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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, et al,

Petitioners,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Respondents.

BRIEF OF RESPONDENTS

INTRODUCTORY STATEMENT REGARDING BRIEF

The briefs submitted in the companion cases Nos. 281 and 349 are identical. This statement is made so that this Court may be spared the inconvenience of a separate detailed analysis of both briefs.

Case No. 281 relates to the Petition filed by the plaintiffs for a review of the decision of the Circuit Court of Appeals

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for the Fourth Circuit. Case No. 349 relates to the Cross-Petition of the defendants from the same decision. The plaintiff's Petition in case 281 was granted on June 29, 1970. Although action on the defendants' Cross-Petition has been deferred until the convening of this Court at its October 12, Term, 1970, this Court has advised that both cases will be heard on October 12, 1970, and has instructed the defendants to file briefs in both cases. The two cases have not been consolidated for briefing.

Each of the two cases involves the same school system, the same orders of the district court and Circuit Court and the same issues. In order to be of as much assistance as possible to this Court, it is prudent that one comprehensive presentation shall be made. It is for this reason that, although separate briefs are filed, their text and content are the same.

OPINIONS BELOW

The opinions of the courts below are set forth in Brief for Petitioners filed in No. 281 on pages 1 through 3 thereof.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 26, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was filed in this court on July 2, 1970. On August 31, 1970, the Chief Justice deferred action on Cross Respondents' pending Petition for Writ of Certiorari and directed filing of briefs and set this case for oral argument on Monday, October 12, 1970.

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QUESTIONS PRESENTED

1. Did the Court of Appeals join in the error of the trial court in rejecting the desegregation plan offered by the Board of Education where 68% of the black students would attend schools in which their race was in the minority and where the remaining 32% of the black students would attend schools having white ratios of 17% to 1% and these black students would be taught by a predominantly white faculty and further where such black students were offered more generous freedom of transfer than that offered by the customary majority to minority transfers?

2. Did the Court of Appeals join in the error of the trial court in rejecting the plan for desegregation of the 72 elementary schools prepared and offered by the Board of Education, where the plan left no all-black schools, though nine of 72 schools had white ratios of 1% to 17% and black students attending those schools would have an untrammeled right to transfer to any one of the 63 remaining elementary schools, and upon departure from elementary schools would be assured of a desegregated education during the remainder of their schooling?

3. Did the Court of Appeals join in the error of the trial court in rejecting (by the trial court's offering the Board a "Hobson's choice") the Board plan for desegregation of junior high schools where only one of 21 junior high schools would have more than a 39% black student ratio and the remaining predominately black school would house 758 black and 84 white students and have a predominately white faculty by imposing a requirement on the Board to create nine black satellite districts containing approximately 2,700 black students and assigning them to predominately white suburban junior high schools?

4. Did the Court of Appeals join in the error of the trial court in rejecting the Board plan for desegregation of senior high schools where the plan provided that no school would have more than a 36% black ratio and that each school would

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have a predominately white faculty and in imposing a further requirement upon the Board that 300 black students residing in four designated grids would be bussed a substantial distance from the northwestern part of the city to a high school serving the extreme southeastern portion of the county?

5. Did the Court of Appeals join in the error of the trial court in imposing racial balances in junior and senior high schools in contravention of Title 42 U.S.C. 2000(c)(b) and 6(a)(2) (Sections 401(b) and 407(a)(2)) of the Civil Rights Act of 1964.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000(c)(b) and 6(a)(2)].

PRELIMINARY STATEMENT

The principal question presented by the several appeals herein relates to whether or not the Charlotte-Mecklenburg public school system may retain one or more predominately black schools. If the absolutists are to prevail, then the presentation which follows is wholly irrelevant. The Court of Appeals held that no such absolute requirement exists as desegregation of the predominately black schools will be adjudged by the "test of reasonableness."

In order to answer the question, one must have an understanding of this school system. The system involves 103 schools, 4 kindergarten programs and one learning academy, which last year served approximately 84,500 students of which 29% were black and 71% were white. The system is expected to grow by an approximate 3,000 students this

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school year. In comparison to other school systems in this nation, the system ranks 43rd largest.

As an urban school district, it shares the same problem of other urban school systems. Since 1954, the black student population has increased from 10,000 to 24,000 students and during this period eleven formerly all-white schools are now almost entirely black (691a). The transition has been rapid. In 1965 these eleven schools housed a 35% black student population. During the 1969-70 school year, these schools housed an 81% black population and the areas in which this transition has taken place are located generally in the older white neighborhoods. Charlotte has experienced phenomenal growth and, therefore, the older neighborhoods are primarily located near the center of the city, which serves as the base for the expanding black areas as whites on the economic move improve their position; blacks improving their position take over the white homes. This had led to the transition of schools from white to black. Today, 95% of the black students reside in the northwestern inner-city quadrant or the fringes thereof.

The Board was in the process of combating this problem by construction of schools in areas which would offer more stable desegregation, the most notable of which were Olympic High School, originally scheduled for construction in a predominately black neighborhood, and Randolph Junior High which was also scheduled for construction in a similar neighborhood (72a-73a).

Further efforts of the Board involved closing and consolidating of twenty schools; creation of a single athletic league; nondiscriminatory employment practices; substantial desegregation of school faculties with total desegregation to follow for the 1970-71 school year; cross racial assignment of principals; appointment of black professionals to ranking administrative positions; board appointment of a black member to the Board of Education; elimination of the dual bus system; nondiscrimination with respect to teacher salaries, school fees, school lunches, library books, instructional materials,

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quality of school buildings, use of federal funds, course offerings and evaluation of students; merger of the black and white PTA Councils; operation of specialized and supplementary programs implemented to increase desegregation; redesigning of freedom of choice so that its only effect would increase desegregation and give racial stability to the schools; gerrymandering of attendance lines to promote maximum racial desegregation and other techniques designed to create and promote racial stability (681a-683a, 1265a-1266a).

The rural areas of the school system do not offer such difficult problems in desegregation as the races are scattered and, therefore, as with most rural systems, these schools present substantial stable desegregation (313a).

Freedom of choice has neither perpetuated nor made substantial inroads on the desegregation problem. The superintendent estimated that approximately 1,200 (565a) white students had left predominately black schools where they would have been mixed in varying degrees with approximately 16,000 blacks.

In 1957 Charlotte led the South in opening its schools to students of both races. However, it is admitted that there were few students who took advantage of this option. Consolidation of the city and county systems, the two largest in the state, occurred in 1961, creating a school system having an east-west span of 22 miles and a north-south span of 36 miles and comprised approximately 550 square miles. The City of Charlotte contains 64 square miles, making it larger than the District of Columbia. The county is nearly twice the size of the City of New York.

In 1965 a plan was devised by the Board embracing freedom of choice, rezoning and non-racial assignment of faculty which entirely abolished the former dual system under the law as then understood. That plan was approved by the district court in 1965 and by the Court of Appeals in 1966. The plan led to the abolition of all dual auxiliary programs and services, such as transportation, athletic leagues, PTA's, etc.

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Consistent with racial anonymity, racial identification of students and faculty was completely removed from all school records. Because of this, during the course of this litigation, requests for racial information created a substantial burden on the school system in producing this data.

The plan proposed by the Board eliminates 8 of the 17 predominately black elementary schools, four of the five predominately black junior high schools and establishes ten senior high schools so that no high school will have more than a 36% black ratio. It reduces the number of blacks attending predominately black schools to 7,497. (Compare district court's finding of 16,000 previously). Faculties will be racially balanced.

These exemplary steps have been taken by a school board which petitioners variously label as "recalcitrant," "contemptuous," "lawless" and similar characterizations.

STATEMENT OF THE CASE

The plan for desegregation offered to the district court by the Charlotte-Mecklenburg Board of Education would place 68% of the 24,000 black students in predominately white schools and the remaining 32% would attend schools having a black ratio of 83% to 99%. No other school system of similar size and complexity in this nation has the degree and volume of desegregation offered by this plan.

The exemplary proposal of the Board was summarily rejected by the district court for the reason that this system would not be permitted to have a predominately black school. The district court therefore ordered racial balancing of the schools served by the system.

The present action was instituted in 1965 which resulted in the district court's approval of the plan then offered by the Board. The salient features of the plan related to school closings, school consolidation, freedom of choice (as suggested by *Goss v. Knoxville,* 373 U.S. 683 (1963)), rezoning, nonracial assignment of teachers, and nonracial records of students. Circuit Judge Craven, then district judge, noted:

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> As a general proposition, it is undoubtedly true that one could deliberately sit down with the purpose in mind to change lines in order to increase mixing of the races and accomplish the same with some degree of success. I know of no such duty upon either the school board or the district court. The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing, but whether gerrymandering occurred for the unconstitutional purpose of preventing the mixing of races. I am unable to find from the evidence a sufficient showing of the unconstitutional purpose with respect to any school zone . . . *Swann v. Charlotte-Mecklenburg Board of Education,* 242 F. Supp. 667 (1965).

The holding of the district court was affirmed by the Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F.2d 29 (1966).

Following the Supreme Court decision in *Green v. New Kent County,* 391 U.S. 430 (1968), and companion cases, the petitioners filed a motion for further relief alleging discrimination in teacher salaries, school plants, facilities and numerous other areas, and in addition sought further desegregation. During the course of the hearings conducted in March 1969, the district court noted that it was familiar with the fact that in this system black teachers as a group were paid higher salaries than white teachers for the reason that they had longer tenure and had more graduate education (93a).

In its order of April 23, 1969, the district court found there was no racial discrimination or inequality with reference to the use of federal funds for special aid to the disadvantaged, use of mobile classrooms, the quality of school buildings and equipment, coaching of athletics, parent-teacher association contributions and activities, school fees, school lunches, library books, elective courses, individual evaluation of students and gerrymandering (293a-302a).

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The district court further noted that school location in Charlotte had followed residential development including its *de facto* patterns of segregation (305a).

With respect to the motives and judgment of the School Board, the district court found that the schools had been operating pursuant to ". . . the general understanding of 1965 about the law regarding desegregation." The Board had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions." The schools served by this system were "in many respects models for others", and "the rules of the game have changed and the methods and philosophies which in good faith the Board have followed are no longer adequate to complete the job which the courts now say must be done 'now'." (311a-312a).

The court then concluded:

> The school board has an affirmative duty to promote faculty desegregation and desegregation of pupils and to *deal* with the program of the all-black schools (313a). (Emphasis added)

Thereupon, the district court directed the Board to submit a plan for complete desegregation of teachers to be effective for the 1969-70 school year and to submit a plan and time table for the desegregation of pupils to be predominantly effective in the fall of 1969 and completed by the fall of 1970 (314a-315a). The plan submitted pursuant to the order of April 23 was found inadequate by the district court and submission of a new plan by August 4 was directed.

During the interim, this Court decided the case of *United States v. Montgomery,* 395 U.S. 225 (1969), which for the first time indicated limited racial ratios in faculty could be required by the courts.[1] In accordance with *Montgomery,*

[1] *In Montgomery, supra*, page 236, the court noted: ". . . Petitioners on the other hand, do not argue for precisely equal ratios in every school under all circumstances . . . . As the United States, Petitioner in

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supra, the Board of Education proposed a plan for desegregation which would produce substantial faculty[2] and student desegregation for the school year 1969-70 and proposed a comprehensive computer-assisted study for the purpose of restructuring attendance lines for the year 1970-71. It was estimated that the study would require approximately six months to complete (487a). On August 15, 1969, the district court entered an order (579a) in which it noted the repudiation by the Fourth Circuit of the *Briggs v. Elliott* dictum on July 11 in *Hawthorne v. Lunenburg,* 413 F.2d 53 (4th Cir. 1969) (581a). The trial judge found that the Board had acknowledged its affirmative duty to desegregate pupils, teachers, principals, and staff members at the earliest possible date (583a) and had dramatically exceeded its goal in desegregating former all black faculties (584a). It approved the reassignment of consenting inner-city black students to outlying white schools for the school year 1969-70.[3] Further,

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No. 798, recognizes in its brief, the district court's order is designed as a *remedy* for past racial assignment . . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required."

[2]The Board reported: "With reference to faculty desegregation, substantial changes have been made as indicated on Exhibit "A" (498a-502a). With few exceptions, schools having black or nearly all black students have white faculties ranging from 40 to 50 percent of the faculty of such schools. By the school term 1970-71, further faculty desegregation will be experienced." (495a).

[3]The Board proposed offering transportation to the reassigned black students and made extensive efforts to secure their acceptance of reassignment. The court stated:

> However, this part of the plan is not compulsory. Students who want to remain in the comfort of their area may elect to attend the Zebulon Vance School (Irwin Avenue) instead; alternatives also are provided for the junior high students. (587a).

In response to objections to reassignment of blacks, the district court stated:

> No legal authority is cited that the Constitution prohibits transportation of *consenting* black children from an inferior educational environment into a better environment for the

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the court approved in principle the proposed restructuring of attendance lines and other factors for the 1970-71 school year, but rejected them for lack of specific detail and time table.[4] Results of the desegregation of faculties commended by the district court appears in the record (642a-649a).

In view of the fact that it was impossible to complete the computer restructuring of attendance lines within the time limited, motion was made for additional time in which to present the plan. The district court responded by presenting interrogatories to the Board and issuing its last benign statement on behalf of the Board as follows:

> Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of the duty by the Board to desegregate the schools "at the earliest possible date." Limited steps

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> purpose of complying with the constitutional requirement of equal protection of laws. (589a). (Emphasis added.)

The Board pointed out that it could not specify the number of students who might object to such assignments (493a).

Nevertheless, later the district court unjustly condemned the Board for not carrying out the plan as "advertised." (658a). "The performance gap is wide." (659a).

At the request of black community leaders, the Board proposed and secured a modification to permit substitution of Irwin Avenue Junior High School for the Zeb Vance school for black students exercising freedom of choice to attend a black elementary school in the inner city. The district court denied the Board the opportunity of upgrading the education for these black students by imposing restrictions on innovative programs for such students unless provided for all blacks who transfer to white schools (593a). The Board was forced to abandon innovative programs for these blacks as such programs require full student participation or segregation of black students in the white schools.

[4] The Board proposed completing the computer restructuring of attendance lines within six months or February 1, 1970 (487a). Furthermore, implementation was directed for the school year beginning 1970-71. (457a and 315a).

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> have been taken toward compliance with pupil desegregation provisions of the original order . . . (601a).

Pending application for an extension of time, this Court announced its decision in *Alexander v. Holmes County*, 369 U.S. 19 (1969), and the district court held that as a result of *Alexander*, discretion to grant an extension was prohibited (667a). The district court in its November 7, 1969, order then proceeded to severely criticize the Board for not implementing its 1969-70 desegregation plan. The district court stated "the plan has not been carried out as advertised" (658a) and "the 'performance gap' is wide" (659a). It is difficult to reconcile this criticism in the face of the district court's previous defense of the right of the Board to transport consenting black students to outlying schools and in view of faculty desegregation that resulted in precisely the figures estimated by the Board (589a and 584a). The district court reversed its earlier finding ". . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation" (305a) and substituted ". . . There is so much state action imbeded in the shaping of these events that the resulting segregation is not innocent or *'de facto'*, and the resulting schools are not 'unitary' or desegregated." The district court further found that freedom of choice had tended to perpetuate segregation by allowing children to leave schools where their race would be a minority (662a).[5] The district court noted that the school system ranked high with reference to desegregation in comparison with the 100 largest school systems, but held this to be immaterial (664a).

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[5] The evidence clearly shows that only 1,200 white students had left predominately black schools (665a) (housing a total of 16,000 blacks). This would therefore appear to fall under the *de minimus* rule. Compare the limited number of students who sought freedom of choice and the infinitesimal effect it had on desegregation for the school year 1969-70 (635a-638a).

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For reasons not understood, the attitude of the district court changed with increasing frequency to condemnation or misconstruction of whatever the Board proposed. It assumed that the Board's computer program, designed to promote stability by a 40% limitation on black student assignments, precluded white students from attending predominately black schools. Obviously, if the computer designed a school on a 50/50 ratio, the whites would soon leave the attendance district. The Board has no intention of devising attendance districts which would offer such instability. However, after the best efforts of the computer had been exhausted, those white students residing in the ultimate attendance zones populated predominately by blacks, would nevertheless be assigned to those schools. The district court simply misconstrued one step of the Board plan as constituting the final plan.

In fairness to the district court and the petitioners, the Board on October 19, 1969, gave advance notice that its plan would be unable to eliminate each all-black school (665a).[6] The district court, continuing its castigation of the Board, said the Board had "demonstrated a yawning gap between predictions and performance." (666a). The court thereupon directed the filing of a plan for desegregation ten days later on November 17, notwithstanding the fact that the Board had reaffirmed February 1, 1970, as the earliest date for presentation of a comprehensive plan.

Therefore, faced with this unrealistic time table, the Board was compelled to present an admittedly incomplete plan for desegregation (670a) and report (680a) in which the Board took a strong position for the purpose of attempting to determine the meaning of a "unitary system" and related terms. Attention is directed to the fact that the Board predictions with reference to desegregation of elementary schools was substantially accurate as disclosed by the following:

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[6] At this point, the Board had been admonished to "deal with the problem of the all black schools" (313a).

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Percentage Black Students	Projected No. of Schools Nov. 17, 1969	Board Final Plan, No. of Schools Feb. 2, 1970
0-10%	21	20
11-40%	44	43
41-100%	7	9

It would therefore appear that the Board performed as "advertised". There was no wide "performance gap" and there was no "yawning gap between predictions and performances." The court was further advised in August that the Board plan would be complete approximately the first of February 1970, and the Board performed (726a).

On December 1, 1969, the district court again misconstrued the computer instructions as being the results of a finalized plan. Although the Board proposed that each faculty would be predominately white at each school, the court seemed to take offense at the fact that there was no promise of total balance (700a). Compare *Montgomery, supra,* which countenances schools having 83% black faculties.

In response to the inquiries of the Board, the district court outlined some of the parameters of its notions of a desegregated system, which included pro rata distribution of teachers by race and that "all the black and predominately black schools in the system are illegally segregated" (711a and 714a). The district court further held that any plan should seek to reach a 71-29 ratio so that one school would not be racially different from the others though variations may be unavoidable (710a). It is believed that the absolutes of the district court's legal position began to crystalize with the order of November 7, 1969.[7] This has resulted in the

[7]In the order of November 7, 1969, and all subsequent orders, namely, December 1, 1969, February 5, 1970, March 21, 1970 and August 3, 1970, resulted in reversal of facts previously found in favor of the Board and many inferences resolved against the Board together with misconstruction of many of the facts presented to the court. The Board attempted to correct many of the findings by Objections and Exceptions thereto (1239a) and Objections and Exceptions to Findings of Fact dated August 14, 1970.

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failure of the court to make any subsequent findings favorable to the Board.

The district court then disapproved the Board's plan for further desegregation and directed desegregation of faculties on a three-to-one ratio effective not later than September 1, 1970, and indicated that a court consultant would be appointed. This was accomplished by order of the court dated December 2, 1969, wherein the court appointed Dr. John Finger as the court's consultant, a witness who had previously testified on two occasions for the plaintiffs and had offered earlier desegregation plans. The order of December 1 did not suggest implementation of pupil desegregation would be advanced to a date earlier than September 1, 1970. The Board was invited to continue working on its plan (714a-716a).

The Board submitted its completed plan on February 2, 1970 (726a). The plan utilized computers to achieve a maximum racial mix of 71% white and 29% black in each school where possible by restructuring attendance lines. One hundred (100) of the 103 schools would have a racial mix, leaving only three all-white schools. Sixty-eight per cent (68%) of the black students would attend schools having less than 40% black population. Thirty-two per cent (32%) of the black students would attend nine elementary and one junior high schools which would have black ratios of 83% to 99% under the Board plan (R. Br. A-4-6, A-10). This plan reduced the number of blacks in predominately black schools from 16,197 to 7,497 and the number of predominately black schools from 22 to 10.

The plan for desegregation submitted by the Board included imposition of faculty ratios of approximately three-to-one, white predominating, in each school and proposed implementation of its plan for the school year 1970-71 in accordance with the various court orders. The Board plan would require the in-district transportation of approximately 5,000 additional students, who would qualify for such transportation under state law.

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The court consultant's plan was submitted contemporaneously with that of the Board on February 2, 1970, which effectively adopted in many respects the Board's geographic zoning plan and engrafted upon it the features of pairing of distant elementary schools and creation of satellite districts in predominately black inner-city areas whose students were assigned to distant predominately white outlying secondary schools.

On February 2, 1970, the court conducted a hearing limited solely to the question of time required for implementation. It refused to hear any evidence with reference to the merits of the two plans before the court. On February 4, 1970, the Board made a motion for hearing on its plan and for the opportunity to examine the court consultant, who resides in Rhode Island and beyond the process available to the Board. In response thereto, the court permitted a short hearing severely limited as to time on the following day and declined to direct the consultant to be present for examination. The Board was compelled to submit substantial evidence nunc pro tunc (848a-900a).

On the same day, February 5, 1970, the court entered its order, in which the court found in part as follows:

> The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by rezoning; however, the Finger plan goes further and produces desegregation in all the schools in the system.
>
> Taken together, the plans provide adequate supplements to a final desegregation order (819a).

Although the court stated "the order which follows is not based on any requirement of 'racial balance' . . ." (821a), the court then adopted the entire plan of the court consultant and thereby directed racial balancing with reference to the various schools:

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A. The Board's pupil assignment plan for senior high schools was approved[8] upon condition that 300 black students residing in four grids suggested by the court consultant would attend Independence High School. Therefore, the court consultant's sole recommendation with reference to high schools was approved, although no school under the Board plan would house more than a 36% black ratio.

B. With respect to junior high schools, the Board plan was approved[9] upon condition that the only junior high school out of 21 which would remain predominately black would be desegregated by giving the Board a "Hobson's choice" of furnishing transportation and increasing blacks in attendance at several outlying schools and in default of rezoning (which had been fully explored), two-way transportation of students (which is cross bussing to which the Board is opposed) or closing the junior high school (whose classrooms are desperately needed to minimize the already serious overcrowding which exists at the junior high level). None of the alternatives were accepted. Therefore, the Board was directed to implement the court consultant's plan, which provided for establishing nine satellite attendance districts (containing 2,760 students) in inner-city black areas for attendance at nine distant predominately white suburban schools.

C. With respect to elementary schools, the court adopted the court consultant's plan which utilized the Board's rezoning[10] and engrafted upon it the features of pairing and grouping nine inner-city black schools with 24 suburban white

[8]The Board plan for senior high schools eliminated the one all black senior high school, West Charlotte, and established black ratios of 17% to 36% for nine of the ten schools. The remaining school, Independence, would house a 2% black ratio. (748a).

[9]The Board plan for junior high schools eliminated four of the five predominately black schools and the remaining school, Piedmont, would have a 90% black ratio or 758 black students (747a).

[10]The Board plan reduced the number of predominately black elementary schools from 17 to 9 (744a-746a).

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schools, thereby necessitating extensive cross-bussing.[11] Approximately 10,300 students would be involved in the elementary cross assignments.

The Board plan contemplated transporting only those students eligible for transportation under state law which would result in furnishing additional transportation to approximately 5,000 students (871a-875a). The order of desegregation imposed substantial additional transportation requirements upon the school system (880a-884a) which were compiled by the transportation office of the school system as follows:

Finger Plan

Additional Students	No. of Buses	First Year Cost
23,000	526	$4,199,439.00

Board Plan

Additional Students	No. of Buses	First Year Cost
4,935	104	$ 864,767.00

Supplementary findings of the court dated March 21, 1970, (1217a-1219a) reflect a finding that transportation as ordered by the court would show the following totals:

Court Estimates

Additional Students	No. of Buses	First Year Cost
13,300	138	$1,011,200.00[12]

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[11] The Board transportation office estimated these students would travel fifteen miles each way per day (860a). The district court estimated the school to school distance at seven miles (1261a).

[12] The district court found that the cost of 138 buses would be $743,200.00. The annual operating cost of $532,000.00 was reduced by one-half in its order of April 3, 1970 (1259a), resulting in a total of $1,011,200. The district court amended its February 5 order by order dated March 3, 1970 (921a) to provide that transportation should be offered only to those city students who lived in an area which had been rezoned as a result of the court order. The Board accordingly submitted revised estimates which reduced the requirements for addi-

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Extensive objections and exceptions (1239a) were filed by the Board with reference to the findings of the district court dated March 21, 1970, and the Court of Appeals noted that it was difficult to furnish reliable predictions with respect to transportation estimates (1271a).

On appeal, the Court of Appeals approved the provisions of the order of the district court with reference to assignment of faculty and assignment of students to secondary schools and reversed and remanded for further consideration the assignment of pupils attending elementary schools (1262a). In doing so the Court of Appeals noted that the voluntary faculty desegregation of the Board was in compliance with other orders of that court (1263a). The finding of the district court with reference to residential patterns leading to segregation resulting from federal, state and local government action was affirmed on "familiar principles of appellate review."[13]

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tional transportation to 19,285 students and 422 buses at a first year cost of $3,406,687.00. Thereafter, State Board of Education, pursuant to *Sparrow v. Gill*, 304 F. Supp. 86 (MDNC 1969) authorized transportation of all city students residing a mile and a half from their school. Accordingly, this reinstated the original estimates of the local transportation staff.

[13]In view of the importance of other issues in this case, the Board does not deem it appropriate to fully controvert the very shallow and incompetent evidence upon which the district court's findings were made on November 7 reversing its prior findings without benefit of further evidence or hearing. We would point out several areas. With respect to racial restrictive covenants, the only evidence was a 1946 North Carolina Supreme Court case enforcing such restrictions. Other evidence of racial restrictions or the extent thereof is absent from the record. Blacks have for many years purchased homes in predominately white neighborhoods. Plaintiffs' evidence (31a-34a) discloses that relatively small black areas have taken over large white communities. As a result, blacks predominated in 11 former all white schools (591a). Although older black and white neighborhoods were zoned industrial in 1947, no substantial inroads were made in these neighborhoods by industry (254a), industrial zoning in residential areas was substantially curtailed (254a) and existing zoning generally follows existing land use (261a). Urban redevelopment assisted the displaced persons in finding

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The reforms the Board undertook to create a unitary school system were applauded by the Court of Appeals (1265a). Noting the district court's holding "that the Board must integrate the student body of every school" (1266a) the Court of Appeals gave a partial answer to the unitary school question in holding:

> . . . first, that not every school in a unitary system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, the school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race . . . (1267a).

The Court of Appeals thereupon adopted ". . . the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law . . ." (1267a).

Although Piedmont Junior High School was a formerly all white facility, and nearly all white in 1965 (25 blacks) (691a), the Court of Appeals noted that this school was now in the heart of the black residential area (1268a), a school which could not be desegregated by rezoning. This school precipitated the creation of nine satellite junior high school districts for the purpose of eliminating this one predominately black junior high school.

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new homes but had no power to direct the location to which they moved (265a). Furthermore, there is no evidence that any citizen was so directed. Many other examples could be cited.

It is noted the findings of the district court, although largely unsupported, closely parallel those of the U.S. Commission on Civil Rights with respect to separation of races in 75 representative cities scattered throughout this nation. *Racial Isolation in the Public Schools–Summary Report by the Commission on Civil Rights (1967).*

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The Court of Appeals, utilizing the district court's unrealistic transportation estimates, found its approval of the secondary portion of the desegregation plan precluded approval of the elementary plan. The combined plans would represent a 56% increase in pupils transported and the number of buses would be increased by 49%. The Circuit Court acknowledged that the Board ". . . should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system." (1276a).

The Court of Appeals thereupon vacated the judgment of the district court and remanded ". . . the case for reconsideration of the assignment of pupils in the elementary schools, and for adjustments, if any, that this may require in plans for the junior and senior high schools." (1277a).

On remand, the district court had before it five elementary, two junior and two senior high school plans. An understanding of these plans will be facilitated by reviewing the separate map appendix to this brief.

Pursuant to the suggestion of the Court of Appeals, the Board met with representatives of HEW and sought to participate in the development of a new desegregation plan. Although the Department of Health, Education and Welfare obtained from the Board all the information it desired, it refused to accept the Board offers to assist it in developing a plan (Tr. 197, July 15, 1970). Nevertheless, the Board reconsidered all the techniques of desegregation in an effort to develop a new plan (Tr. 10-20, July 15, 1970). After presentation of the HEW plan on June 26, it was reviewed by the Board and rejected by a unanimous vote. Nevertheless, the Board presented the HEW plan to the district court for its consideration.

A hearing was convened on July 15, 1970, at which time the district court again reviewed the February 2, 1970 Board plan and the February 5, 1970 court approved Finger plan. The district judge also considered the HEW plan, a plan prepared by minority of Board members, and an earlier draft of a plan considered by the court consultant.

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The Board and court approved plans have been described earlier herein.

The HEW plan's salient features involved utilization of the Board restructured lines and then clustering a group of school districts contiguous to each other for specialized grade assignment to a particular school, for instance, one school might house grades 1 and 2, a second school grade 3, etc. Many of the districts involved in these clusters were desegregated by the Board's rezoning.[14]

A four-member minority of the Board presented an elementary plan which utilized the 1969-70 school zones, grouped 72 elementary schools within eighteen separate clusters, many of which were far removed from each other. The court's attention is invited to the map (R. Map Appendix), which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg system. It was an obvious successful attempt at racial balancing, as all 72 elementary schools would house black ratios ranging from 27% to 34%. Students chosen for attendance outside their district would be selected on a lottery basis. (R. Ex. 45, July 15, 1970). Dislocations and transportation requirements were essentially equivalent to those of the court ordered Finger plan (Order, August 3, 1970).

Petitioners, calling Dr. Finger as their witness, had him unveil a draft of a preliminary plan previously prepared by him. Basically, the plan was Dr. Finger's attempt to restructure attendance zones. Finding his rezoning attempts left

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[14]Cluster or zone number IV of the HEW plan grouped all white Pinewood, nearly all black Marie Davis with Sedgefield (38% black) and Collinswood (33% black). This plan was roundly condemned for the reason that an elementary student in such a zone would attend four elementary schools in six years and it interfered with the educational programs and organizations of the school system. It also involved substantial transportation and utilized many schools that already had the approximate racial ratio of the entire system. Most of the groupings were near-black or predominately black (R. Ex. 1 and 2, July 15, 1970).

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approximately 6,800 black elementary school children in inner-city black schools (Tr. 264, July 15, 1970), he then developed walk-in attendance zones for black students at those schools who would comprise approximately 30% of the capacity of the school. The blacks would attend these schools for six years. Whites residing generally in the inner perimeter of the city limits would be transported to such schools. Blacks who were not assigned to the inner city schools would be transported for six years to suburban white schools. The grade structure of the suburban schools was rearranged on a 3-3 basis with grades 1 - 3 in one school and a school in a contiguous area would have grades 4 - 6. Students in the contiguous zones would attend these two schools along with blacks from the inner city schools. Dr. Finger admitted the plan was incomplete (Tr. 263, July 15, 1970) and contains a complex grade structure (Tr. 258, July 15, 1970). The enormous amount of dislocation and transportation is apparent. As the district court found:

> 26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan. (Order, August 3, 1970).

The district court characterized three of the plans as "reasonable": the court ordered (Finger) plan, the minority board plan and the earlier draft of a Finger plan. The Board was given the "option" of adopting any one of these plans for the elementary schools. The Board met and found the three alternate plans to be unreasonable and the court ordered (Finger) plan was thereupon imposed by order of August 7, 1970.

The Board filed notice of appeal to the Court of Appeals for the Fourth Circuit on August 14, 1970, and has made application to this Court for permission to supplement the record or, in the alternative, that the motion be considered as a writ of certiorari to the Court of Appeals for the Fourth Circuit pursuant to Rule 20 of the Rules of the Supreme Court. No action has been taken thereon at this writing.

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SUMMARY OF ARGUMENT

Both the district court and the Fourth Circuit have misapplied the Constitutional imperatives of *Brown I, Brown II* and *Green* as they apply to the Charlotte-Mecklenburg schools. In doing so, both of these Courts erred in disapproving the Board plan and imposing upon this System requirements that are unlawful and unwarranted by the facts in this case.

The basic error stems from the misconception of the rights guaranteed black and white children by the Fourteenth Amendment and the goal to be achieved by a dismantling of a dual system and the establishment of a unitary one. Although disclaiming any intent to require racial balancing, the orders imposed upon the Charlotte-Mecklenburg System are based upon the proposition that student assignments at each school must be fashioned in a manner which will achieve or approximate the 70% white - 30% black racial ratio of the system at large. This false premise in turn is founded on the erroneous notion that each black or white child has an individual guaranteed right to attend a school having the prescribed racial mix. Any fair interpretation of the orders of the trial judge point unerringly to the conclusion that he deemed that presumed right to be an absolute one that cannot be diluted or denied by reason of circumstances, costs, disruptions or educational or administrative considerations. Tacitly, the Circuit Court also espoused racial balancing as its goal—but sought unsuccessfully to temper the absolutism of the district court with a test of reasonableness, to which on remand the trial judge gave only thinly veiled lip service. The Board is in general agreement with the employment of a Rule of Reason in appraising desegregation plans. But in this case, the Fourth Circuit misapplied its own Rule of Reason and in effect the district court ignored it. Racial balancing is not required by the Constitution and when imposed by a court violates the prohibitions of the Civil Rights Act of 1964.

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Contrary to these erroneous views, the pronouncements of this Court make it clear that the guaranteed right of a child is to attend a school *system* within which discrimination originating from the old state-imposed dualty has been eliminated. If such discrimination has been eradicated and if schools are fairly operated and administered on a nonracial basis, a dual system has been dismantled and a unitary one has been established within which no child is excluded because of his race or color. Nondiscriminatory geographic attendance zones, including those promoting the neighborhood school concept, establish a unitary system—notwithstanding a residue of predominately black schools that remain for reasons totally unrelated to race.

A corollary to the requirement of racial balancing is the burden of massive bussing and dislocation of children to achieve the goal of 70% white—30% black ratio in the schools of the Charlotte-Mecklenburg System. This balancing and the bussing to implement it impinges upon the Constitutional rights of children, both black and white, who may not wish to be assigned and moved out of their neighborhood attendance zones for the sole purpose of promoting the presumed rights of other children.

The February 2, 1970, Board plan is based on geographic attendance zones that were drastically gerrymandered to promote desegregation. This plan severely strains, but maintains the basic benefits of the neighborhood school concept. By this technique, the Board satisfactorily desegregated all but 10 of its 103 schools. *All* but a small handfull of the black children who remain in these 10 schools will have a desegregated school experience for at least one-half of their 12 years of schooling. The Board itself sought to achieve in as many schools as possible a maximum racial mix. By doing so, the Board proposal exceeds Constitutional imperatives. The compulsion of court orders cannot be employed to coerce a school system to do what the Constitution does not require.

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The Board plan is reinforced by majority to minority transfers to promote stable desegregation, prevent resegregation and afford blacks that remain in the 10 predominately black schools an opportunity to attend a predominately white school with free transportation to accomplish the move. The teachers at each school are assigned on a ratio of 3 to 1 which is the ratio of white to black teachers in the system. The staff, extra-curricular activities, transportation, facilities, programs and other facets of the system are nondiscriminatory and thoroughly desegregated, and are employed to promote integration throughout the system.

The Board plan effectively establishes a unitary system. Both the district court and the Fourth Circuit erred in disapproving that plan and supplanting it with one or more alternatives designed to racially balance each school, with the consequent bussing and movement of children that the Board considered unnecessary, impractical, costly, disruptive, educationally unsound and not required by the Constitution.

ARGUMENT

I. GENERAL DISCUSSION OF CONSTITUTIONAL PROBLEMS AND CONCEPTS.

A. A CHILD'S CONSTITUTIONAL RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT IS TO GO TO SCHOOL IN A UNITARY SYSTEM. IF THE SCHOOL IS PART OF SUCH A SYSTEM, HE HAS BEEN ACCORDED THAT RIGHT.

It is unarguable that the negro and white children in the Charlotte-Mecklenburg system must be and will be accorded their Constitutional rights in full measure. However, the district court's misconception of the nature of those rights is succinctly stated in its August 3, 1970, Order (Pets' Br. Al):

> The issue is not the validity of a "system", but the rights of individual people.

Of course, the Constitutional rights of a black or white child under the Fourteenth Amendment are individual and per-

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sonal, but the question remains: What is the essence of that right—the right to do what? The trial judge concludes that the right is an absolute one of each child to be in a desegregated school and presumably in a desegregated classroom within the school—regardless of the rights of white children, circumstances, problems peculiar to urban areas, costs, disruptions, educational considerations and other factors which prevent a color blind school system from achieving the ideal racial mix in every one of its schools.

This view does not comport with the previous declarations of this Court. Briefly stated, it is our understanding that this Court has defined the right guaranteed a negro or white child by the Fourteenth Amendment as being the right to attend a school in a *system* where no state-imposed discrimination exists and has prescribed the attendant affirmative duty of a school board to establish such a *system*. This right and duty are summarized in *Green v. New Kent County*, 391 U.S. 430 (1968):

> [I]t was such dual *systems* that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school *system*" . . . *Id.* at 435. (Emphasis added)
>
> . . . *Brown II* commanded the abolition of such dual *systems* . . . *Id.* at 437. (Emphasis added)
>
> School boards such as the respondent then operating State-compelled dual systems were nevertheless clearly charged with the affirmative duty . . . to convert to a *unitary system* in which racial discrimination would be eliminated root and branch . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this . . . *Id.* at 437-38 (Emphasis added)

The thrust of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955) and all that this Court has said since those landmark decisions point unerringly to the validity of this proposition:

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State-imposed dual *systems* must be abolished and must be replaced with unitary *systems.* The Constitution does not guarantee to a child the right to attend a school having any particular racial complexion. The Fourteenth Amendment secures for him only the privilege to attend a school that is part of a unitary *system* which is comprised of "just schools" (*Green, supra,* at 442)–schools that are operated and administered without any vestige of discrimination. Once a conversion or transformation to a unitary nondiscriminatory *system* has been accomplished, every child in that *system* has been accorded his rights. Those who contend for a particular racial mix or balance in each school propose a perversion of the commands of *Brown I* and *II* and *Green.*

It is by these standards that the plan of the School Board in this case must be judged. An analysis of that plan clearly demonstrates that it realistically will achieve the nondiscriminatory unitary system the Constitution requires. The oppressive plan of the district court does not conform with these standards. In spite of disclaimers, its objective is the racial balancing of each one of the schools of the Charlotte-Mecklenburg system.

B. A UNITARY SYSTEM IS ONE WITHIN WHICH NO CHILD IS EXCLUDED FROM ANY SCHOOL BECAUSE OF RACE. IF A DESEGREGATION PLAN PROMISES REALISTICALLY TO ACCOMPLISH THIS, IT IS CONSTITUTIONALLY ACCEPTABLE NOTWITHSTANDING A RESIDUE OF PREDOMINATELY BLACK OR WHITE SCHOOLS THAT REMAIN FOR REASONS UNRELATED TO RACE.

The now familiar definition of a unitary system is one "within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes,* 396 U.S. 19 (1969); *Northcross v. Board of Education* (Burger, Chief Justice, concurring opinion) 397 U.S. 232 (1970). Unhappily for school boards charged with the responsibility of fashioning a unitary system, this definition only begins,

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not ends, inquiry regarding the necessary ingredients and characteristics of a unitary system.

This Court is well aware of the diversity and change of opinion both among and within courts that have been wrestling with the scope and meaning of this definition. This ought not to be. We hope this Court will find an opportunity in this case to put some meat on the bare bones of this definition which will give instruction and guidance to school boards and will help dispel the disparity that presently characterizes the findings of fact, conclusions and opinions of the lower courts.

Brown I and *II,* the *Green* triad and *Alexander v. Holmes* are of some help—but not much for practical application "in the field." From these cases, we understand a unitary system to have at least these attributes: It is "nonracial." It is "racially nondiscriminatory." It is what is left after a "well-entrenched dual system" has been "dismantled." It is one in which "racial discrimination" is "eliminated root and branch." It is one within which no child is "effectively excluded because of race or color." Running through all of these criteria is one common theme: If a system is established that does not discriminate against the race of a child and thereafter operates on a color blind basis, a former dual system has been transformed, converted and, we presume, purged.

It is worth noting that the 2-school rural residentially mixed New Kent County involved in *Green* typifies the systems stricken down by *Brown I* and *II,* a fact which is specially commented upon at page 435:

> The pattern of separate "white" and "Negro" schools in the New Kent County school system established under the compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two

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> schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "negro."
>
> It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301, 75 S.Ct. at 756.

The *Green* triology formed the primary vehicle for the last detailed pronouncements of this Court concerning some of the characteristics of a dual and non-dual system. The factual context within which the teachings of *Green* were made presents considerable difficulties when these guides are applied to a complex urban system like Charlotte-Mecklenburg—particularly when that system has long since abandoned the discriminatory practices that were so flagrantly involved in New Kent County.

In identifying a unitary system, the *Alexander v. Holmes* definition embodies two basic aspects: (1) effective exclusion and (2) the reason for exclusion—i.e. because of race.

The word "exclude" means to shut out. It implies keeping out hwat is already outside. That a person remains outside does not necessarily mean that he is excluded. The idea of shutting out suggests affirmative action on the part of someone to accomplish the exclusion. If a person outside is afforded an opportunity to come inside, he is not barred or excluded. This opportunity must be a reasonable one. If the opportunity accorded a person is unreasonable, he may be said to be effectively excluded.

The *Holmes* definition does not prohibit all exclusion—only invidious ones based on race or color. There are any number of reasons why a child can fairly be required to attend one school instead of another: capacity, distance,

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cost, disruptions, location of residence, age, travel, safety, administrative problems, educational considerations and a host of other factors that have absolutely nothing to do with his race or color.

If, in the operation of a school system, these factors are honestly, realistically and reasonably applied without the slightest degree of racial discrimination, the system is nonetheless unitary even though by reason of these factors some black children remain in predominately black schools.

The Fourth Circuit correctly comes to this conclusion in the Charlotte-Mecklenburg case (1267a):

> . . . [W]e hold: First, not every school in a unitary system need be integrated . . .
>
> . . . [I]f a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary system. *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970).

This view agrees with the trend of lower court decisions which may be summarized as follows: The maintenance of some all-black or all-white schools in a given school system will not automatically invalidate a desegregation plan nor will it automatically indicate a shirking of responsibility by school board officials so long as the segregation is the result of housing patterns and means are made available whereby black children in the all-black areas may transfer to predominately white schools. The operation and maintenance of a particular school building, attended only by negro or white children, is not *per se* unconstitutional. *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1085, 1093 (5th Cir. 1969), *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970), *Goss v. Board of Education, City of Knoxville, Tennessee*, 406 F.2d 1183 (6th Cir. 1969), *Deal v. Cincinnati Board of Education*, 419 F.2d, 1387 (6th Cir. 1969).

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The trial judge who heard the Charlotte-Mecklenburg case is out of step with this trend and obviously disagreed with the opinion of the Court of Appeals for the Fourth Circuit. On February 5, 1970, the trial judge ordered (822a); "That no school be operated with an all-black or predominantly black student body." The district court did not retreat from this position in its August 3, 1970, Order (Pets.' Br. A1) issued after the conclusion of hearings held pursuant to the Circuit Court directives. This misconception of what the Constitution requires lies at the heart of the unlawful orders of the district court and the unwarranted findings of fact which the trial judge used to support his erroneous conclusions.

C. A "RULE OF REASON" RATHER THAN A "RULE OF ABSOLUTES" SHOULD BE THE STANDARD BY WHICH TO JUDGE THE SUFFICIENCY OF A DESEGREGATION PLAN.

We approve the test of reasonableness adopted by the Court of Appeals–instead of one that calls for absolutes (1267a-1268a):

> We adopted the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integration of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruc. of Orange County,* No. 29124, Feb. 17, 1970___ F.2d. ___ (5th Cir.)

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Such a test is consistent with the equitable principles elucidated in *Brown II* which made it clear that desegregation plans and the means of implementing them should take into account a variety of local problems and conditions–including by implication those specifically itemized by the Court of Appeals (age of pupils, board resources, costs, effect of bussing on traffic and the distance and time for transportation).

In the name of common sense, what standards other than "reasonable" ones should be applied to test the efficacy of desegregation plans? In fashioning and effectuating decrees, *Brown II* directed that trial courts be guided by equitable principles. The very concept of equity presupposes the application of fairness, practicability and reason. Equity is employed where absolutes are inappropriate.

As stated in *Green, supra:*

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance.[15] *Id.* at 439.

The August 3, 1970, Order of the district court (including its findings of fact) clearly shows that the trial judge gave only lip service to the test of reasonableness directed by the Court of Appeals. The recital of a few evidences of this lip service will suffice at this point: "The circuit court's reasonableness order is vague" (Pets.' Br. A7); "reservations" about the pertinence of a rule of reason are expressly acknowledged (Pets.' Br. A31); the size of a system is immaterial (Pets.' Br. A10); " 'Busing' is still an irrelevant issue" (Pets.' Br. A10); current long distance bussing of kindergarten children is cited as justification for bussing thousands

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[15]With tongue-in-cheek solemnity, the district judge in *Ross v. Eckels, Houston Independent School District*, F. Supp. (S.D. Texas 1970), in commenting on the practical problem occasioned by Buffalo Bayou, proclaimed: "A child is not required to swim or fly to school."

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of elementary youngsters (Pets.' Br. A16, A18); "There is no way to decide what remnant shall be determined intractable" (Pets.' Br. A18); "cost and inconvenience" are not pertinent considerations (Pets.' Br. A31).

In view of the reservations entertained by the district court about the pertinence of a Rule of Reason, it is not surprising that upon remand the trial judge concluded that his own prior orders were "reasonable"—notwithstanding the determination of the Fourth Circuit that the trial judge's earlier mandate regarding the elementary plan was unreasonable. This reaffirmation by the district court of its own prior conclusions evidences a subjectivity that does not square with either the directions of the Court of Appeals or with the equitable principles decreed by this Court.

It is incomprehensible that two dissenting members of the Court of Appeals (Judges Sobeloff and Winter) should find a "test of reason" so frightening. They find it undefined, subjective, ambiguous and pernicious (1288a, 1289a, 1290a, 1302a, 1303a). They say it threatens dire consequences of delay and exploitation. (1290a).

In his dissent Judge Sobeloff rejects what he calls (1291a) the "slippery test" of reasonableness because it implies that desegregation is not "worth the price" (1288a). This misconception is echoed by the plaintiffs' assertion (Br. 58) that the Circuit Court's reasonableness rule demonstrates a departure from the educational goal of desegregation laid down in *Brown I* and *II* and reinforced by *Green*.

This unwarranted conclusion misconstrues the goal sought to be achieved. *Green, supra,* succinctly defined that goal:

> [S]chool boards operating such school systems (i.e. dual systems) were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system" . . . The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . *Id.* at 435-36 (Emphasis by Court).

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And at 437-38, school boards were charged with:

> [T]he affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Regardless of the prior dualty of a school system previously operated under the authority of *Plessy v. Ferguson,* 163 U.S. 537 (1896) or otherwise, from these teachings it follows that if a current desegregation plan of a school board realigns its schools and its assignment policies in a fashion that effects a conversion to a nonracial, nondiscriminatory system, the commands of this Court have been obeyed. "Discrimination' is defined as "the act, practice, or an instance of discriminating categorically rather than individually." *Webster's Seventh New Collegiate Dictionary* (1967). Within the context of desegregation, if the operation and administration of a school system does not countenance such acts and practices on account of race, discrimination has been eliminated.

It is for the courts to appraise the plans proffered by a school board to determine whether the results achieved are genuinely founded on considerations that are completely disassociated from any degree of racial discrimination. When judged by the peculiarities of local problems, conditions and circumstances, the plan of the Charlotte-Mecklenburg School Board ought not to be supplanted by a court plan that comports with the subjective views of a trial judge that absolutes are required.

In his dissent in *United States v. Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967), Judge Gewin (Bell concurring) responded to the champions of absolutism:

> . . . No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken

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> into account. All things must yield to speed, uniformity percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since Brown II. As the Court there stated:
>
> > Because these cases arose under *different local conditions* and their disposition will involve a variety of *local problems,* we required further argument on the question of relief. (349 U.S. p. 298, 75 S.Ct. p. 755). *Id.* at 403.

In appraising the efficacy of desegregation plans, even courts espousing the Rule of Reason have been prone to place undue emphasis upon tangible factors such as numbers of buses and numbers of dollars—with very little direct consideration of the effect of such plans upon the educational processes of a particular system. After all, education is what *Brown I* and *II* professed to be all about.

We believe that judicial restraint should be employed in assessing the impact of a particular desegregation plan upon the educational program of a local system lest the excesses of plans devised by absolutists tear to shreds the fabric of the educational process that the decisions of this Court were designed to improve and promote for all children—black and white.

This is not meant to imply that courts should refrain from looking behind the judgments of school boards and administrators to ascertain whether or not they are in fact being employed as a guise to circumvent the commands of *Brown I* and *II* and *Green.* We suggest, however, that the judiciary should beware lest court-devised plans throw the education baby out with the bath water.

The Fourth Circuit (1267a) explained its reasons for adopting a Rule of Reason:

> We adopt the test of reasonableness—instead of one that calls for absolutes—*because it has proved to be a reliable guide in other areas of the law.* (Emphasis added)

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The soundness of the explanation assigned by the Court of Appeals for its adoption of this test should require no documentation, except for those encumbered by a predisposition for absolutes.

The "other areas of the law" referred to by the Court of Appeals include the construction and application by this Court of a variety of fundamental individual rights guaranteed by the Constitution. By way of example we call attention to only a few.

Some of the limitations on Freedom of Religion are summarized in *Mohammad v. Sommers,* 238 F. Supp. 806 (E.D. Mich. 1964):

> [I]n the interest of the public weal, there are many limitations which bound religious freedom. Generally, it can be said that these limitations begin to operate whenever activities in the name of religion affect or collide with the liberties of others or of the public, or violate public policy. Witness this but partial lists of instances of such conflicts which have all been resolved against the claims of religion: Sunday closing, spiritualistic readings, selective service, parading in the streets, practice and advocacy of polygamy, vending periodicals in the streets, fluoridation of water, compulsory school attendance, child labor regulations, compulsory vaccination, blood transfusion, surgery and medical attention. *Id.* at 808.

Numerous limitations have been imposed upon the Right of Free Speech. For example, see *Cox v. Louisiana,* 379 U.S. 536 (1965); *Gitlow v. People of the State of New York,* 268 U.S. 652 (1925); *Times Film Corporation v. City of Chicago,* 365 U.S. 43 (1961)–"It has never been held that liberty of speech is absolute"; *Schenck v. United States,* 249 U.S. 47 (1919); *Gilbert v. Minnesota,* 254 U.S. 325 (1920)–"it is not absolute–it is subject to restriction and limitation;" *Dennis v. United States,* 341 U.S. 494 (1951).

The same is true of the Right to Trial by Jury. Of interest is what this Court said in *Duncan v. Louisiana,* 391 U.S. 145

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(1968), holding that a jury trial for petty offenses was not required by the Sixth and Fourteenth Amendments:

> . . . [T]he *possible consequences to defendants* from convictions for petty offenses had been thought *insufficient to outweigh* the *benefits* to efficient law enforcement and simplify judicial administration resulting from the availability of speedy and *inexpensive nonjury adjudications.* These same considerations compel the same result under the Fourteenth Amendment. *Id.* at 1453. (Emphasis added)

And in *Baldwin v. State of New York,* ___ U.S. ___, 90 S.Ct. 1886 (1970)

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences which face him, and the consequences which face appellant here. Indeed, the prospect of imprisonment for however short of time will seldom be viewed by the accused as trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. *Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they be, may be outweighed by the benefits which result from speedy and inexpensive nonjury adjudications. Id.* at , 90 S. Ct. at 1890. (Emphasis added)

With reference to the Right to Counsel as expounded by this Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court in *Brinson v. State of Florida, County of Dade,* 273 F. Supp. 840 (S.D. Fla. 1967), at 845-47 had this to say:

> . . . The right to counsel should not be treated as an abstract theorem, but rather as a means of achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction. However, *that right is qualified by practical exigencies . . .*
>
> *The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right,*

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nor are any of the rights guaranteed by the Constitution "absolute." See *Creighton v. State of North Carolina,* 257 F. Supp. 806 (E.D.N.C. 1966). *As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of the country and the protection of the rights of its citizens In today's complex society there can be no truly "absolute" rights.* Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. One cannot refuse to pay taxes because of religious scrupples, nor can one engage in polygamy or any other practice directly harmful to the safety, morals, health or general welfare . . . The "absolute" right to free speech has been qualified and curtailed by libel and slander laws. Such right, on occasion, must be subordinated to other values and considerations. *Dennis v. United States,* 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1950). It does not confer the right to persuade others to violate the law. *Bullock v. United States,* 265 F.2d 683 (6th Cir. 1958) . . . Neither does such right preclude Congress from excluding obscene matter from the mails or from punishing person advocating overthrow of the government by force. *United States v. Bryan,* 167 F.2d 241. *Likewise, the "absolute" right to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial administration would be disregarded* and the administration of justice thrown into senseless chaos. (Emphasis added)

Without belaboring the point further, these examples are cited to demonstrate the futility of a Rule of Absolutes and the necessity for a Rule of Reason. As the dissenting opinion of Judges Sobeloff and Winter and the orders of the district court suggest, if a test of reasonableness is slippery and inapplicable to an evaluation of a school board's efforts to convert to a unitary system, a consideration of costs, disrup-

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tions, buses, administrative problems, and impact on educational programs become totally unnecessary and irrelevant. If such be true, there would be no need for complex desegregation plans and much of the elapsed time since *Brown I* and *II* has been wasted.

To the contrary, we subscribe to what this Court said in *Dennis v. United States, supra:*

> Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nonomenclature. *Id.* at 866.

Green gave birth to a major portion of the nomenclature applied to measure school systems and desegregation plans. We find little evidence of any disposition on the part of the absolutists to heed the admonition suggested by *Dennis* that there are differences, which should reasonably be taken into account, between the 2 rural schools (1300 pupils) of New Kent County and the 103 primarily urban schools (84,500 pupils) of Charlotte-Mecklenburg.[16] The absolutists springboard from the nomenclature of *Green* to rationalize their own views, without taking into account the limitations of the ruling of this Court in that case:

> *[A]ll we decide today* is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. *Id.* at 440. (Emphasis added)

If the review of the Charlotte-Mecklenburg case does nothing else, we hope standards and guidelines for desegregation

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[16]The trial judge glibly dismisses the differences in his August 3 Order (Pets.' Br. A10): "The principal difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000." Even this reference to 16,000 leaves an erroneous impression. Under the Board plan only 7,497 black youngsters will attend predominately black schools. See statistical data relating to the Charlotte-Mecklenburg schools and the Board plan attached hereto at A-3.

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plans will be evolved that are sufficiently clear and definite to curtail the temptation of some lower courts to rely on their personal educational and social philosophies in judging plans and the system for which they are formulated.

D. THE DISTINCTION BETWEEN DE FACTO AND DE JURE IS NOT A VALID STANDARD BY WHICH TO DETERMINE WHETHER A SCHOOL SYSTEM IS UNITARY.

A major thrust of the district court's sweeping orders is based upon its findings that such segregation as remained in the Charlotte-Mecklenburg schools was the result of *de jure*, not innocent *de facto*, action of federal, state and local authorities. These findings are summarized in the opinion of the Court of Appeals (1264a):

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley v. Kraemer,* 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the

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> needs of immediate neighborhoods. Predominately black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.

These findings were employed as a justification by both the trial judge and the Court of Appeals for the disapproval of the Board's plan that would desegregate all but 10 of the system's 103 schools and place 100% of the black and white children in schools with thoroughly integrated teaching staffs and 68% of the blacks in 93 predominately white schools—with almost all of the remaining black children being scheduled to attend such schools for at least one-half of their 12 years of schooling. These *de jure* findings are in marked contrast to earlier findings of the district court in its April 23, 1969, Order (311a-312a):

> A word about the School Board.—The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. *They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions.* The Charlotte-Mecklenburg schools in many respects are *models for others.* They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1965 and *Green v. New Kent County* of 1968. *The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed* are no longer adequate to complete the job

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> which the courts now say must be done "now". (Emphasis added)

Of particular interest is the district court's April 23, 1970, finding:

> . . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto patterns of segregation.* (305a) (Emphasis added)

Six months later, in its November 7, 1969, Memorandum Opinion (661a-662a) the district court gratuitously and without the benefit of further evidentiary hearings reversed its previous findings that segregation in Charlotte was *de facto.* The trial judge attributed to the School Board every real or fancied ill that beset the Charlotte-Mecklenburg community and stemmed from federal, state, local and private action, including, among others, public accommodations and housing, racial restrictions in deeds, zoning ordinances, urban renewal, low rent housing and placement of neighborhood schools.

The unfairness and artificiality of these attributions is underscored by a comparison of the district court's findings in this case with those of the Sixth Circuit in *Deal v. Cincinnati Board of Education, supra,* wherein the Court considered the same factors, and arrived at a diametrically opposite result and concluded:

> In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. *Id.* at 1392.

In *Deal, supra,* the Court observed that in Cincinnati due to residential patterns there was a large concentration of negroes in one portion of the city and schools had been located to serve the neighborhoods where the children live. The Court in *Deal* referred to an Ohio statute that *required* the selection of school sites in areas of the heaviest concentration of children and declared that:

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> Even in the absence of such a statute, it would seem prudent to locate the schools where they will be easily accessible and convenient to most of the children and without the necessity of bussing the children or their crossing dangerous thoroughfares. The Board should consider locations in areas that are being developed where large population increases are anticipated, and locations in areas where the Board already owns property.

We, of course, are mindful of the holding of this Court in *Cooper v. Aaron,* 358 U.S. 1 (1958) which is frequently cited for the proposition that as agents of the state a local school board is responsible for conditions created by state officials. This holding was made within the context of the violent, disruptive and overt action generated by Governor Faubus and other state officials to thwart the rezoning efforts of the local school board. In the case of Charlotte-Mecklenburg it is manifestly unsound, unfair and unrealistic that the actions of others should be arbitrarily attributed to its School Board as justification for the excessive order approving the disruptive and costly plan of the district court and disapproving the plan proposed by the Board.

It is common knowledge that prior to 1954 Charlotte-Mecklenburg maintained a dual system, sanctioned by the laws of the State of North Carolina promulgated under the authority of the "separate but equal" doctrine of *Plessy v. Ferguson, supra,* stricken down by *Brown I* and *II,*

Following the mandates of *Brown I* and *II,* in order to achieve further racial mixing Charlotte-Mecklenburg adopted a plan of redistricting that in 1966 was found by the Court of Appeals for the Fourth Circuit to comply with the Constitution as then understood. *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F.2d 29 (1966). Thereafter, in furtherance of additional desegregation, the Board initiated a number of actions which were applauded by the district court in its April 23, 1969, Order (298a-301a, 311a-312a). Following *Green* and in response to the orders of the district court the School Board submitted its plan that on

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February 5, 1970, was disapproved by the district court in favor of its own—reciting in support of its action that the local system was tainted by the *de jure* factors referred to above.[17]

The history of this case, the 1966 Circuit Court approval of geographic zones, the Board's initiative to promote desegregation and the results which will be achieved by the February 2, 1970, plan of the Board compels an answer to this question: When, if ever, can a school system born under the ill-fated star of *Plessy v. Ferguson* purge itself of the *de jure* stigma reserved for systems that once-upon-a-time had the dualty that *Plessy* condoned?

We suggest that the distinction between *de jure* and *de facto* is invalid and artificially contrived. In doing so, it is not our purpose to whitewash the Charlotte-Mecklenburg system by pointing a finger at other systems in other parts of the nation that have escaped the lash of oppressive court orders because they operate behind the mask of *de facto* segregation. We do suggest, however, that the *de jure - de facto* standard is not an appropriate test by which to judge a school board's compliance with the commands of *Brown I, Brown II* and *Green*. Schools everywhere should be measured by the same yardstick.

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[17]In Charlotte-Mecklenburg, 68% of the blacks during the school year 1969-70 attended predominately black schools. Under the Board plan this percentage is dramatically reduced to 32% (see A-3 Appendix attached to this brief). Comparable information derived from HEW figures reflects the following percentages of black students at predominately black schools: New York City, 86%; Los Angeles, 96%; Detroit, 91%; Philadelphia, 90%; Milwaukee, 88%; San Francisco, 54%; Boston, 77%; and Cincinnati, 78%.

The percentages of black students attending schools housing 95% to 100% black students in other cities is as follows: Baltimore, 76%; Cleveland, 80%; Washington, 89%; St. Louis, 86%; Newark, 75%; Buffalo, 61%; Gary, Indiana, 80%. In Chicago, 76% of the blacks attended schools less than 2% white. Source: United Press *International Release*, May 17, 1970.

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The flaw in the *de jure* - *de facto* dichotomy is that from the moment *Brown I* was announced all federal, state and local laws requiring or permitting segregation were void and of no effect. On and after May 31, 1955, there plainly could be no *de jure* racial discrimination in any school system in the United States. What was left, North and South, was segregation in the schools in fact.

The *de jure* concept was never of any importance except as a handle upon which to hang state action and an affirmative duty to dismantle. If one accepts an affirmative conception of the Constitution, the *de jure* idea becomes worthless and the North and South distinctions intolerable.[18]

If separation by race in the public schools renders educational opportunities inherently unequal and if accomplishment of a social purpose is really the true goal, it ought to be purely of historical interest and wholly irrelevant how the practice originated, whether by law, custom or ghetto economics.

It is abundantly clear that social reform is the goal that the trial judge sought to achieve in Charlotte-Mecklenburg: Segregation *per se* is unlawful; educational opportunities and performances are not controlling–"Segregation would not become lawful, however, if all children scored equally on the [achievement] tests" (Pets.' Br. A15); "no school [shall] be operated with an all-black or predominately black student body" (822a); the "pupils of all grades [shall] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students" (822a); the School Board shall "maintain a continuing control over the race of children in each school . . . to prevent any school from becoming racially identifiable" (823a); the School Board shall "implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school

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[18]Senator Abraham Ribicoff, of Connecticut, has described this double standard as "monumental hypocricy."

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year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation" (824a).[19] One embarked upon a crusade for social reform finds both opportunity and justification in the *de jure* precept. By way of illustration, it seems rather strained that private racial deed restrictions negated by *Shelley v. Kraemer*, 334 U.S. 1 in 1948 should be relied upon in support of nefarious state action now. The same is true of the purported effects of federal financing and other governmental action over which the school board has no control.

It is inescapable that an all-black school in Washington or Baltimore is just as unequal as an all-black school in Charlotte or Atlanta. People are pretty much the same everywhere and race prejudice now and in the past has not been confined to the southern part of the United States.[20]

If social reform were to be candidly admitted as the objective, we could more profitably concern ourselves with what is reasonably practicable for a school board to do to correct

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[19]Even if *arguendo* the *de jure* - *de facto* distinction were to be accepted, such a requirement of continued maintenance and control over the race of children in each school would seem to exceed the authority of a district judge, once he concludes that a desegregation plan has dismantled a dual system and has established a unitaiy one. After this has been accomplished, any future segregation would be *de facto*–not *de jure*.

[20]*Racial Isolation in the Public Schools, Summary Report by the Commission on Civil Rights* (1967), at 3:

> Although school segregation was sanctioned by law and official policy in Southern cities until 1954, there is a legacy of governmentally sanctioned school segregation in the North as well. State statutes authorizing racially separate public schools were on the books in New York until 1938, in Indiana until 1949, and in New Mexico and Wyoming until 1954. Although not sanctioned by law in other States, separate schools were maintained for Negroes in some communities in New Jersey, Illinois, and Ohio, as late as the 1940s and 1950s. In some cities such as New Rochelle, N.Y. and Hillsboro, Ohio, the courts found that school district lines have been gerrymandered for the purpose of racial segregation.

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social inequities—North and South—rather than having our attention diverted to how a particular school system may have gotten that way. Further, it would obviate the necessity for artifically contrived rationales to support a trial court desegregation order, which in this case the Court of Appeals accepted "under familiar principles of appellate review."

E. THE CONSTITUTION DOES NOT REQUIRE RACIAL BALANCING IN SCHOOLS OR BUSSING OF CHILDREN OUTSIDE GEOGRAPHIC ATTENDANCE ZONES TO EFFECT SUCH BALANCING. BALANCING AND COMPULSORY BUSSING INFRINGE ON THE PERSONAL RIGHTS AND LIBERTIES OF THE CHILDREN INVOLVED.

The test of reasonableness adopted by the Court of Appeals—instead of one that calls for absolutes—can be the only sensible standard. Transportation may be employed on a "reasonable" basis as a legitimate tool to effectively desegregate an otherwise dual system. However, this still leaves open to question the circumstances under which and the purposes for which bussing may be or should be imposed upon a school system.

The mandate of the Constitution does not require racial balancing or compulsory bussing outside of normal attendance zones to achieve such balancing if the attendance areas are fairly drawn.

1. Racial Balancing and the Bussing to Achieve It Were the Bases for the Decisions of the Trial Court and Court of Appeals.

The net effect of the trial court orders of February 5, 1970, and August 3, 1970, was to require racial balancing at all three instructional levels and the bussing necessary to implement it—regardless of cost or disruptions. The net effect of the Court of Appeals decision was to impose racial balancing at the junior and senior high levels and to authorize

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it at elementary level—tempered only by its test of reasonableness with reference to the amount of bussing involved.

In its August 3, 1970, Order the district court asserts that " 'Racial balance' is not required by this court, merely racial diversity." (Pets.' Br. A10). This was merely a reaffirmation of its previous denials that its prior denials that its prior orders were not based upon a requirement of "racial balance" (710a, 821a). A careful consideration of the various orders of the district court clearly shows that contrary to the trial judge's disclaimers his rulings were in fact premised upon the proposition that a racial balancing of the Charlotte-Mecklenburg schools is required by the Law of the Land.

In its April 23, 1969, Order (310a) the trial court entertained doubts about its power to order a racial ratio in the various schools of the Charlotte-Mecklenburg system:

> Counsel for the Plaintiffs says that since the ratio of white to black students is about 70/30 the School Board should assign children on a basis of 70% white and 30% black and bus them to all schools. This Court does not feel that it has the power to make such a specific order.

In its December 1, 1969, Order (710a) the trial judge acknowledged that his previously expressed doubts had been dispelled:

> . . .[T]he court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71/29 ratio in the various schools so that there would be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

In his February 5, 1970, Order (822a) the trial judge abandoned temporarily any pretense concerning racial balancing as a requirement when he directed:

> That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at

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> various grade levels have about the same proportion of black and white students.

The Court of Appeals likewise disavowed any purpose to require racial balancing of the Charlotte-Mecklenburg schools. In his dissent, Circuit Judge Bryan cut through the sematics employed by both the district court and his colleagues on the Court of Appeals (1293a-1294a):

> The Court commands the Charlotte-Mecklenburg Board of Education to provide busing of pupils to its public schools for "achieving *integration*". (Accent added) "[A]chieving integration" is the phraseology used, but actually, achieving racial *balance* is the objective. Busing to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of busing for this or other reasons, and regardless of the cost consideration or duplication of the bus routes, I think the injunction cannot stand.
>
> Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.
>
> The majority opinion presupposes this racial balance, and also busing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the school; . . . (and) to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." . . .
>
> I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase. (Emphasis by Judge Bryan.)

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In expressing his approval of the district court's plan at all three instructional levels, Circuit Judge Winter in his dissenting opinion candidly acknowledges that racial balancing *per se* should be required and cites as his justification the teacher ratios discussed in *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). Judge Winter concludes: "if in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration . . ." (1301a-1302a).

Having had substantial integration of its faculties in the past, with the opening of its schools this fall Charlotte-Mecklenburg has in each of its 103 schools a white-black teacher ratio of about 3 to 1, which is the racial ratio of faculty members throughout the system. The School Board believes these assignments to be beneficial for both black and white children. However, we do not agree with the district court or Circuit Judge Winter that racial balancing of teachers can be cited as support for the proposition that children can or should be racially balanced as a Constitutional requirement. Teachers are under no compulsion to teach in a particular system. Teacher assignments occasion little, if any, inconvenience for the teacher and no costs or disruptions are imposed upon the school system. By contract they are employed by a system to apply their teaching talents wherever needed. If dissatisfied, they are free to quit and move to a system where employment contracts and conditions are more to their personal likings. Children must attend the school to which they are assigned and have no option to escape the unpalatable effects of their forced participation in a program of racial balancing designed to accommodate others.

In *United States v. Montgomery County Board of Education, supra*, at 236, this Court observed that the petitioners in that case did not argue "for precisely equal ratios in every single school under all circumstances" and that the United States did not argue that "racially balanced faculties are constitutionally required." As noted above, in apparent

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agreement with the principle of racial balancing of school children, Circuit Judge Winter sought to temper the import of the district court order with the mollifying comment that "deviations from the overall ratio" had been permitted to "accommodate circumstances" with respect to particular schools. To one wedded to the proposition that racial balancing and ratios is the desired objective, circumstances and practical problems will seldom be asserted to prevent the achievement of this goal.

2. Racial Balancing and Compulsory Bussing Required by the District and Circuit Courts Violate the Constitutional Rights of the Children Involved.

In its February 2, 1970, Plan the School Board concluded with a statement of its conviction that its duty is to protect the rights of all children (741a):

> . . . The Board understandably is prone to *exercise caution lest, in protecting the rights of some of its citizens, it tramples on the rights of others* in the absence of a clear mandate of the Supreme Court. (Emphasis added.)

This concern of the Board was well-founded. The compulsory cross and satellite bussing requirements of the district court and the Court of Appeals will violate the individual rights guaranteed by the Fourteenth Amendment of those blacks and whites caught up in the forced mass movement of children away from their neighborhoods and out of their normal attendance zones for the sole purpose of achieving the racial balancing prescribed by those orders. It is ironic that the counterpart of the compulsion outlawed by *Brown I* and *II* is now employed in the name of the Constitution. Is it trite to suggest that two wrongs do not make a right?

It is obvious that a school board must necessarily have wide latitude in the establishment of attendance zones for orderly administration of the various schools in its system

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and that, if these zones are fairly conceived on a nondiscriminatory basis, the children may be compelled to attend the school to which they are assigned under the applicable compulsory attendance laws. (See N.C.G.S. Sec. 115-116 et seq.) Absent an unlimited freedom of choice arrangement (which the Charlotte-Mecklenburg Board has not proposed), the right of a child to go to a particular school is, of course, not absolute, but circumscribed by the inherent power of a school board to make reasonable attendance assignments to conform to the needs of the school system and the community it serves.

Whether or not the Board as an elective body could lawfully have required cross and satellite bussing to effect the compulsory mass movement of children may be open to question. Suffice it to say, the Board did not choose to go to this extreme. The point now at issue is whether the judiciary under the mandates of the district court and the Court of Appeals infringed upon the individual constitutional rights of the children and their parents–black and white–who do not want to be bussed or balanced. In requiring this compulsory bussing those orders exceeded any Constitutional requirement, by *excluding* children from attending nearby schools *solely* on account of their race.

Deal v. Cincinnati Board of Education, supra, at 1391-92 (6th Cir. 1969) addressed itself to this matter:

> It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. *Appellants are not the only children who have constitutional rights.* There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neigh-

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> borhoods in order to mix the races. (Emphasis added.)

The district judge in *Ross v. Eckels, Houston Independent School District, supra*, asked an interesting question:

> Our hypothetical student well might say to the Superintendent of Instruction, "You are excluding me from School A, two blocks from my home, because I am black, and for no other reason. How can you do this when the Supreme Court of the United States in its latest pronouncement on the subject imposes on you the duty 'to operate as [a] unitary school system *within which no person is to be effectively excluded from any school because of race or color*?" I would be interested to know how this question would be answered. (Emphasis added.)

From time immemorial, the public school has been a focal point of community and family life. The location of a particular school is a major consideration for parental decisions regarding the location of their homes and the neighborhood in which they choose to live. Obviously, affluent whites and blacks are normally better able to make this choice than poor whites and blacks. Nevertheless, some poor people prefer that their children attend the school serving the areas of their residence. To afford disadvantaged parents the flexibility of greater options for the education of their children than their existing economic or social status may permit and to bring these available options made in line with those enjoyed by the more affluent citizens are worthwhile objects of any desegregation plan. But it is quite a different matter for a judicial decree to compel bussing to a distant school outside the normal attendance zones—whether the parents like it or not. A court mandate that requires this coercion to achieve what it conceives to be a worthy social purpose (i.e. racial balance) is judicial paternalism.

The dissenting opinion of Judge Bell (concurred in by Judge Gewin) in *United States v. Jefferson County Board of Education, supra*, involving the desegregation of numerous deep south schools, speaks to the matter at hand (at 411):

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> Then there is the matter of personal liberty. *Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty.* History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty . . . They (the majority opinion) *cast a long shadow over personal liberty as it embraces freedom of association and a free society.* They do little for the cause of education. (Emphasis added.)

In *Jefferson County, supra*, Judge Gewin in his own dissent (concurred in by Judge Bell) expressed similar views

> . . . There must be a mixing of the races according to majority philosophy *even if such mixing can only be achieved under the lash of compulsion* . . . Accordingly, *while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.* There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law . . . *When our concepts as to proportions and percentages are imposed on school systems*, notwithstanding free choices actually made, *we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly . . . embrace.* (Emphasis added.)

The majority in *Jefferson, supra*, and other courts have sought to justify infringement upon the rights of students in the majority where segregation is said to rest upon *de jure* action.

The distinction between *de facto* and *de jure* is not a valid test by which to measure the liberties of either black children or white children. It is fair to assume that both black and white school children are blissfully unaware of any such distinction or of the circumstances that are relied

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upon by some to justify unequal treatment. The personal rights and liberties of one child should not be sacrificed to promote those of another.

3. A Neighborhood Plan Fairly Administered Without Racial Bias Satisfies the Constitutional Requirements of a Unitary System.

The neighborhood school concept[21] is one that the Board considers to be beneficial to the children and enhances the support that comes when children and parents identify themselves with a particular school and its programs. Fragmentation of this type of association is not in the best interest of our schools.

In its April 23, 1969, Order the district court volunteered its own educational philosophy in opposition to the neighborhood school (306a):

> Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood . . . If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships . . .

To the contrary, all too many of our present day relationships have become institutionalized and depersonalized. We believe this trend to be unwholesome. Close relationships among teachers, parents and children should to the maximum extent be encouraged and undergirded. The neighborhood school plays an important part in fostering such relationships–particularly at the elementary level where the

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[21]Geographical zoning is the common method of determining school attendance and the neighborhood school is the predominant attendance unit. *Racial Isolation in the Public Schools–Summary of a Report by the Commission on Civil Rights*, page 3, (March 1967).

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ties between home, school and after-class acitvities are an important part of the educational process of children in their early formative years. In a metropolitan system such as ours the ideal may not always be achieved. This should not be a reason for dismantling and abandoning the neighborhood school.[22]

From the beginning there has been this marked contrast between the views of the trial court and those of the Board regarding the pertinence of the neighborhood school. The School Board responded to the pressure of the trial court when it submitted its February 2, 1970, plan–a plan which retained, but severely strained, the principle of the neighborhood school. *Deal v. Cincinnati Board of Education*, 324 F.2d 209 (6th Cir. 1966) succinctly stated the case for the neighborhood school:

> Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominately or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and

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[22]It is interesting to note that in the brief filed by petitioners with this Court in *Green, supra*, October Term, 1967, No. 695, substantially the same view of the importance of the neighborhood school was expressed at page 14 of that brief: "Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school populations."

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> administration through the use of neutral, easily determined standards, and better home-school communication.

This appraisal was reaffirmed in *Deal v. Cincinnati Board of Education* (1969) *supra*, wherein the Court observed that the neighborhood school concept was not only sanctioned, but required, by statute in the State of Ohio.

In his policy statement of March 24, 1970, entitled *SCHOOL DESEGREGATION: A Free and Open Society* (116 Cong. Rec. S4351, Daily Ed., March 24, 1970), the President of the United States addressed himself at length and in depth to the important role that the neighborhood school plays in the education of our public school children. He said in part:

> The neighborhood school will be deemed the most appropriate base for such a [unitary] system.
>
> Transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required.

An earlier statement[23] by Robert Finch, then Secretary of Health, Education and Welfare, with particular reference to the Charlotte case, underscored some of the ill-effects of a dismantling of the neighborhood schools:

> We have a very confused set of decisions—that go to both ends of the spectrum with regard to the question of bussing, for example. We have a decision out of the Fifth Circuit involving Orange County, Florida, which says in effect the neighborhood school is the important concept, and that must be preserved at all costs, and that's where the dollars ought to be allocated.
>
> Then you have decisions like Charlotte, in the Carolinas, in Los Angeles, which I think are totally unrealistic, because they say that you shall take the

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[23] *PROFILE*, a production of Metromedia Radio News, Feb. 27, 1970, Transcript at 7-8.

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> percentages in the district as a whole and apply those and force those on each district—or, each school within that district.
>
> And in the case of Charlotte, they have to buy 400 new buses; in the case of Los Angeles, they have to buy, I guess, better than 500 new buses, with all that goes with that, and when you have that kind of a situation, that's not the best use of your resources, because you're trying desperately to keep the doors open, to pay faculty, to pay janitors. But beyond that, it's not the best educational experience, because to haul young children, for an hour or more, across long distances, as you have particularly in the Los Angeles situation, means they can't get any tutoring after school, the parents can't—have great difficulty in getting to the teacher to talk about their child; they can't take part in athletic events, or dramatic events or extracurricular events, and it's not good educational policy.
>
> So that I feel very strongly that those decisions are moving in the wrong direction.

In the Charlotte-Mecklenburg case, the trial court quite obviously considered the neighborhood school to be unimportant and irrelevant. The Court of Appeals, though not addressing itself *per se* to the neighborhood school concept, nevertheless disapproved the geographic zones at all three instructional levels which the Board in its considered judgment had proposed to achieve a unitary system while retaining the basic benefits of the neighborhood school.[24]

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[24] In commenting upon the complexities of ineffective freedom of choice plans, the petitioners in *Green, supra*, at page 15 of their brief, recommended the simplicity of disestablishing dual zones by conversion to compact attendance areas close to home: "The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method . . . ."

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The School Board plan clearly demonstrates a good faith, conscious and effective effort to keep its neighborhood school attendance areas–drastically gerrymandered to promote maximum desegregation. This plan satisfies the Constitutional requirement that a unitary system be established within which no child is excluded because of race or color.

4. The Compulsory Bussing Approved by the Court of Appeals Is Violative of the Provisions of Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000c(b) and 2000c-6(a)(2)] Which Expressly Prohibits a United States Court To Order Transportation To Achieve Racial Balance in Schools.

The Court of Appeals has read into the Civil Rights Act of 1964 interpretations which are not fairly warranted by the plain and intelligible language of the Act or supported by its legislative history. In so doing, it has joined the error committed by the Court of Appeals for the Fifth Circuit in *Jefferson, supra*, which reached its conclusion by a strained illogical analysis of this Act and the legislative history.

The clear language of the Act makes no distinction between *de facto* and *de jure* segregation and the legislative history expressly disclaims any sectional or tenuous distinctions adopted by the Court of Appeals and the cases on which it relies. If it were otherwise, Congress would have expressly so stated and the proponents of the bill would have made it so known.

The Courts have been unwilling to give any definitive statement with respect to the term "desegregation" and, therefore, it became incumbent upon Congress to supply an answer in this void. 42 U.S.C. 2000c(b) provides as follows:

> "Desegregation" means the assignment of students to public schools and within such schools without

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> regard to their race, color, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

It is therefore apparent that Congress in expressing a definition of "desegregation" in a positive manner stated that no student would be *excluded* from his school on account of race, color, religion or national origin. This is the language of *Alexander v. Holmes, supra.* Congress also negatively stated "desegregation" does not mean assignment to overcome racial imbalance.

In order to give further meaning to its definition, Congress by 42 U.S.C. 2000c(a) provides in part as follows:

> . . .[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with Constitutional standards. . . .

The term "desegregation" has taken on such national concern and importance that a Congressional definition may properly be regarded as a statement of public policy. Although the courts may take action with reference to establishing public policy, it primarily rests with the lawmakers to determine public policy. In *Building Service Employees International Union v. Gazzam*, 339 U.S. 991 (1950), the Supreme Court held:

> The public policy of any state is to be found in its Constitution, acts of the legislature, and the decisions of its courts. *Primarily, it is for the lawmakers to determine the public policy of the state.* (p. 787) *Twin City Pipeline Company v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S. Ct. 476, 478, 75 L. Ed. 1112, 83 A.L.R. 1168.

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Having primary responsibility, and acting to fill a void left by the courts, the public policy as expressed by the Congress of the United States is binding upon the judiciary.

Shortly after the Civil Rights Act of 1964 became the law of the land, the Circuit Court for the Fifth Circuit by a three-judge panel in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966) commonly referred to as *Jefferson I*, and *en banc* in *United States v. Jefferson County School Board*, 380 F.2d 385 (1967), commonly referred to as *Jefferson II*, undertook to dissect that Congressional enactment. In *Jefferson I* the Court acknowledged the supremacy of the legislature in the establishment of national policy in the constitutional scheme of things and the restraints that should be employed by the judiciary in running counter to such a declaration policy:

> More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation. (at page 850) . . . When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy. (at 856) . . . We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy. (at 856) . . .

Having made these pronouncements, the panel in *Jefferson I* abandoned these professed restraints and adopted a rationale by which it came to unwarranted conclusions that clearly thwarted the legislative policy as expressed in the Civil Rights Act of 1964[25] expressly forbidding racial balancing

[25]The remarks of Hubert Humphrey, then Majority Whip, made during the course of Senate deliberations are a clear down-to-earth expression of the legislative intent:

> . . .[T]he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The

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and the use of transportation to achieve it. This error was perpetuated by the majority in *Jefferson II* and other courts relying upon the ill-considered reasoning of these cases.

Judge Bryan in his dissent in the Charlotte-Mecklenburg case clearly recognizes congressional hostility to the principle of "racial balance":

> Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code §2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal Court] seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . to achieve racial balance . . .

The opinions and orders of the Court of Appeals and of the district court are based on the premise that balancing of the races in each of the Charlotte-Mecklenburg schools is the optimal objective. Those opinions and orders contravene the prohibition of the Civil Rights Act of 1964.

F. RACIAL BALANCE–THE HARBINGER OF MASSIVE COURT INVOLVEMENT IN SOCIAL THEORIES.

The Supreme Court is now being asked by petitioners to direct this School Board to engage in another experiment in efforts to seek some educational or social goal which has eluded them and will continue to do so for years to come. It is well known that social balance, social equivalence,

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bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. 110 Cong. Rec. p. 12717, June 4, 1964.

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educational equivalence and related concepts will not be accomplished by the blacks over night. All the sociologists and educators agree on this point.

The theory advanced by the petitioners in the original *Brown* case, *supra,* was not that every child would be entitled to go to a non-segregated school, but rather that the children would be distributed to the schools by drawing attendance lines on a natural basis. 21 U.S.L.W. 3164 (Dec. 16, 1952). This position was pursued in *Cooper v. Aaron*, 358 U.S. 1 (1958) where petitioners sought enforcement of a plan which proposed to "develop school attendance areas consistent with the location of white and colored pupils with respect to the present and future physical facilities of the Little Rock school district." *Norwood v. Tucker,* 287 F.2d 798 (8th Cir. 1961).

The theory of freedom of choice was successfully urged upon this Court in *Goss v. Knoxville*, 373 U.S. 683 (1963) and was openly embraced by the Department of Health, Education and Welfare under the Civil Rights Act of 1964 and by the Fifth Circuit in *United States v. Jefferson*, 380 F.2d 385 (1967).

Petitioners' attorneys in *Green, supra*, (Oct. term, 1967, #695), on page 15 of their brief, argued:

> After Brown, southern school boards were faced with the problem of "effectuating a transition to a racially non-discriminatory system" (Brown II at 301). *The easiest method*, administratively, was *to convert* the dual attendance zones *into single attendance zones*, without regard to race, so that assignment of all students would depend only on *proximity* and *convenience*.[16]
>
> [16]Indeed, it was this method that this Court alluded in Brown II when it stated "[t]o that end, the courts may consider problems related to administration, arising from . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U.S. at 300-301). (Emphasis added.)

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Similar expressions appear throughout petitioners' brief in *Green*.

Notwithstanding petitioners' arguments in *Green*, and notwithstanding appellate approval of the existing attendance lines of the Charlotte-Mecklenburg system, the Board gerrymandered so as to produce a maximum racial mix in schools and proposed to totally desegregate faculties. It has gone far beyond the requirements of *Brown, Green* and the position of the NAACP throughout all Supreme Court proceedings. Now the NAACP seeks total racial balance. Why?

For years, the courts and school systems have been advised that dramatic improvement in the performance of black students could be expected upon the attainment of desegregation. The Coleman Report teaches there is a tendency for blacks to improve in desegregated schools. The achievement tests of this system (R. Ex. 64, July 15, 1970) disclose that the improvement brought about by desegregation is indeed slight. Perhaps the reason is that this system has been offering educational equivalence in its facilities and programs for some years (298a-302a).

The disappointing results of school desegregation brings to the forefront the environmentalists who have consistently maintained that the environment and attitudes of a child are the largest determinants in achieving equivalence. How will the courts meet this problem? Will it require massive economic assistance to families in the lower economic strata? Perhaps the court will be persuaded that the attitudes and environment of the blacks may be enhanced by enlarging the school board's responsibility with respect to food, clothing and shelter, all of which may best be resolved by placing these children in state maintained boarding educational centers. If the court has at that time accepted the racial balance theory, then in view of the substantial transportation times which children encounter in traveling to and from these centers, it is a simple step of mental gymnastics to require full attendance of whites in these educational centers so as to further satisfy the peer

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group advocates. If this Court embraces the principle of racial balancing, it will have adopted the proposition that the constitutional rights of one child may be submerged to promote the presumed rights of another.

Even this will not produce total social mixing sought by petitioners and additional areas of court intervention will be requested which the court must be prepared to face. For instance, the district court conjectured that public housing has been concentrated by action of federal officials. Obviously, the concentration of blacks in large public housing projects would perpetuate segregation not only in the schools but in neighborhoods. Will the court limit the size of public housing projects and the distance between such projects so as to assure dispersal of blacks?

Related questions arise in the area of private residential housing which the district court said perpetuated segregation. Will this Court ultimately require a private owner of a subdivision to include a prescribed quota of homes for blacks only in each block of a residential development? Will transportation be required in remote suburban areas for those blacks who customarily use public transportation?

Numerous other questions relate to what extent this Court will require local public authorities to inaugurate plans for the racial residential balancing of entire communities. If community balancing is required, will judicial control over power possessed by local building licensing officials be used to establish and maintain such balancing? Will local governments be required to submit for court approval plans for desegregation of entire cities? Will such plans be subject to continued judicial review and supervision?

Another area which petitioners may pursue through the courts relates to school grading, IQ and achievement tests administered by the school system. Obviously, those students who perform poorly in school on such tests are less likely to get the desired employment positions. The remedy which may be urged upon the courts is that such grading is unfair to minority groups with different cultural back-

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grounds. Therefore, all students should be automatically promoted as having received the same education and given the same certificate on graduation. In the eyes of the prospective employer, all students would possess the same educational qualifications. Is this Court prepared to foist this theory upon the nation?

Recently, this Court had occasion to pass upon the unconstitutionality of disproportionate district representation which resulted in the "one man one vote rule." *Reynolds v. Sims*, 377 U.S. 533 (1964). School boards are now being faced with demands by black students that student organizations, cheerleaders, school officers, class officers and other positions ordinarily determined by popular vote be accorded blacks pro rata and without regard to the vote of the majority. If this Court should direct pro rata representation in the schools, then this Court must be prepared to answer similar demands of these black students when they move into the adult world which does not permit racial ratios in elective offices. Will this Court direct that minority groups be permitted to select a pro rata number of seats in Congress, state legislatures and other positions of government?

It is quite obvious that this Court would be unwilling to order the adults of this society to such extremes in an attempt to attain social racial balances. Are children any less citizens by reason of their youth? Certainly not, as they are accorded the full spectrum of constitutional rights and obligations conferred on adults, other than the right to vote. This being true, this Court cannot justify taking from the children involved their personal preferences, their time, their right to free association and the host of other rights they possess as citizens which would be sacrificed in being involuntarily transported to a school beyond the area in which they reside—solely for the purpose of satisfying a racial balance numbers game. The rights of one child and the child's parents to be free of standardization by the state is clearly enunciated in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925):

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> . . . The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to *standardize its children* by forcing them to accept public instruction from public teachers only. *The child is not the mere creature of the state.* Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (Emphasis added.)

In describing the word "liberty", this court held in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as follows:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of the happiness of men . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect . . .

If this Court directs racial balance in the child's world, then there is no constitutional prohibition which would prevent the court ordering racial balance in the adult world. The Constitution as written and as developed contains no premise upon which to undergird such reckless appropriation of the constitutional rights of its citizens, be they children or adults. Mr. Justice Reynolds in *Meyer v. Nebraska, supra*, describing the totalitarian ancient state of Sparta, stated:

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> . . . In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of the state without doing violence to both the letter and spirit of the Constitution.

Will the courts tread where it has forbidden the legislature to walk?

II. DISCUSSION OF CONSTITUTIONAL PRINCIPLES TO DESEGREGATION PLANS.

A. GENERAL STATEMENT REGARDING DESEGREGATION PLANS INVOLVED IN THIS CASE.

When the Fourth Circuit heard this case, there were two plans before it, both of which related to all three instructional levels: The February 2, 1970, plan of the Board and the February 5, 1970, plan of the district court, which the trial judge later reapproved and reinstated in his orders of August 3 and August 7, 1970. After remand by the Court of Appeals, during the course of the hearings held pursuant to the Circuit Court directives, three other desegregation plans were presented for the elementary level: the HEW plan, a plan prepared by a minority of the Board and an earlier draft of a plan prepared by the court consultant Dr. John A. Finger. In his August 3, 1970, Order, the trial judge disapproved the HEW plan and found the other two to be reasonable alternatives. Having appealed to the Fourth Circuit from the August 3 and August 7 Orders, the School Board on September 3, 1970, filed with this Court a motion for leave to supplement the record, or in the alternative for a Writ of Certiorari to the Court of Appeals, so that this

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Court would have before it the complete record of the proceedings that culminated in the August 3 and August 7 Orders–including the three additional plans referred to above. As this brief is being prepared no action has been taken by this Court upon the Board's motion of September 3. On the assumption that the motion will be granted, this brief addresses itself to all five plans.

In an effort to be of the greatest possible assistance to this Court, as a separate appendix to this brief the School Board has filed a total of 9 maps (color coded where appropriate) to show graphically the attendance areas, pairings, clusters and other information concerning all of the plans–with the exception of the earlier Finger draft that was too indefinite for adaption to a graphic portrayal. Careful consideration of these maps is earnestly invited with the hope that this Court will find them to be a convenient means of getting a quick accurate picture and comparison of the various desegregation proposals.

B. THE BOARD PLAN CONVERTS THE CHARLOTTE-MECKLENBURG SCHOOLS TO A UNITARY SYSTEM. THE FOURTH CIRCUIT JOINED IN THE ERROR OF THE TRIAL COURT BY DISAPPROVING THAT PLAN.

1. The Board Plan Squares with the Conversion Checklist Prescribed by Green.

In *Green, supra*, this Court (commenting upon the typical pattern of state-imposed dualty found in New Kent County and outlawed by *Brown I* and *II*) observed at 435:

> . . . Racial identification of the system's schools was complete, extending not just to the *composition of student bodies* at the two schools but to every facet of school operations–*faculty, staff, transportation, extracurricular activities and facilities* . . . (Emphasis added.)

This itemization has been used by courts as a checklist by which to measure the effectiveness of desegregation efforts.

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The administrative staff and school faculties of the Charlotte-Mecklenburg system are now thoroughly integrated. In its April 23, 1970, Order the district judge made specific findings that there was no discrimination with respect to the "other facets" referred to in *Green*, as well as a number of others (298a-301a). The Fourth Circuit also took note of these (1265a-1266a). In addition the Board has inaugurated many other innovative programs.

Most of these policies and practices were undertaken by the Board on its own initiative, a circumstance that prompted the district court to state that nothing in its April 23, 1969 Order shall be construed as any reflection on the good faith motives or judgment of the School Board which had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others." (311a-312a).

Since the petitioners do not controvert the findings of the trial judge in giving Charlotte-Mecklenburg a clean bill of health with respect to these "other facets," the only one at issue in this case involves the question of whether the Board plan effectively eliminates discrimination in the schools and student bodies of this system.

2. The Board Plan Based on Geographic Attendance Zones Gerrymandered to Achieve Maximum Racial Mix Fully Complies with Constitutional Requirements for Desegregation of the Charlotte-Mecklenburg Schools and Their Student Bodies.

The pivotal issue in this case is whether the School Board's desegregation plan based on comprehensively restructured geographic attendance zones satisfies the Constitutional requirement of a unitary system in a situation where these zones are established to promote the maximum amount of desegregation possible by the employment of this tech-

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nique.[26] This issue involves a consideration of the extent to which a school board may employ this technique as a means of preserving some semblance of the neighborhood school concept which it, together with most school systems and educators, believe to be beneficial.[27]

Of the maps previously referred to, the Court's attention is invited to Map Nos. 1, 6 and 8 showing the elementary, junior high and senior high restructured zones of the Board

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[26]The Board plan is supplemented by a majority to minority transfer program designed to promote desegregation and to prevent resegregation. It allows any black child in a school having more than 30% of his race to attend one that is less than 30% black, but permits a white child to transfer only if his present school is more than 70% white and the one to which he seeks assignment is less than 70% white. To encourage blacks to take advantage of this option, transportation is provided for those chosing to move from their neighborhoods.

[27]Compare article appearing in NATION'S SCHOOLS, June, 1970, page 100, entitled "*Forced Busing Vetoed by 90% of Schoolmen*":

> Although nearly 40 per cent of the nation's school superintendents think the Nixon Administration is vacillating on its enforcement of school desegregation, 90 per cent agree with the President's recently stated reservations about compulsory busing . . .
>
> Despite the various shadings of opinion on enforcement policy, most schoolmen reported unequivocal opposition to busing as a means for achieving desegregated schools. Judging form their comments, for a sizeable majority of superintendents the neighborhood school represents, as one New Yorker expressed it, "a fundamental principle in American public education." Objections to busing fell mainly into the following categories:
>
> Busing is an infringement on the rights of parents and students.
>
> Busing is a poor solution to the problem of desegregating the schools since the long-term answer depends on the alteration of residential housing patterns.
>
> Busing is too expensive a solution, when money could be better spent to upgrade educational programs in poverty area schools . . .
>
> How administrators voted: . . .

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plan and Map No. 2 showing the new elementary zones superimposed upon the previous attendance areas.[28]

Under the Board plan, 100 of the 103 schools in the Charlotte-Mecklenburg System would have some degree of racial mix, leaving only three all-white schools. 68% (16,709) of the black students would attend 93 schools with less than 40% black student bodies[29]—leaving the remaining 32% of the black pupils in the 10 schools having white ratios of 17% to 1%.[30] These 10 predominately black schools remained in spite of the Board's best efforts to achieve a more satisfactory racial mix in them by means of the drastically gerrymandered attendance lines. Of these 10 schools, 9 are elementary[31] and 1 is a junior high school.[32]

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2. Do you think busing of students should be implemented to achieve desegregation, even if it means a weakening of the neighborhood school concept?

10% Yes 90% No . . .

The opinion poll survey, conducted monthly by the editorial staff of NATION's SCHOOLS, is based on a five per cent proportional sampling of 14,000 school administrators in 50 states. This month's poll brought a 40 per cent response.

[28]Some of these maps reflect slight adjustments occasioned by "rounding off" the square corners of the computer lines to conform them to identificable landmarks.

[29]This represents a 100% increase over 1969-70, when 8,858 blacks attended 73 predominately white schools. In March of 1965 only 343 blacks attended 22 white schools. Several predominately white schools slightly exceed 40% black.

[30]See Appendix attached to this brief for statistical data pertaining to the Board plan.

[31]Under the Board plan, these 9 elementary schools have the following black-white ratios: Bruns Ave. (90-10); Marie Davis (88-12); Double Oaks (99-1); Druid Hills (96-4); First Ward (99-1); Lincoln Heights (99-1); Oaklawn (99-1); University Park (85-15); and Villa Heights (83-17). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

[32]Under the Board plan, Piedmont Junior High has a black-white ratio of 90% (B)-10% (W). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

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The remaining predominately black schools are located in the inner-city core which is populated for the most part by blacks, many of whom due to shifting housing patterns had moved into previously white areas. In its March 21, 1970, Supplemental Findings of Fact (1208a), the trial court acknowledged:

> Both Dr. Finger and the school board staff appear to have agreed, and the *court finds as a fact,* that for the present at least, there is *no way to desegregate* the all-black schools in Northwest Charlotte *without providing* (or continuing to provide) *bus or other transportation* for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (Emphasis added.)

In formulating its plan, the Board to a very significant degree has elected to exceed Constitutional requirements. It materially altered the compactness of neighborhood school areas.[33] It introduced into each school a precise black-white teacher ratio. It sought to achieve a 70/30

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[33]*Brown II* recognized that an acceptable desegregation plan may employ geographical rezoning if done fairly and in good faith to effect "a revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis." A pertinent historical note is made by Alexander M. Bickell in his recent book, *The Supreme Court and the Idea of Progress:*

> At the first argument of *Brown v. Board of Education* in 1952, Justice Frankfurter asked the future Justice Thurgood Marshall, then counsel for the Negro children, whether a decision in his favor would "entitle every mother to have her child go to a non-segregated school?" Mr. Marshall replied in the negative. "What will it do?" Justice Frankfurter pursued. Mr. Marshall replied: "The School Board, I assume would find some other method of distributing the children by drawing district lines." The only requirement would be, Mr. Marshall added, that the lines be drawn "on a natural basis," and not be gerrymandered so as to enclose or exclude Negro neighborhoods. Bickell, *The Supreme Court and the Idea of Progress,* p. 117 (1970). See also 21 U.S.L.W. 3164 (1952).

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racial mix in as many of the 103 schools as possible—a goal which the Board maintains cannot be required by judicial fiat. Because of neighborhood patterns, only an intractable remnant of black children will be assigned to the 10 inner-city black schools. Any of these who wish to leave their neighborhoods are encouraged to do so by the majority to minority transfer policy and are provided the transportation with which to accomplish the move. Of those who remain, almost all are assured of a desegregated school experience for one-half of their 12 years.[34]

By any reasonable standard the Board plan dismantles whatever remained of the old dual system that years ago was maintained under the permissiveness of *Plessy v. Ferguson* and the compulson of State law. Any vestige of racial discrimination or identification has been obliterated. All facets of the Charlotte-Mecklenburg schools—including student bodies, faculty, staff, transportation, extracurricular activities and facilities—are desegregated. No child is excluded from any of the 103 schools because of race or color. As stated by the Court of Appeals (1268a), an intractable remnant of segregation "should not void an otherwise exemplary plan for the creation of a unitary system."

A consideration of the pro-desegregation gerrymandered zones of the Board excludes any inference that they were formulated for any purpose other than a color conscious one to promote maximum desegregation of the Charlotte-Mecklenburg Schools. The Board has acquitted its affirmative duty to convert to a unitary system.

Both the trial judge and the Court of Appeals erred when

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[34] Of the 32% black children who will remain in predominately black schools 6,739 are assigned to 9 (out of a total of 72) elementary schools and 758 will attend 1 (out of a total of 21) junior high school. All 10 of the high schools are desegregated. Under the Board plan all of the 758 junior high students will advance to the predominately white high schools and all but a small handful of the elementary youngsters will advance to the 20 desegregated junior high schools.

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they disapproved the Board plan—errors premised upon the faulty notion that more racial balancing should be superimposed upon that which the Board itself elected to undertake. By so doing, the Circuit Court exceeded the bounds of its own test of reasonableness.

C. THE COURT APPROVED FINGER PLAN EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING AND THE BUSSING TO IMPLEMENT IT. THE FOURTH CIRCUIT JOINED IN THE TRIAL COURT'S ERRORS BY DISAPPROVING THE BOARD PLAN AND MISAPPLYING ITS OWN RULE OF REASON.

This controversy revolves around the trial court's February 5, 1970, Order requiring long distance bussing to racially balance the elementary, junior high and senior high schools of the Charlotte-Mecklenburg system. The plan adopted by the trial court and ordered into effect was prepared by Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College, who had previously appeared as a witness for the plaintiffs.[35] The objectionable features of the Finger plan were basically occasioned by his adding to the Board plan the paired and clustered schools and satellite areas that he considered necessary to comply with trial court instructions to eliminate the 10 schools that remained predominately black under the Board plan and to create a racial balance in one senior high school (981a). Upon appeal, the Fourth Circuit approved the secondary plans of the district court, but disapproved its elementary plan as being unreasonably onerous. Upon remand (August 3, 1970, Order) contrary to the Circuit Court ruling the trial judge concluded

[35]The Fourth Circuit in commenting on the use of Dr. Finger as court consultant cautioned against the use of a partisan witness, but concluded that his dual role did not cause him to be faithless to the trust imposed on him and therefore, "the error, if any, in his selection, was harmless." (1279a).

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that his own elementary plan was reasonable and reaffirmed his February 5 Order at all three instructional levels.

1. An Analysis of the Court Approved Finger Plan Shows the Racial Balancing Imposed Upon the Charlotte-Mecklenburg Schools.

The following is a brief summary of the consequences of balancing requirements at all three instructional levels which were prescribed by the February 5 and August 3 Orders of the district judge—those at the secondary level having been approved by the Circuit Court and those at the elementary level having been held by the Circuit Court to be unreasonable because too extensive and onerous.

(a) *Elementary Schools*

The most burdensome part of the trial court's order is the long distance cross-bussing of about 10,300 elementary children to eliminate 9 predominately black inner-city schools by pairing them with 24 predominately white suburban schools—requiring the bussing of 5,150 black first, second, third and fourth graders to the white schools and 5,150 white fifth and sixth graders to the black schools.

It is ironic that, under court compulsion it is proposed to reinstate the dual bus system Charlotte-Mecklenburg abandoned years ago. Once again, buses for whites only and buses for blacks only will be passing each other on the streets of Charlotte.

This Court's attention is invited to Map 3 which shows more clearly than can any written description the practical effect of the racial balancing edicted by the court plan at the elementary level. The long streamers on that map are designed to assist this Court in identifying the 9 inner-city predominately black schools that are paired with the 24 white suburban schools for the sole purpose of achieving the optimal 70/30 racial mix the trial judge adopted as his goal.

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These are the 9 elementary schools in which the School Board was unable to attain a more satisfactory mix[36] because the concentration in black neighborhoods is so great that pulling in whites from adjoining areas would cancel out the desegregation achieved under the Board plan in the nearby schools.

In disapproving the trial judge's elementary plan, the Fourth Circuit did not quarrel with the racial balancing goal sought to be realized. Under its test of reasonableness, the Court of Appeals merely concluded that, based on the trial court's estimates, the resulting increase of 39% in the number of elementary students bussed and 32% in the present bus fleet was too extensive and too onerous (1276a). The dissenters, Judges Sobeloff and Winter, were delighted with the results and the means of attaining them.

(b) *Junior High Schools*

The Board plan proposed to restructure the attendance lines of the 21 junior high schools so that all but one of them would not have more than 38% black students. In spite of the Board's best efforts, the one remaining school (Piedmont Junior High) housing about 840 pupils was left 90% black and 10% white. As was the case with the 9 elementary schools, the Board was unable to achieve further mixing of Piedmont Junior High because of the adverse domino effect upon the nearby junior highs where satisfactory racial ratios had been accomplished.

In order to reduce the percentage of blacks in this one school from 90% (758 pupils) to 32% (243 pupils), the court consultant reshuffled the Board's proposed attendance zones for the junior high schools and provided for satellite bussing

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[36]The results of the School Board plan regarding these 9 schools are summarized in footnote No. 31 at page 72 of this brief. Even under the Board plan in 4 of these 9 schools the student bodies would be comprised of 10%-17% whites, a mix considered completely acceptable by many courts.

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of inner-city black youngsters to nine predominately white suburban junior high schools. This proposal of Dr. Finger was approved by the trial court and the Court of Appeals.

Map No. 7 shows the junior high zones restructured by district court and the streamers on that map identify the various inner-city schools from which black youngsters will be bussed to outlying schools. As indicated, all of these changes were occasioned by the insistence of both the district court and the Court of Appeals that the 90% black-10% white ratio at Piedmont is not good enough. The extensive court imposed surgery was undertaken notwithstanding the fact that the Board had already produced satisfactory ratios in all of the schools involved in the reshuffle, with the single exception of Piedmont, a school nearly all white 5 years ago (691a).

According to Board estimates these changes prescribed by Dr. Finger require the bussing of 4,741 additional children–6,129 under the Finger plan v. 1,388 under the Board plan (881a, 872a). All of this is directed to effect a reduction of black students at 1 of the 21 schools (Piedmont) by only 515 students. These dislocations and the cost of the bussing required to accomplish this racial balancing cannot stand up under the test of reason or the requirements of the Constitution.

(c) *Senior High Schools*

In some respects, the court action at the senior high school level evidences the most glaring, if not the most extensive, example of racial balancing. Under the Board plan all 10 high schools were desegregated–9 of them 17%-36% black and 1 (Independence High) with 2% black. This plan was adopted by the trial court and approved by the Circuit Court with one exception: 300 black students residing in the inner core of the City must be bussed from the area of their residence through center city traffic a distance of about 12 or 13 miles to Independence High School located in white suburbia.

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Reference is made to Map No. 9 for a graphic illustration of the practical result of Dr. Finger's modification requiring the bussing of the 300 blacks from the inner city satellite area to Independence High.

The Court of Appeals referred to the bus mileage for the black youngsters as being about the same as the average of other bus routes serving Independence High (1273a)–but neglected to observe that the existing bus routes were primarily in rural and suburban areas, rather than in the congested inner city areas which would be traversed by the 300 black students.

Under the Board plan these 300 children would have attended a thoroughly desegregated high school having a racial composition of 36% black and 64% white. The only purpose served by the court-directed shifting of these 300 was to make a white school less white. Is the time and safety of these black children irrelevant? They were assured of a desegregated education.

2. The Court-Approved Finger Plan Is Unreasonable and Proper Consideration Was Not Given to the Burdens Which that Plan Imposes on the Charlotte-Mecklenburg System.

The reservations of the district court regarding the pertinence of the Fourth Circuit's Rule of Reason and its preference for a Rule of Absolutes impaired a proper and full consideration of the Board's evidence and the practical and educational problems confronting the Charlotte-Mecklenburg System within the context of a complex urban setting.

In his August 3 Order (Pets.' Br. Al *et seq*) after eight days of testimony at the hearing that the Circuit Court required, the district judge did not make a single finding of fact favorable to the School Board. The same is true with reference to the March 21, 1970 Supplemental Findings of Fact (1198a) made after hearings that were also held

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pursuant to Circuit Court directions.[37] These findings indicate appalling disdain of the Board's evidence.

The School Board filed objections and exceptions to the findings of fact set forth in both of those Orders. The district court took no material action with respect to the Board's motions that these findings of fact be modified to conform to the evidence. The objections and exceptions to the March 21 findings appear at Appendix 1241a-1254a. Those submitted in response to the August 3 findings will be printed and filed with this Court as part of an additional appendix. A careful consideration of those objections and exceptions will assist this Court in appraising the conclusions of the district court.[38]

Due to limitation of space it is practical to discuss only a few of the areas wherein the findings of the trial judge failed to conform to the evidence.

There was a marked disparity between the estimates of the trial court and those of the experienced transportation staff of the schools regarding the additional number of children to be transported under the Finger plan and the number of busses required—13,300 (138 busses) according to the judge and 23,384 (526 busses) according to the staff. As the Court of Appeals observed (1271a), anyone's estimates rest on many variables. This is, of course true, but the judge's drastic discount factors (1215a) were unwarranted. The trial court's computations ignore the fact that

[37]At the February 5, 1970 hearing the trial judge repeatedly stated that the evidence regarding transportation costs and other such data was irrelevant and indicated his impatience with the whole subject. (For example, see Tr. 111-14, 128-30, 133-134, 150-151, 153.) On March 5, 1970, the Fourth Circuit granted a stay of the February 5, 1970 Order with directions that the district court make supplemental findings of fact regarding transportation, the stay being left undisturbed by this Court.

[38]Among other portions of the record that this Court may find particularly helpful are the affidavit of J. D. Morgan and its attachments (853a-890a), the affidavit of William C. Self (850a-852a) and affidavits of Herman J. Hoose (894a-897a, 1038a-1040a).

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the long routes through the city traffic will hamper the use of multiple bus trips and will occasion the need for hard-to-get adult drivers unless class schedules of student drivers are severely staggered to accommodate transportation. The court presumes that a bus can make 1.8 trips per day which was the 1969-70 experience of the system with its rural routes. This conclusion disregards the evidence showing that the 1.8 average includes empty bus trips by the driver, that (excluding empty bus trips) last year's average on primarily rural trips were 1.49 overall and 1.06 at the elementary level, that the length of trips includes not only school to school but the meanderings of routes to pick up children, that some busses must operate with under-capacity loads when necessary to pick up pockets of children in out-of-the-way areas and that busses in inner-city traffic should not be overloaded. In computing the additional children to be transplanted, the trial judge ignores the evidence that a space must be provided for each child assigned to a bus whether or not he is absent on a particular day, that due to familiarity with specific schools and community areas the school staff reduced where appropriate the eligible children who would not utilize the busses and that almost all of the children in the low economic areas would be dependent upon school bus transportation.

The district court's justification of the great expansion of the existing fleet resulting from its order by reference to the pre-existing transportation (280 busses; 23,000 children) is unwarranted and ignores the problems occasioned by the mass movement of children and busses over the streets and arteries of the inner-city and its perimeter already saturated and glutted to the breaking point—particularly during rush hour traffic. School busses having a 35 mile speed limit will be thrown into the stream of arteries moving 40-50 miles per hour. The city traffic engineer acknowledged that at present some school busses are being operated in congested areas—but equated the practice to a tolerable amount of "smallpox" that should not be consciously turned into an "epidemic." Overloaded busses on

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rural routes cannot sensibly be cited to support the wisdom of overloading busses operating cross-town in the congestion of inner-city rush hour traffic—particularly with immature drivers.

The trial judge's findings imply the availability of unlimited funds from State and local sources with which to defray the extensive cost of the additional bussing imposed upon the Charlotte-Mecklenburg System—citing in support the size of the budgets for the State of North Carolina, the County of Mecklenburg and the local school system and implying that, if the local community gets financial assistance from the State, it is therefore "free." The evidence shows that the School Board has no control over the State budget, that the funds it gets from Federal and State sources are nondiscretionary and earmarked primarily for teacher salaries, instructional services and special programs, that the current local school budget permits the educational programs (severely beset by inflation and growing pains) to just about stay even and that diversion of funds to finance a greatly expanded transportation system will curtail the availability of funds for educational pursuits. To the extent the judge implies money from the State is "free" he overlooks the fact that the State gets its money from the taxpaying public and the source thereof is immaterial in applying a Rule of Reason. In seeking to minimize the cost of busses to implement the Finger plan for the 1970-71 school year, the district court takes refuge in the willingness of the State to lend the Charlotte-Mecklenburg System obsolete busses (14 to 16 years old) on a one-year basis as a supplement to the existing fleet.[39] This overlooks the obvious fact that

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[39]Paragraph 14 of the order dated August 3, 1970, carries with it an implication of the Board's prior concealment of ownership of additional busses totaling 107. Common sense dictates that a bus fleet of 280 would require approximately 20 spare busses which could not be used for regular runs as they are required for use as substitutes while other busses are out of service. The 29 activity busses, although titled in the Board, are owned by the individual schools and for limited use, 500 to 600 miles annually (Tr. 1043, July 15, 1970). Delivery of

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the capital outlay burden of acquiring busses is merely postponed to another day. The judge minimizes the cost and problems of reconditioning these obsolete busses and ignores the lack of wisdom of using them in congested traffic.

The district judge completely discounts other increased costs occasioned by an extensive expansion of the System's bus fleet (1218a). For example, the costs of additional supervisory, mechanical and clerical personnel; of additional drivers (the expense being greatly increased to the extent adults are used); of additional service and gasoline trucks and other equipment; of improving and constructing bus parking areas for loading and unloading children where insufficient or non-existent; of new and improved rights of way for safe and efficient circulation to, from and within school grounds (R. Ex. 47, 49-53, 65-68; 853a; P. Ex. 15).

In finding No. 3 of the August 3, 1970 order, the district court implies that desegregation will close the gap in the academic performance of the blacks. The test results of this System disclose that the improvement is slight.

Popular attitudes, which are apparently shared by the district court, are that desegregation eliminates or nearly eliminates the disparity of educational achievement between black and white children. Results of desegregation are material on the question of reasonableness but the district court's comparisons are meaningless in this regard. The Coleman Report makes a general finding that desegregation *tends* to hold that blacks advance without retarding the whites. Achievement statistics compiled by the Board relating to the performance of black students attending schools which have been desegregated since 1965 reflect that the improvement of the black students is indeed slight. For example, elementary schools which have been so dese-

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busses subsequent to the last hearings created the 30 used bus category, busses which are 14 to 15 years old. The 28 new busses were clearly scheduled for future delivery. This example is cited as an indication of the district court's predisposition to downgrade Board actions and representations.

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gregated (Cornelius, Huntersville and Davidson) found that their black third-grade students performed on an average school level of second grade, first month, whereas predominantely black schools (First Ward, Irwin Avenue and Amay James) found that their third-grade black students performed at an average school level of first grade, ninth month, or a grade differential of one school month. Black students attending those schools at the sixth grade level performed at an average school level of fourth grade, third month at the desegregated schools; and third grade, ninth month at the predominantely black schools, or a difference of three school months improvement experienced by the blacks attending desegregated schools for a period of six years. In making these comparisons, the Board acknowledges that the sampling is small and that the performance of individual black students in some cases substantially exceeds the performance of the group, and conversely, other black students do not perform as well as the group. The primary purpose of the Board in reporting this information was to disclose to the district court that educators and courts must rely on other means to bring about educational equivalence. In determining priorities to bring about this equivalence, the courts are ill-fitted to adjudge the various techniques, including the very expensive and disruptive technique of long distance bussing. Determination of such priorities should be left with the educators, who after having made extensive efforts at desegregation, should be permitted judgments based on sound educational consideration. (R. Ex. 64, July 15, 1970).

In an attempt to justify findings that bussing is a desirable and safe practice, the court (Findings Nos. 2, 4, 6, 13 and 32 of August 3 Order) refers to the present transportation of elementary youngsters and of kindergarten children. This observation is irrelevant to the question of how much of such bussing should reasonably be required or permitted under the circumstances existing in the Charlotte-Mecklenburg School System. The implication of the trial judge's findings are at odds with the conclusions of the educators:

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Bussing of elementary children away from their neighborhoods is educationally unsound and should be minimized, not increased; the school day of young children should be shortened and not lengthened to accommodate bus schedules; unattended immature children at bus pickup points is neither desirable nor safe; staggered schedules and multiple pickups should be minimized; bus transportation interferes with after-school activities which are an important part of the educational process; bussing of young children away from their neighboring schools dilutes the interchange between home and school which is most important at the elementary level. Transportation should be built around education, rather than make education serve transportation. Dr. Self stated the matter succinctly (Tr. 138, July 15, 1970):

> [O]ur computations have assumed that we would begin with the concept that the transportation system serves the educational program. And instead of operating our schools in such a way as to accommodate a bus fleet, we'd like to try to have the bus fleet serve the schools.

In submitting its estimates, the School Board readily acknowledged that if savings could be realized through educationally sound staggering of school schedules, the use of busses for multiple trips, a reasonable and safe degree of overloading and other economies it would do so.

The foregoing are recited as typical examples of the treatment that was accorded by the trial judge to the evidence of the School Board regarding the practicability and desirability of the massive bussing occasioned by the court approved Finger plan. The district court's findings clearly show its unreasonable view of the Rule of Reason.

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D. THE HEW ELEMENTARY PLAN IS EDUCATIONALLY UNSOUND, REQUIRES RACIAL BALANCING, FOSTERS RESEGREGATION AND IS UNREASONABLE.

The HEW elementary plan was built upon the restructured lines of the Board plan which were used to form seven different clusters within each of which 3 or 4 elementary schools were grouped together. Each school within a cluster serves one, two or three grades. The clusters proposed by HEW are shown on Map No. 4. The HEW plan had the dubious distinction of being shot down in flames by the district court, Dr. Finger, the school staff, the Board majority and the Board minority—by everyone except the HEW representatives.

The trial court's August 3 Order (Pets.' Br. A28) outlines its objections to the plan. In rejecting the plan we agree that the trial judge was right—but for the wrong reasons. The district court's complaints are primarily based on the failure of the HEW plan to do a complete job of racial balancing.

The Board's rejection of the HEW plan was prompted by a variety of practical and educational reasons. The plan requires the bussing of about as many children as do the Finger and Minority plans (R. Ex. 47, Tr. 136). In terms of what is accomplished by the plan, the transportation costs are prohibitive (R. Ex. 47, 50, 52 and 61a).

The proposed grade structure which in 4 of the 7 proposed clusters would require children to attend 4 different schools during the course of their elementary education, was severely criticized as being educationally unsound (Tr. 24, 112, 265), imposing a rigidity that would effectively preclude experimentation with programs of ungraded classes (Tr. 24-27, 99) and would necessitate a complete change in teacher assignments (Tr. 110). The head of the HEW team admitted that aside from desegregation he would not recommend this organization of the elementary schools (P. Ex. 4, p. 68). The proposed grade structure unnecessarily increases transportation requirements (Finger, Tr. 228, 233).

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Four of the 7 HEW clusters result in a 50-57% black enrollment, a condition that promises resegregation (Tr. 30, 100, 112, 229). The cluster arrangement brings together a predominately black school and several other schools which were already desegregated (Tr. 31-34, 111, 230, 267). It overpopulates some schools and underpopulates others, compounding the system's housing problem (Tr. 30).

As stated by Dr. Finger (Tr. 267), the HEW plan has little to recommend it. We agree.

E. THE ELEMENTARY PLAN OF THE BOARD MINORITY IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING COMPLETE RACIAL BALANCING OF EVERY ELEMENTARY SCHOOL AND THE BUSSING TO IMPLEMENT IT. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

The elementary plan was developed by a 4-member minority of the School Board. In his August 3 Order the trial judge approved the Minority plan as a reasonable alternative available for implementation by the Board. This plan was rejected by the Board.

The plan groups all of the 72 elementary schools within 18 separate clusters, many of which are far removed from each other and all of which occasion massive dislocation of elementary children. This Court's attention is invited to Map No. 5 which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg System.

The authors of the plan acknowledge that its purpose is to racially balance the 72 elementary schools of the system. The plan is educationally unsound (Tr. 68, 174). In its various clusters the Minority plan includes schools that are already desegregated (Tr. 180-181, 297).

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A random selection for the assignment of children is required within the clusters by the use of a complicated lottery system (Tr. 69, 118). The plan would occasion great administrative difficulties and would involve the problem of selecting children from year to year and could require elementary children of the same family to attend different schools (Tr. 120).

The plan will require the bussing of about the same number of children as would be transported under the Finger and HEW plans (August 3 Order). The burden of this amount of transportation had been declared by the Fourth Circuit, which accepted the district court's discounted estimates, to be too onerous and hence unreasonable with reference to the Finger plan. The transportation system required to implement the plan would be complex and cumbersome and would involve the mass movement of children within the congested areas of the city (Tr. 225, 239). Both Dr. Finger and the Superintendent observed that the Minority plan involved very long-distance bussing for a large number of children (Tr. 265) and could not be implemented without a heavy network of transportation (Tr. 119). Both Dr. Finger and the Superintendent agreed that education should be controlled by the educators rather than by a transportation system (Tr. 138, 303).[40]

The plan would require the closing of Double Oaks School in spite of the fact that the schools of the system are presently overcrowded with a 12% overcapacity.

The Board's objections to the Minority plan include all of the exceptions which it has to the court-approved Finger plan discussed elsewhere in this brief—as well as those peculiar to the Minority proposal. The racial balancing that this plan envisions is 100%. Every one of the 72 elementary schools are involved in this complete reshuffling to achieve the 70/30 racial mix of each student body. In spite of the

[40]This is a rather remarkable concession on the part of Dr. Finger, whose own plan occasions massive cross and satellite bussing of children through the most congested parts of the City.

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weaknesses, defects, costs and disruptions of this plan that were pointed out by both the School staff and the court's consultant, Dr. Finger, the trial judge found it to be reasonable. This conclusion is unwarranted and underscores once again that racial balancing is the basic, but erroneous, precept which undergirds this and every other order of the district court.

F. THE EARLIER DRAFT OF THE FINGER ELEMENTARY PLAN IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

This draft of Dr. Finger is illustrated by Plaintiff's Exhibit 10. At the hearings preceding the August 3 Order, only a minimal amount of attention was accorded this proposal which was prepared by Dr. Finger in the early days of his appointment as court consultant. It had been abandoned in favor of the one which the consultant evolved by the use of the restructured lines of the Board plan and which was adopted by the judge's February 5 Order.

Dr. Finger himself did not recommend this early draft (Tr. 263). He described it as an incomplete plan that he prepared only "to illustrate what some of the elements are that enter into the problem of determining how a desegregation plan should be prepared" (Tr. 263). Dr. Finger pointed out that the plan has a "complex grade structure" (Tr. 258). It will require transporting about the same number of elementary children as the court-approved February 5 and Board Minority plans (August 3, Order).

The purpose of this draft of Dr. Finger was to achieve racial balancing of elementary schools, which the court consultant admitted (981a). It is not a reasonable alternative.

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G. IN ASSESSING THE EFFECTIVENESS OF A DESEGREGATION PLAN, A RULE OF REASON REQUIRES THAT DUE CONSIDERATION SHOULD BE ACCORDED SCHOOL BOARDS AND ADMINISTRATORS IN CONTROLLING THE DESTINY OF PUBLIC EDUCATION.

President Nixon defined the role of a school board:

> In devising local compliance plans, primary weight should be given to the considered judgment of local school boards–provided they act in good faith, and within Constitutional limits. President Nixon's March 24, 1970, policy statement entitled *SCHOOL DESEGREGATION: A Free and Open Society, supra.*

If it were otherwise, the admonition of Judge Coleman in *Bivins v. Bibb County Board of Education,* 419 F.2d. 1211 (5th Cir. 1970), is pertinent:

> Some of these days, the Courts are going to have . . . to free themselves of their tragic failures in the role of school administrators and get back to their primary functions.

The Charlotte-Mecklenburg School Board is an elective body and, as such, is charged with the responsibility of exercising its own judgment regarding the needs of the system and the best interest of its children.

It is the School Board's duty to determine whether the dollars allocated to it by other elective officials (the Board of County Commissioners for Mecklenburg County) for the education of our children shall be spent for *books or buses.* It is for the Board to determine whether the existing transportation system shall be expanded or contracted, whether it is educationally good or bad to stagger the opening and closing of schools at any particular grade level, whether after school activities will suffer, whether inconveniences and disruption to children and parents are justifiable, whether overloaded buses are acceptable or safe, whether the time of children in transit is justifiable and how the host of other value judgments and policies shall be made to administer

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effectively a large complex metropolitan school system charged with awesome responsibility of providing 84,500 school children in 103 schools with a quality education.

Books, bricks and buses (and all that they imply) are part of the tools to be used in the educational process. How and when these tools are used must be left to the good faith decision of local school boards or the boards should be disestablished and the administration of school systems should be turned over the courts.

In his findings of fact, the trial court justified his rulings requiring extensive and disruptive transportation by calling attention to the extent that the system already was involved in burdensome bussing. This rationale is unsound. The reasonableness of a desegregation plan should not be measured by the worst aspects of a school program.

The fact that last year the Charlotte-Mecklenburg school system transported 23,000 children with 280 buses, the opening and closing of some of its schools were staggered, in some schools after-school activities were impaired, some school buses travelled over congested traffic arteries, some elementary children waited for the school bus by the side of the road at 6:30 in the morning and others got home at 5:00 in the afternoon, some buses were overloaded and some children had to stand up, some buses were unsound and should have been replaced—is no answer to the administrative and educational problem of how much of this is desirable, tolerable or necessary in a system as large and complex as Charlotte-Mecklenburg. A court mandate that edicts racial balancing and forced bussing supplants the value judgments of the elected school board and the educators on its administrative staff. An overdose of judicial paternalism and control will ultimately sign the death warrant for public education.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that:

1. The judgment of the Fourth Circuit be affirmed only in so far as it vacated the judgment of the district court.

2. The judgment of the district court, including its Orders of August 3 and August 7, 1970, be reversed; and

3. This matter be remanded to the district court with instructions to approve the implementation of the February 2, 1970, plan of the School Board as one complying with the Constitutional requirements for a unitary school system.

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SUMMARY OF RESULTS FROM RESTRUCTURED SCHOOL ATTENDANCE LINES

	% Black	1969-1970 No. of Students	1969-1970 No. of Schools	1970-1971 No. of Students	1970-1971 No. of Schools
Elementary Schools	All White	6,607	9	6,437	8
	1- 5	9,519	17	2,477	4
	6-10	7,349	11	5,603	8
	11-15	3,595	6	5,311	10
	16-41	6,516	12	17,626	33
	42-100	11,312	17	7,242	9
	Error			202	
	Totals	44,898	73	44,898	72
Junior High Schools	All White	-0-	-0-	557	1
	1- 5	4,539	3	1,875	2
	6-10	6,372	5	524	1
	11-15	876	1	1,282	1
	16-41	5,049	5	16,227	15
	42-100	4,563	5	842	1
	Error			92	
	Totals	21,399	19	21,399	21
High Schools	All White	-0-	-0-	-0-	-0-
	1- 5	2,133	1	1,264	1
	6-10	1,592	1	-0-	-0-
	11-15	5,398	3	-0-	-0-
	16-41	4,287	2	15,895	9
	42-100	3,902	3	-0-	-0-
	Error			153	
	Totals	17,312	10	17,312	10
Total All Schools	All White	6,607	9	6,994	9
	1- 5	16,191	21	5,616	7
	6-10	15,313	17	6,127	9
	11-15	9,869	10	6,593	11
	16-41	15,852	19	49,748	57
	42-100	19,777	26	8,084	11
	Error			447	
	Totals	83,609	102	83,609	104

*Figures presume present inner-city bussing remains in effect.

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