> zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or "desegregated."

Segregation of black children into black schools is *not* because of residential patterns, but because of assignment and other policies of the School Board, including the call upon segregated housing and school site selection to lend respectability to those policies.

(There is attached hereto an 18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which the segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years. Many of these provisions were repealed by the 1969 General Assembly, but most of them were still on the books when the April 23, 1969 opinion was written.) [The exhibit referred to is not printed herein.]

A consultant, Dr. John A. Finger, Jr., was appointed by the court in December, 1969, to draw a desegregation plan after it became apparent that the defendants had no such plan and had not resolved to prepare one which would desegregate the schools. The development of the plan is described in the order of February 5, 1970, the supplemental historical memorandum of March 21, 1970, and the supple-

mental findings of fact dated March 21, 1970. Briefly stated, the court-appointed consultant prepared plans for the desegregation of all the black schools. Faced with the imminent existence of valid desegregation plans, the Board then went to work and prepared some plans of its own.

This court approved the Board's plan for senior high schools (with one minor change); it gave the School Board a choice of several plans or procedures as to junior high schools; and it disapproved the Board's plan for elementary schools, because it left half the black children in black schools, and ordered into effect one of the plans designed by the consultant, Dr. Finger, for desegregation of the elementary schools.

The Circuit Court of Appeals granted a stay as to the elementary schools and the Supreme Court left the stay in effect. The district court then, in the order of March 25, 1970, postponed until September 1, 1970, the implementation of the plans for junior and senior high schools because the stays issued by the Circuit Court and the Supreme Court had taken off the pressure for mid-year 1969-70 desegregation.

Before the appeal to the Fourth Circuit was concluded, the defendants, including the Governor and the State Board of Education, voiced strenuous opposition to compliance with the court order, basing their objections in part upon parts of the 1964 Civil Rights Law and upon North Carolina's "anti-bussing law" which had been passed by the General Assembly a few weeks after this court's original April 23, 1969 order. A three-judge court was convened and has met and has decided that the "anti-bussing law" in pertinent part is unconstitutional, and eventually issued appropriate injunctions.

The Circuit Court of Appeals then issued its opinion on May 26, 1970. It affirmed the principal findings of fact and legal conclusions of the district court, including the finding that the segregated residential housing upon which the defendants relied for defense was caused by forces deriving their basic strength from governmental action. It (1) approved the desegregation of faculties, (2) approved the plans for desegregation of junior high schools, and (3) approved the plans for desegregation of senior high schools all as ordered by the district court. It expressly *dis*approved the Board's plan for elementary schools because it left half the black elementary children in "black" schools, and it remanded the matter for the school board to prepare a new plan using all reasonable means of desegregation, and for the district court to reconsider the assignment of elementary pupils under a theory of "reasonableness". The district court was directed to put a plan into effect for the fall term 1970.

The Supreme Court on June 29, 1970, entered an order reading in pertinent part as follows:

> ". . . The petition for a writ of certiorari is granted, provided that the judgment of the Court of Appeals is left undisturbed insofar as it remands the case to the district court for further proceedings, which further proceedings are authorized, and the district court's judgment is reinstated and shall remain in effect pending those proceedings."

At the July 15-July 24 hearings the defendants announced that:

> (a) Faculties have been assigned for all schools according to the February 5, 1970 order, so that when

schools open in September all faculties will have about 75% white teachers and about 25% black teachers;

(b) The senior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court;

(c) The junior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court; and

(d) As to elementary schools the majority of the defendants have no official plan and no plan of action for desegregation except the plan, previously rejected by both district court and the Circuit Court, which would leave half the black elementary children in segregated schools.

Since the school board has refused to obey the Circuit Court's instructions to file a new elementary plan by June 30, 1970, it might, were this an ordinary case, have no standing to be heard further. However, the case affects numerous people who, though not Board members, are entitled to have the matter further considered as fully and fairly as possible.

This court has tried to follow faithfully the orders of the Supreme Court and the Circuit Court. This presents some unique problems; the Circuit Court's "reasonableness" order is vague; the Supreme Court's order allowing certiorari is cryptic, and raises and leaves unanswered several major questions; neither order is a clear guide for this court. However, this court believes that, regardless of the Board's continued default, this court's duty is to reconsider the elementary desegregation problem in view of

the questions whether the methods previously required by the court are reasonable and whether the Board has exhausted all reasonable methods available to it.

III.

The Extent of Continued Segregation—And Its Results.

The schools are still segregated as described in this court's memorandum opinion of November 7, 1969. Over 9,000 black children attend schools that are 100% black. Two-thirds (16,000) of the black children still attend racially identifiable "black" schools. Fifty-seven schools are "white" and twenty-five are predominantly "black."

The tangible results of segregation continue to be apparent from the 1969-70 Stanford Achievement Tests in Paragraph Meaning and Arithmetic, given during the sixth month of school, for grades 3, 6, 8 and 10. In "black" schools third graders perform at first grade or early second grade levels, while their contemporaries at "white" schools perform at levels generally from one to two grades higher. Sixth graders in the black schools (Double Oaks and Bruns Avenue, for example) perform at third grade levels while their contemporaries at Olde Providence, Pinewood, Lansdowne and Myers Park perform at seventh or eighth grade levels. In the eighth grade we see Piedmont Junior High students reading at early fifth grade levels while their contemporaries at McClintock and Alexander Graham read at early ninth grade levels. In the tenth grade, on a scale where the *average* is 50, the black high school, West Charlotte, had English scores of 38.30 and mathematics scores of 35.89; Harding, nearly half black, had scores of 42.89 and 40.76; while the obviously "white" schools had scores ranging from 43.2 to 52.2. At First Ward Elementary

School only two black *third* graders out of 119 tested scored as high as third grade, while 100 were still at first grade level of proficiency as to paragraph meaning.

Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the state* which still constitutes the greatest deterrent to achievement.

IV.

The Legal Basis For Desegregation.

A. *Segregated public schools are unconstitutional.*—Desegregation is based on the Constitution as interpreted in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), where the Supreme Court said:

> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. *Segregation with the sanction of law, therefore, has a tendency to* [*retard*] *the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial*[*ly*] *integrated school system.*'
>
> * * *
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal. . . . .*" (Emphasis added.)

Green v. *New Kent County,* 391 U.S. 430 (1968) placed upon school boards the burden

> ". . . to come forward with a plan that promises realistically to work, and promises realistically to work *now*," [and]
>
> ". . .to convert promptly to a system without a 'white' school and a 'Negro' school, *but just schools.*" (Emphasis added.)

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. If *Brown* and *New Kent County* and *Griffin* v. *Prince Edward County* and *Alexander* v. *Holmes County* are confined to small counties and to "easy" situations, the constitutional right is indeed an illusory one. A black child in urban Charlotte whose education is being crippled by unlawful segregation is just as much entitled to relief as his contemporary on a Virginia farm.

B. *"Racial balance" is not required by this court.*—The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix", but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools.

C. *"Bussing" is still an irrelevant issue.*—Until the end of the 1969-70 school year, state law and regulations au-

thorized bus transportation for almost all public school children who lived more than 1½ miles from the school to which they were assigned. The excluded few were those inner-city children who both lived and attended school within the old (pre-1957) city limits.

If an inner-city child was assigned to a suburban or a rural school, or if a rural or suburban child was assigned to an inner-city school, he *was* entitled to bus transport.

Under those regulations, virtually all the children covered by the court order of February 5, 1970, were entitled to bus transport under *then existing* state regulations *even if the order of this court had not mentioned transportation.*

In *Sparrow* v. *Gill,* 304 F.Supp. 86 (1969), a three-judge federal court ordered an end to the discrimination against the inner-city children (and thereby in effect ordered bus transport for those children) by requiring the school authorities to discontinue transport for suburban children unless they also offered it to inner-city children.

The state authorities have announced intention and promulgated rules to comply with this decision by providing transport on the usual basis for *all* city children who live over 1½ miles from school.

The local School Board, in its last plan for partial elementary desegregation, stated that

> "Transportation will be provided to and from school for all students who are entitled thereto under state law and applicable rules and regulations promulgated by the State."

(Without such transportation even the Board's own plan would have left children, in numbers they estimate at nearly 5,000, assigned to schools too far away to reach.)

In view of the above facts, every child assigned to any school over 1½ miles from his home is entitled to bus transportation in North Carolina.

The issue is not, "Shall we bus children?" but "Shall we *withhold* transportation already available?"

In *Griffin* v. *Prince Edward County,* 377 U.S. 218 (1964), the Supreme Court held that a county could be required to recreate an entire public school system rather than keep it closed to avoid desegregation. The same principle would seem to apply here.

D. *This is a local case in a local court—a lawsuit—to test the constitutional rights of local people.*—The *principles* which outlaw racial discrimination in public schools certainly are of nationwide application, but the *facts* and results may vary from case to case. This is a local suit involving actions of the State of North Carolina and its local governments and agencies. The facts about the development of black Charlotte may not be the facts of the development of black Chicago or black Denver or New York or Baltimore. Some other court will have to pass on that problem. The decision of the case involves local history, local statutes, local geography, local demography, local state history including half a century of bus transportation, local zoning, local school boards—in other words, local and individual merits.

This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

The orders of this court have been confined to the only area they can properly embrace, and that is *the rights of*

the particular parties represented in this case, on the particular facts and history of this case.

E. *The issue is not the validity of a "system", but the rights of* INDIVIDUAL PEOPLE.—If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals.

F. *The Issue Is One Of Constitutional Law—Not Politics.*—At the hearings the defendants offered public opinion polls and testimony that parents don't like "bussing," and that this attitude produces an adverse educational effect upon the minds of the children. The court has excluded such evidence, and must continue to proceed unaffected, if possible, by this and other types of political pressure and public opinion.

This is not out of disregard for the opinions of neighbors. A judge would ordinarily like to decide cases to suit his neighbors. Furthermore, as first suggested on August 15, 1969, it may well be that if the people of the community understood the facts, as the court has been required to learn and understand them, they would reach about the same conclusions the court has reached.

To yield to public clamor, however, is to corrupt the judicial process and to turn the effective operation of courts over to political activism and to the temporary local opinion makers. This a court must not do.

In the long run, it is true, a majority of the people will have their way. The majority must be a majority of the pertinent voting group. As our slave-owning grandfathers

of the South learned in 1865, the pertinent voting group on constitutional matters includes the people and their elected representatives from the nation at large, not just the South, and not just Mecklenburg County. Methods exist to amend the Constitution. If the Constitution is amended or the higher courts rule so as to allow continued segregation in the local public schools, this court will have to be governed by such amendment or decisions. In the meanwhile, the duty of this and other courts is to seek to follow the Constitution in the light of the existing rulings of the Supreme Court, and under the belief that the constitutional rights of people should not be swept away by temporary local or national public opinion or political manipulation.

Civil rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom needs to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid.

Lord Edward Coke, Chief Justice of the Court of Common Pleas of England, may have summed it up when in 1616 he wrote, responding to a peremptory demand from the King's attorney general, that he must deny the King's request because under his oath his obligation was that he

> ". . . shall not delay any person of common right for the letters of the King or of any person nor for any other cause . . . ."

G. *The duty to desegregate schools does not depend upon the Coleman report, nor an any particular racial proportion of students.*—The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation would not become lawful, however, if all children scored equally on the tests.

Nor does the validity of *Brown* depend upon whether the system contains ideal proportions of black and white students. The Charlotte-Mecklenburg system does contain a theoretical "ideal" 70-30 proportion of white and black students. This has some bearing upon the reasonableness of any particular local plan or part of such plan. However, it does not give rise to any legitimate contention that *Brown* may be ignored where you cannot have at least 60% or 70% white children in a school. The HEW plan providing for 57% black students in a group of schools may well be constitutional in some other system, though unconstitutional in Mecklenburg where a school 57% black is immediately racially identifiable as a "black" school.

V.

The Reasonableness of the Specific Methods and the Overall Plans Available to Desegregate the Black Charlotte Schools.

A. *The facts under which any question of "reasonableness" must be judged.*—From the lengthy and largely repetitious testimony at the July 15-24 hearings, and from previous evidence, the following facts bearing on "reasonableness" are found:

Memorandum of Decision and Order, dated August 3, 1970

1. In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated* schools. Last year 610,000 children, comprising nearly 55% of the state's public school population, were transported daily on school busses. With the 1970 extension of transportation to inner-city children, the average daily school bus population of North Carolina this September will reach perhaps three-fifths of all public school children. Those eligible for transport are far more numerous. The "anti-bussing law" has been held unconstitutional.

2. Some 70.9% of these bussed children are in the first eight grades. There may be more first graders than children of any other age riding school busses.

3. The academic achievement tests quoted in this and previous orders show that the later desegregation is postponed in this school district the greater the academic penalties are for the black children. By the sixth grade the performance gap is several grades wide. By the eighth grade it may be four grades wide.

4. School bus transportation is safer than any other form of transportation for school children.

5. The defendants have come forward with no program nor intelligible description of "compensatory education," and they advance no theory by which segregated schools can be made equal to unsegregated schools.

6. In Charlotte-Mecklenburg approximately 23,300 children in grades one through twelve (plus more than 700 kindergarten children, ages four and five) ride some 280 schools busses to school every day. The school bus routes for the four and five years olds vary from seven miles to thirty-nine miles, one way. The average one way bus route

in the system today is about an hour and fifteen minutes. Average daily bus travel exceeds forty miles.

7. Approximately 5,000 children of all ages rode public transportation (City Coach Company) every day of the 1969-70 school year at reduced fares, or 20¢ a day (10¢ each trip).

8. The State Department of Public Instruction has announced that it will pay for transportation of children on city bus systems or by other contract carriers at whatever rate may be approved by the North Carolina Utilities Commission. City Coach Company has requested a fare increase. City Coach has indicated a capacity to transport between 6,000 and 7,000 pupils daily if they get fares and routes satisfactorily established.

9. There are only two adult male drivers out of some two hundred and eighty regular bus drivers who drove school busses during the 1969-70 school year, and only about seventeen adult women who drove kindergarten school busses during that year. The other 260-plus drivers are boys and girls, 16, 17 and 18 years old.

10. There is no black residential area in this school system which is so large that the students can not be afforded a desegregated education by reasonable means. The additional length of travel required to implement the best available plans for desegregating the system is less than the average distance of bus transportation now being provided elementary children under existing bus practices, and the travel times are less than times required by existing bus routes.

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11. The offer of transportation to encourage "freedom of choice" is ineffectual. It was expressly ordered by this court on April 23, 1969, and put into effect by the defendants in the fall of 1969; and it has had no substantial effect upon the exercise by black children of freedom of choice to go to white schools.

12. There is no "intractable remnant of segregation" in this school system. No part of the system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable.

13. The regular bus routes are about 280 in number, including 17 bus routes transporting four and five-year-old children to child development centers (kindergartens).

14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 buses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J. W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:

(i) Spare buses	20
(ii) Activity buses (each driven less than 1,000 miles a year)	29
(iii) Used buses replaced by new ones in 1969-70	30
(iv) New buses currently scheduled for replacement purposes and expected to be delivered in near future	28
Total:	107

15. It only requires, at the most, 138 busses to implement the court ordered plans for desegregation of all the high schools, junior high schools, and elementary schools in the county!

16. In addition to this, the State school Bus Transportation Department informed the local defendants in early 1970 that there were 75 new busses available to the local school system if they wanted them, out of the 400 new buses then held by the State.

17. As of July 18, 1970, it was stipulated that the State Board of Education had 105 new busses on hand and 655 new ones on order, of which some 289 had been manufactured.

18. It was stipulated that by September 1st the State Department of Education would have approximately 400 secondhand busses on hand and available on loan, without cost, for local school boards to use in 1970-71.

19. According to Defendants' Exhibit 35, a letter of July 10, 1970 from the State Superintendent of Public Instruction to the Superintendent of the Charlotte-Mecklenburg school system:

> "At the present time approximately 400 discarded busses are available at various school garages in the state *that could safely be used, if necessary,* on a temporary basis for the transportation of additional children." (Page 4) (Emphasis added.)
>
> "In the event discarded busses must be used on a temporary basis the state will expect a local school unit to replace the discarded bus pressed back into service

as early as possible and at least by the beginning of the following fiscal year." (Page 6)

* * *

"We would request school units that hold title to these [old] *busses to transfer the title without cost to the school unit needing to use these vehicles on a temporary basis."* (Page 6) (Emphasis added.)

* * *

"It would be the responsibility of the school unit requesting temporary use of old busses to put the old busses in good mechanical repair after they receive delivery of the bus." (Page 7)

20. The testimony of Mr. Harrison was that for a 54-passenger bus a set of new tires, if needed, would cost $324; a complete overhaul of the brakes with replacement of all rubber parts and working parts would cost about $25. (Mechanics are paid on a salary, not a commission, basis.)

21. The brakes, tires, lights and steering on any second-hand bus which might be put into service can be put into first-class safety condition for a figure per bus not exceeding $500. In the case of the busses already on hand in the Charlotte-Mecklenburg system, this cost should be less, because the local system has an excellent preventive maintenance and parts replacement program and according to the transportation superintendent anticipates and makes repairs before trouble develops, rather than wait for breakdowns, so that the old rolling stock as well as the new is kept in good condition.

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22. The transportation superintendent, Mr. Harrison, testified that he maintains, and now has, a manpower reserve of about 100 students who are qualified and available as school bus drivers, over and above the 280-odd regular drivers. More are now being trained.

23. The estimated school budget for the year 1970-71 is approximately $66,000,000, which is $8,000,000 more than the 1969-70 budget.

24. Of this $66,000,000 the amount of approximately $21,900,000 was allocated to the School Board by the county without restriction as to its use, and the School Board is free to use whatever part of it they find necessary to comply with court orders. (Blaisdell testimony.)

25. The Board's opinion evidence, including numerous exhibits, on numbers of pupils to be transported and numbers of extra busses required (526 for the entire system, 293 for elementary schools) can not be taken seriously. The pupil count was made by counting all pupils in each zone who live more than a mile and a *quarter* (not a mile and a *half*) from each school, and (with some minor but unspecified adjustments) treating all of these children as requiring transportation. This method fails to account for several factors such as (1) the 7% who are absent every day; (2) the pupils now riding City Coach busses; (3) the pupils now already receiving school bus transport; (4) those who go to school in private vehicles.

Moreover, by cutting the "walking distance" from the statutory figure of 1½ miles to 1¼ miles, the Board method reduces by 40% (from over seven square miles to just over five square miles) the area of the walking zone and thereby sharply increases those eligible for bus transport.

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In computing needed busses, the Board figures unwarrantedly assume: (1) that each bus can make only one round trip a day instead of the average of 1.8 round trips a day now made; (2) that each bus can only transport 46 pupils a day instead of the present average of 84.4; (3) that busses used in the desegregation program must be less efficient than the others.

All these assumptions are contrary to the evidence which, for example, shows that one "desegregation" bus (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary, and Quail Hollow Junior High on the other, with the driver then going on in the bus to South High School.

The court's previous findings on these items are reaffirmed. Maximum numbers of pupils to be transported and additional busses needed, even if *Sparrow* v. *Gill* were not in the picture, remain:

	No. Pupils	*No. Busses*
Senior High	1,500	20
Junior High	2,500	28
Elementary	9,300	90
	13,300	138

(Board witnesses after refining lines and making actual pupil assignments now say that the number of senior high pupils requiring transportation is 1,815 and the number of junior high pupils requiring transportation is 2,286.)

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.

27. Mecklenburg County had a July 31, 1970 surplus or "carry-forward" of approximately four million dollars, of which one million dollars are completely free of any allocation or budgeting commitment.

28. North Carolina, whose biennial 1969-71 budget is $3,590,902,142.00, regularly has a biennial surplus of many millions of dollars.

29. The annual cost of pupil transportation is approximately $20 a year per pupil; the state pays it all, except for certain minor local administrative costs, and the original purchase of the first bus for a route; thereafter, the state replaces the bus periodically. Earlier findings that the cost was $40 per pupil year were in error.

30. No capital outlay will be needed to supply busses for the 1970-71 school year. The state is ready and willing to lend the few busses the Board may need; replacements can be bought after actual need has been determined under operating conditions.

31. The $66,000,000 school budget amounts to about $366,667 a day for a 180-day school year. If the county eventually has to buy as many as 120 new busses, their cost, at $5,500 each, would be $660,000, which is less than the cost ($733,000) of two days of school operation.

32. *Age of children* has apparently never prevented their school bus transportation. There are, of course, more children between kindergarten and the sixth grade than there are in the higher grades when the dropout rate increases, and more elementary children, including first graders, receive transportation than do high schoolers.

The longest bus routes in the entire county are the routes by which four and five-year-old kindergarten children are transported to child development centers (see Principals' Monthly Bus Report, Defendants' Exhibit 63). The Pineville Child Development Center has one bus, No. 297, which travels over 79 miles a day on one round trip with four and five-year-old children. Another such trip is over 70 miles a day. The Davidson Child Development Center has five busses which travel from 48 to 60 miles a day on one round trip with five-year-old children. The Bain Elementary School has a bus route, No. 115, which travels over 61 miles on one round trip each day, requiring two hours in the morning and two hours in the afternoon with elementary children. Routes to numerous elementary schools are very long in miles and time. The more than 10,000 children in grades one through six who have been riding school busses all these years and who now ride at an average travel time of an hour and a quarter each way are not shown to have had their education damaged by the experience.

Educationally it appears unreasonable to postpone desegregation of small children until later grades. The only concrete evidence of an educational nature in the whole hearing which rose above the level of opinion is the Stanford Achievement Tests which show that the performance gap, which is ordinarily noticeable in the first grade, has become several grades wide by the time the segregated

black child reaches the sixth grade. The lasting effects of segregation are minimized if it is eliminated at an early age.

33. *Traffic problems.*—The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most parts of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

34. The schools already operate on staggered schedules. Today, the opening and closing of schools and the class hours of school bus drivers are adjusted to serve the practical requirements of transportation. Plaintiffs' Exhibit 12 shows that the elementary schools already operate on a staggered opening and closing schedule. Some open at 8:00; some at 8:05; some at 8:10; some at 8:15; some at 8:25 and

some at 8:30 and 8:45 in the morning, and the schools close for grades one and two at hours including 1:30; 1:35; 2:00; 2:15; 2:30; 2:45; 3:00; 3:05 and 3:10. The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools.

35. The defendants have plenty of money, plenty of know-how, plenty of busses on hand or available upon request, and plenty of capacity to implement the court ordered plan or the minority plan or any combination of the various plans. Their contentions to the contrary, and their five million dollar "estimates," when heard against the actual facts, border on fantasy!*

B. *Reasonableness of methods.*—"Reasonable" is variously defined in more than 1,000 words in Webster's *Unabridged Dictionary*. In the context, the most appropriate definition seems to come from Black's *Law Dictionary*: "Reasonable. Just; proper. Ordinary or usual. *Fit and appropriate to the end in view.*" (Emphasis added.)

The end in view is the desegregation of the schools. The methods available include the following: (1) consolidation of schools (which began fifty years or more ago) and for which the school bus has been the "ordinary or usual," as well as the necessary tool; (2) assignment of pupils;

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* "There was a table set out under a tree in front of the house, and the March Hare and the Hatter were having tea at it... . The table was a large one, but the three were all crowded together at one corner of it. 'No room! No room!' they cried out when they saw Alice coming. 'There's *plenty* of room!' said Alice indignantly, and she sat down in a large arm-chair at one end of the table." (Lewis Carroll, *Alice's Adventures in Wonderland.*)

(3) school bussing; (4) non-contiguous zoning (before *Brown*, no black child was allowed to attend the nearest school if it happened to be white); (5) restructuring of grades in schools; (6) rezoning; (7) pairing, clustering and grouping of schools; (8) use of satellite zones; (9) freedom of choice, with appropriate restrictions; and (10) closing of schools.

All of these methods have been approved as legal by the Fourth Circuit Court of Appeals and by other courts. They work; singly and in combination they can work to accomplish the reassignment of children to eliminate segregation. If they are legal, and if they accomplish the end in view, and if they have been in use for half a century, they certainly qualify as "reasonable" methods. They are "appropriate to the end in view"; they desegregate the schools in a practical way.

C. *The various plans.*—

1. *The 5/4 Majority Board Plan.*—The original Board plan was rejected by this court and by the Circuit Court. The School Board has not obeyed the order of the Circuit Court of Appeals to file a new plan, and has not drafted nor attempted to draft another plan. The Board majority have not explored other methods of desegregation as directed by the Circuit Curt (pairing, clustering, grouping, non-contiguous zoning, re-arranging grade structures), except to discuss these matters among themselves and to offer lengthy testimony rationalizing the non-use of alternative methods. Although parts of the disapproved Board plan could be used in a current plan, the Board plan as originally proposed is still inadequate because it leaves half the black elementary students still attending black schools. The court does not find it to be reasonable.

2. *The HEW plan.*—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial desegregation of most of the black schools. The faults of the plan are obvious. It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low-or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be

measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution.

3. *The court order of February 5, 1970, including the Finger Plan.*—This order directs the desegregation of the schools. It offers the Finger plan as one way to do it, and encourages the Board to use its own resources to develop something better. As to the Finger elementary plan itself, the court, after eight days of further evidence and extensive further study, still finds it to be a reasonable method or collection of methods for solving the problem. The plan was designed by a qualified educator. It was drafted with technical assistance of the school staff. It does the complete job. It has a clear pupil assignment plan. It preserves a sound grade structure; it is adaptable to ungraded experimentation; it can be implemented piecemeal, in sections or by clusters of schools if necessary; it embraces local knowledge; it can be implemented immediately. It uses all reasonable methods of desegregation. It takes proper advantage of traffic movement and school capacity. It passes all tests of reasonableness.

4. *The 4/5 Minority Board Plan.*—This plan was presented intelligently and clearly by Dr. Carlton Watkins, its chief drafter, one of a 4/5 minority of the Board. It was spared any aggressive attack by Board witnesses or counsel. It is home grown. It was conceived and drafted by four members of the local Board. It uses all the techniques of the Finger plan. It desegregates all the schools. Like the Finger plan, it involves all communities of the county. It appears to the court that it can be implemented with somewhat shorter travel distances for school busses,

though perhaps a few more children might have to ride school busses than under the Finger plan. Its assignments are made with an eye toward the dynamics of community growth and shrinkage. It is spontaneous in origin and shows a willingness on the part of some of the Board to experiment. Its cost of implementation is roughly on a par with that of the Finger plan. Like the Finger plan, it can be implemented one part at a time and it does not create probabilities of resegregation of black schools. The principal fault of the minority plan is its present lack of a system of pupil assignment. Board witnesses were not willing to admit it outright, but the court has the very definite impression that they could draft a pupil assignment plan and put the minority plan into effect this fall if so directed by the Board.

5. *An earlier draft of the Finger plan.*—This draft, illustrated by Plaintiffs' Exhibit 10, is the first comprehensive recommendation of Dr. Finger to the court and to the school staff. It would require less transportation than any other plan before the court, and for shorter distances. It would have to be implemented all at once, and it does not involve all of the county in its scope. From the standpoint of economics it may be the cheapest plan available. From the standpoint of avoidance of tendencies toward resegregation and from the standpoint of total community involvement in the total community plan it is not on a par with the minority plan nor the final Finger plan. It is however, like the minority plan and the final Finger plan ordered by the court, a "reasonable" plan.

Memorandum of Decision and Order, dated August 3, 1970

VI.

A Reservation Concerning Reasonableness Versus Constitutional Rights

Reasonable remedies should always be sought. Practical rather than burdensome methods are properly required. On facts reported above, the methods required by this order are reasonable. However, if a constitutional right has been denied, this court believes that it is the constitutional right that should prevail against the cry of "unreasonableness." If a home has been illegally searched and evidence seized, the evidence is suppressed. If a defendant in a drunk driving case "takes the Fifth" and puts the state to its proof, the state has to prove its case without any testimony from him. The unreasonableness of putting the state to some expense can not be weighed against nor prevail over the privilege against self-incrimination or the right of people to be secure in their homes. If, as this court and the Circuit Court have held, the rights of children are being denied, the cost and inconvenience of restoring those rights is no reason under the Constitution for continuing to deny them. *Griffin* v. *Prince Edward County, supra.*

ORDER

1. Pursuant to the June 29, 1970 mandate of the Supreme Court of the United States, this court's order of February 5, 1970 will remain in effect pending these proceedings and except as modified herein or by later order of this court or a higher court.

2. The action of the Board in making faculty assignments in accordance with the order of February 5, 1970 is approved.

3. The action of the Board in making pupil assignments and other arrangements to operate the senior high schools in accordance with this court's order of February 5, 1970 is approved.

4. The action of the Board in making pupil assignments and other arrangements to operate the junior high schools in accordance with this court's order of February 5, 1970 is approved.

5. Numbered paragraphs 10 [823a] and 11 [824a] of the February 5, 1970 order of this court are amended by inserting the words "cumulative" and "substantially" at the appropriate points in each paragraph so that the two paragraphs will read as follows:

> "10. That 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the cumulative effect of any given transfer or group of transfers is to increase substantially the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.
>
> "11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the cumulative result of such transfers is to restore or substantially increase the degree of segregation in either the transferor or the transferee school."

6. As to the elementary schools:

(a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the

reasonablness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.

(b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.

(c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:

> "16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

(d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

(e) If the Board elect to carry out the Finger plan, they are authorized, if they find it advisable, to close Double Oaks school and reassign its pupils in accordance with the general purposes of the February 5, 1970 order.

(f) The Board are directed to file a written report with this court on or before noon on Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.

(g) The Board are again reminded, as they were reminded during the July 15, 1970 hearings, that since the 29th day of June, 1970, they have been and still are subject to the order of the Supreme Court, which reinstated this court's February 5, 1970 order pending these proceedings, and that this court will be under some duty to measure the Board's performance against what they could have done starting on June 29, 1970.

7. The following portion of this order is taken in modified form from the recommendations in the proposed plan of the Department of Health, Education and Welfare. It has been included in part in orders of district courts to various school systems, such as the school system in Dorchester County, South Carolina. It is included in this order not with any idea of impairing or affecting any party's right of appeal, but with the thought that this community

has a difficult job of implementing a major desegregation program and that just as in the case of Greenville, South Carolina, whose schools were desegregated before any final word came from the Supreme Court, it will take leadership to do the job. Some of these suggestions of the Department of Health, Education and Welfare are therefore incorporated in this order as follows, for such aid as they may be in working through the difficult administrative and community problems which must be overcome:

SUGGESTIONS FOR PLAN IMPLEMENTATION

Successful implementation of desegregation plans largely depends upon local leadership and good faith in complying with mandates of the Courts and the laws upon which the Courts act. The following suggestions are offered to assist local officials in planning for implementation of desegregational orders.

Community

1. The Superintendent and Board of Education should frankly and fully inform all citizens of the community about the legal requirements for school desegregation and their plans for complying with these legal requirements.

2. The Board of Education should issue a public statement clearly setting forth its intention to abide by the law and comply with orders of the Court in an effective and educationally responsible manner.

3. School officials should seek and encourage support and understanding of the press and community organizations representing both races.

4. The Board of Education, or some other appropriate governmental unit, should establish a bi-racial advisory committee to advise the Board of Education and its staff throughout the implementation of the desegregation plan. Such committee should seek to open up community understanding and communication, to assist the Board in interpreting legal and educational requirements to the public.

5. The Superintendent should actively seek greater involvement of parents of both races through school meetings, newsletters, an active and bi-racial P.T.A., class meetings, parent conferences, and through home visits by school personnel.

6. The Superintendent and Board of Education should regularly report to the community on progress in implementing the desegregation plan.

School Personnel

1. The Superintendent should provide all personnel copies of the desegregation plan and arrange for meetings where the personnel will have an opportunity to hear it explained.

2. The Board of Education should issue a policy statement setting forth in clear terms the procedures it will follow in reassignment of the personnel.

3. Assignments of staff for the school year should be made as quickly as possible with appropriate followings by school principals to assure both welcome and support for personnel new to each school. Invitations to visit school before the new school year begins should be offered.

4. The Superintendent should see that a special orientation program is planned and carried out for both the professional and non-professional staffs (including bus drivers, cafeteria workers, secretaries and custodians) preparatory to the new school year. He should make every effort to familiarize new and reassigned staff with facilities, services, and building policies, and prepare them to carry out their important role in a constructive manner. The Superintendent should direct each principal to see that each teacher new to a school is assigned for help and guidance to a teacher previously assigned to that school. Such teachers should have an opportunity to meet before the school year actually begins.

5. The Superintendent should arrange an in-service training program during the school year to assist personnel in resolving difficulties and improving instruction throughout the implementation period. Help in doing this is available from the St. Augustine College in Raleigh, North Carolina.

8. The Clerk is directed to serve copies of this order on the members of the School Board individually, and upon all other parties by sending copies by certified mail to their counsel of record.

9. Subject to further orders from higher courts, jurisdiction is retained, and the attention of the parties is called to pages 27 and 28 [1278a-1279a] of the order of the Fourth Circuit Court of Appeals respecting the duties of the court and the parties with regard to any desired modification of the plan or of this order.

Memorandum of Decision and Order, dated August 3, 1970

This the 3rd day of August, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

[The "18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years (Br. A4)" is omitted.]

Memorandum Decision, dated August 7, 1970

The defendant school board and this court are under order of the Fourth Circuit Court of Appeals to produce a plan for desegregation of the elementary schools to "take effect with the opening of school next fall."

Pending the proceedings, by order of the Supreme Court of the United States, this court's February 5, 1970, judgment, including the Finger plan, is in effect.

On August 3, 1970, after lengthy hearings, this court by order directed the defendants to elect which among several options they had voted to use to desegregate the elementary schools.

On August 7, 1970, the board reported to the court that they have authorized an appeal from this court's order of August 3, 1970; that they reject the various options from among which the court authorized them to choose; and that the board

> "has no choice but to acquiesce in the District Court's order relative to its own elementary plan of February 5, 1970 . . . In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

The court accepts the board's action as its undertaking to use the plan directed on February 5, 1970, (as modified on August 3, 1970) in its desegregation of the elementary schools.

This 7th day of August, 1970.

/s/ JAMES B. MCMILLAN
JAMES B. MCMILLAN
United States District Judge

Defendants' Report of Action Taken as Directed by the Court in Its Order of August 3, 1970

The Board of Education met in public session and adopted the following resolution for submission to the Court, said resolution being as follows:

"This written report is submitted to the United States District Court for the Western District of North Carolina pursuant to its mandate dated August 3, 1970, and entered into that certain civil proceedings entitled James E. Swann, et. al., plaintiff, vs. Charlotte-Mecklenburg Board of Education, et. al., defendants.

> " 'The Board are directed to file a written report with this Court on or before Noon Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.'

That Court, in its August 3, 1970, Order, provided that as to elementary schools, Paragraph 6-A.

> " 'The Order entered by this Court on February 5, 1970, having been subjected to three weeks of review under the reasonableness test, is expressly found to be reasonable and the School Board are directed to put the Court ordered plan of desegregation into effect at the opening of school in the fall of 1970 *unless* they avail themselves of some of the options indicated herein.'

"The School Board concluded that the options referred to, the Watkins, the early Finger and the HEW plans, do not offer reasonable alternatives which comply with the standards prescribed by the Court of Appeals of the Fourth Circuit and therefore has no choice but to acquiesce in the District Court's Order relative to its own elementary plan of February 5th which, upon rehearing, the District

Defendants' Report of Action Taken as Directed by the Court in Its Order of August 3, 1970

Court itself found to be reasonable. In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

Furthermore, the Board of Education authorized the Board Attorneys to appeal the Order of August 3, 1970, as it is deemed to be unreasonable and contrary to law.

/s/ William J. Waggoner
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