregation."[153] If the mandatory back-up mechanism does not come into play, then the District will not have the legally sanctioned obligation and power to reassign students so as to counter these effects.

The district court in *Díaz* apparently assumed that, even if the mandatory component becomes operative at some future time, the existence of magnet schools would, through its inclusion of educational choices: "lessen community hostility to the mandatory aspects of the plan, increase the educational attractiveness of certain schools, and as a result reduce white flight and protest."[154] However, there is no evidence that instituting magnet schools as part of a mandatory desegregation plan achieves any of these objectives.[155]

V.
CONCLUSION

In *Díaz*, the court adopted the basic desegregation strategy put forward by the District, but the court altered the plan in several important respects in light of the District's partial failure to come forward with what the court considered an appropriate remedy.

The court's statistical definition of a desegregated school, for purposes of determining the District's attainment of a unitary school system, comported with the permissible percentage boundaries allowed by other courts. With respect to its treatment of the phenomena of white flight, the court followed the Context-Specific approach which, unlike the *Morgan v. Kerrigan* view, recognizes the legal significance of white flight in the process of formulating an effective desegregation remedy. The social science research results generally supported the court's choice of remedies and its decision to approve most of the District's plan. Certain research, however, casts doubt on the validity of some of the court's

151. *Id.* (The three programs established by the District will hereinafter be referred to jointly as "magnet schools").

152. EFFECTIVE DESEGREGATION, *supra* note 88, at 37.

153. *Id.*

154. *Id.*

155. *Id.* at 38.

assumptions regarding the probable effects of its desegregation remedy components and on the probable effects of the plaintiffs' proposals.

This study of *Díaz* has to some extent shown how federal courts are more willing and are becoming better able to appraise themselves of legislative facts through the presentation of social science evidence. At the same time, *Díaz* reveals federal courts' limited capacity, or in some cases, unwillingness to apply the more complex yet more accurate models developed by social scientists for ascertaining the potential effects of remedial options. Whether the courts can eventually develop the capacity to utilize social science findings to the extent necessary for an adequate and accurate understanding of a complex phenomenon, such as white flight or other polycentric problems which desegregation cases pose, remains to be answered.