Viewing the plan the district court approved for junior and senior high schools against these principles and the background of national, state, and local transportation policies, we conclude that it provides a reasonable way of elminating all segregation in these schools. The estimated increase in the number of junior and senior high school students who must be bussed is about 17% of all pupils now being bussed. The additional pupils are in the upper grades and for the most part they will be going to schools already served by busses from other sections of the district. Moreover, the routes they must travel do not vary appreciably in length from the average route of the system's buses. The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools.[5]

We find no merit in other criticism of the plan for junior and senior high schools. The use of satellite school zones[6]

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[5] These 300 students will be bussed a straight-line distance of some 10 miles. The actual bus routes will be somewhat longer, depending upon the route chosen. A reasonable estimate of the bus route distance is 12 to 13 miles. The principal's monthly bus reports for Independence High School for the month from January 10, 1970 to February 10, 1970 shows the average one-way length of a bus route at Independence is presently 16.7 miles for the first trip. Buses that make two trips usually have a shorter second trip. The average one-way bus route, including both first and second trips, is 11.7 miles. Thus the distance the 300 pupils will have to be bussed is nearly the same as the average one-way bus route of the students presently attending Independence, and it is substantially shorter than the system's average one-way bus trip of 17 miles.

[6] Satellite school zones are non-contiguous geographical zones. Typically, areas in the black core of the city are coupled—but not geographically linked—with an area in white suburbia.

as a means of achieving desegregation is not improper. District Courts have been directed to shape remedies that are characterized by the "practical flexibility" that is a hallmark of equity. See Brown v. Board of Ed., 349 U.S. 294, 300 (1955). Similarly, the pairing and clustering of schools has been approved. Green v. County School Bd. of New Kent County, 391 U.S. 430, 442 n. 6 (1968); Hall v. St. Helena Parish School Bd., 417 F.2d 801, 809 (5th Cir.), *cert. denied,* 396 U.S. 904 (1969).

The school board also asserts that §§ 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000c(b) and -6(a)(2)] forbid the bussing ordered by the district court.[7] But this argument misreads the legislative history of the statute. Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome *de facto* segregation. See generally, United States v. School District 151, 404

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[7] Title 42 U.S.C. § 2000c(b) provides that as used in the subchapter on Public Education of the Civil Rights Act of 1964:

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

Title 42 § 2000c-6(a)(2) states in part:

> "[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."

F.2d 1125, 1130 (7th Cir. 1968); United States v. Jefferson County Board of Ed., 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing en banc* 380 F.2d 385 (5th Cir.), *cert. denied, sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Keyes v. School Dist. No. One, Denver, 303 F.Supp. 289, 298 (D. Colo.), *stay pending appeal granted,* —— F.2d —— (10th Cir.); *stay vacated,* 396 U.S. 1215 (1969). Nor does North Carolina's anti-bussing law present an obstacle to the plan, for those provisions of the statute in conflict with the plan have been declared unconstitutional. Swann v. Charlotte-Mecklenburg Bd. of Ed., —— F. Supp. —— (W.D.N.C. 1970).[8]

The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated. Part of the difficulty concerning the elementary schools results from the board's refusal to accept the district court's suggestion that it control experts from the Department of Health, Education, and Welfare. The consultants that the board employed were undoubtedly competent, but the board limited their choice of remedies by maintaining each school's grade structure. This, in effect, restricted the means of overcoming segregation to only geographical zoning, and as a further restriction the board insisted on contiguous zones. The board rejected such legitimate techniques as

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[8] The unconstitutional provisions are:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing." N.C. Gen. Stat. § 115-176.1 (Supp. 1969).

pairing, grouping, clustering, and satellite zoning. Moreover, the board sought to impose a ratio in each school of not less than 60% white students. While a 60%-40% ratio of white to black pupils might be desirable under some circumstances, rigid adherence to this formula in every school should not be allowed to defeat integration.

On the other hand, the Finger plan, which the district court approved, will require transporting 9,300 pupils in 90 additional buses. The greatest portion of the proposed transportation involves cross-bussing to paired schools—that is, black pupils in grades one through four would be carried to predominantly white schools, and white pupils in the fifth and sixth grades would be transported to the black schools. The average daily roundtrip approximates 15 miles through central city and suburban traffic.

The additional elementary pupils who must be bussed represent an increase of 39% over all pupils presently being bussed, and their transportation will require an increase of about 32% in the present fleet of buses. When the additional bussing for elementary pupils is coupled with the additional requirements for junior and senior high schools, which we have approved, the total percentages of increase are: pupils, 56%, and buses, 49%. The board, we believe, should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system.

IV.

Both parties oppose a remand. Each side is adamant that its position is correct—the school board seeks total approval of its plan and the plaintiffs insist on implementation of the Finger plan. We are favorably impressed, however, by the suggestion of the United States, which at

our invitation filed a brief as amicus curiae, that the school board should consider alternative plans, particularly for the elementary schools. We, therefore, will vacate the judgment of the district court and remand 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.

On remand, we suggest that the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare, and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation. Undoubtedly some transportation will be necessary to supplement these techniques. Indeed, the school board's plan proposed transporting 2,300 elementary pupils, and our remand should not be interpreted to prohibit all bussing. Furthermore, in devising a new plan, the board should not perpetuate segregation by rigid adherence to the 60% white-40% black racial ratio it favors.

If, despite all reasonable efforts to integrate every school, some remain segregated because of residential patterns, the school board must take further steps along the lines we previously mentioned, including a majority to minority transfer plan,[9] to assure that no pupil is excluded from an integrated school on the basis of race.

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[9] The board's plan provides:

"Any black student will be permitted to transfer only if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted to transfer only if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to

Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969), and Carter v. West Feliciana School Bd., 396 U.S. 290 (1970), emphasize that school boards must forthwith convert from dual to unitary systems. In Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040 (4th Cir. 1969), and Whittenberg v. School Dist. of Greenville County, —— F.2d —— (4th Cir. 1970), we reiterated that immediate reform is imperative. We adhere to these principles, and district courts in this circuit should not consider the stays which were allowed because of the exceptional nature of this case to be precedent for departing from the directions stated in *Alexander, Carter, Nesbit,* and *Whittenberg.*

Prompt action is also essential for the solution of the remaining difficulties in this case. The school board should immediately consult with experts from HEW and file its new plan by June 30, 1970. The plaintiffs should file their exceptions, if any, within 7 days, and the district court should promptly conduct all necessary hearings so that the plan may take effect with the opening of school next fall. Since time is pressing, the district court's order approving a new plan shall remain in full force and effect unless it is modified by an order of this court. After a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the

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attend has less than 70 per cent of his race and has available space."

This clause, which was designed to prevent tipping or resegregation, would be suitable if all schools in the system were integrated. But since the board envisions some elementary schools will remain nearly all black, it unduly restricts the schools to which pupils in these schools can transfer. It should be amended to allow these elementary pupils to transfer to any school in which their race is a minority if space is available.

district court considers the suggested modifications. Cf. Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040, 1043 (4th Cir. 1969).

Finally, we approve the district court's inclusion of Dr. Finger's consultant fee in the costs taxed against the board. See In the Matter of Peterson, 253 U.S. 300, 312 (1920). We caution, however, that when a court needs an expert, it should avoid appointing a person who has appeared as a witness for one of the parties. But the evidence discloses that Dr. Finger was well qualified, and his dual role did not cause him to be faithless to the trust the court imposed on him. Therefore, the error, if any, in his selection, was harmless.

We find no merit in the other objections raised by the appellants or in the appellees' motion to dismiss the appeal. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring in part and dissenting in part:

Insofar as the court today affirms the District Court's order in respect to the senior and junior high schools, I concur. I dissent from the failure to affirm the portion of the order pertaining to the elementary schools.

I

THE BASIC LAW AND THE PARTICULAR FACTS

All uncertainty about the constitutional mandate of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955), was put to rest when in *Green* v. *County School Board of New Kent County* the Supreme Court spelled out a school board's "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," 391 U.S. 430, 437-438 (1968). "Disestablish[ment of] state-imposed segregation" (at 439) entailed "steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools" (at 442). If there could still be doubts they were answered this past year. In *Alexander* v. *Holmes County Board of Education,* the Court held that "[u]nder explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools," 396 U.S. 19, 20 (1969). The command was once more reaffirmed in *Carter* v. *West Feliciana School Board,* 396 U.S. 290 (1970), requiring "relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system." (Harlan, J., concurring at 292).

We face in this case a school district divided along racial lines. This is not a fortuity. It is the result, as the majority has recognized, of government fostered residential patterns, school planning, placement, and, as the District Court found, gerrymandering. These factors have interacted on each other so that by this date the black and white populations, in school and at home, are virtually entirely separate.

As of November 7, 1969, out of 106 schools in the system, 57 were racially identifiable as white, 25 were racially identifiable as black.[1] Of these, nine were all white schools and eleven all black. Of 24,714 black students in the system, 16,000 were in entirely or predominantly black schools.

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[1] In the entire system, 71% of the pupils are white, 29% of the pupils are black. The District Judge deemed a school having 86% or greater white population identifiable as white, one with 56% or greater black population identifiable as black.

There are 76 elementary schools with over 44,000 pupils. In November 1969, 43 were identifiable as white, 16 as black, with 13 of the latter 98% or more black, and none less than 65%. For the future the Board proposes little improvement. There would still be 25 identifiably white elementary schools and approximately half of the white elementary students would attend schools 86 to 100% white. Nine schools would remain 83 to 100% black, serving 6,432 students or over half the black elementary pupils.

To call either the past or the proposed distribution a "unitary system" would be to embrace an illusion.[2] And the majority does not contend that the system is unitary, for it holds that "the district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated." The Board's duty then is plain and unarguable: to convert to a unitary system. The duty is absolute. It is not to be tempered or watered down. It must be done, and done now.

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[2] In its application to us for a stay pending appeal, counsel for the School Board relied heavily on Northcross v. Board of Education of Memphis, — —F.2d —— (6th Cir. 1970), as a judicial ruling that school assignments based on residence are constitutionally immune. The defendant tendered us a statistical comparison of pupil enrollment by school with pupil population by attendance area for the Memphis school system.

Since then the Supreme Court in *Northcross* has ruled that the Court of Appeals erred insofar as it held that the Memphis board "is not now operating a 'dual school system' * * *." 38 L.W. 4219.

II

The Court-Ordered Plan

A. *The Necessity of the Court-Ordered Plan*

The plan ordered by the District Court works. It does the job of desegregating the schools completely. This "places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439.

The most significant fact about the District Court's plan is that it—or one like it—is the only one that can work. Obviously, when the black students are all on one side of town, the whites on the other, only transportation will bring them together. The District Judge is quite explicit:

> 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 (and 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.

The point has been perceived by the counsel for the Board, who have candily informed us that if the job must be done then the Finger plan is the way to do it.

The only suggestion that there is a possible alternative middle course came from the United States, participating as amicus curiae. Its brief was prefaced by the following revealing confession:

> We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

Nowithstanding this disclaimer, the Government went on to imply in oral argument—and has apparently impressed on this court—that HEW could do better. No concrete solution is suggested but the Government does advert to the possibility of pairing and grouping of schools. Two points stand out. First, pairing and grouping are precisely what the Finger plan, adopted by the District Court, does. Second, in the circumstances of this case, these methods necessarily entail bussing.

I am not "favorably impressed" by the Government's performance. Its vague and noncommital representations do little but obscure the real issues, introduce uncertainty and fail to meet the "heavy burden" necessary to overturn the District Court's effective plan.[3]

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[3] A federal judge is not required to consult with the Department of Health, Education and Welfare on legal issues. What is the constitutional objective of a plan, and whether a unitary system has been or will be achieved, are questions for the court. HEW's interpretation of the constitutional command does not bind the courts.

> [W]hile administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards

B. *The Feasibility of the Plan*

Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished. There is no genuine dispute on this point. The plan is simple and quite efficient. A bus will make one pickup in the vicinity of the children's residences, say in the white residential area. It then will make an express trip to the inner-city school. Because of the non-stop feature, time can be considerably shortened and a bus could make a return trip to pick up black students in the inner city and to convey them to the outlying school. There is no evidence of insurmountable traffic problems due to the increased

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controlling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board of Charles City County, 382 F.2d 326 (1967).

Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it was quite understandable that at the outset of this case the District Court invited the Board to consult with HEW. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help. However, after a substantial period of time and the beginning of a new school year, it became clear that the Board had no intention of devising a meaningful plan, much less seeking advice on how to do so. At that point (December 1969) with the need for speed in mind, the Judge appointed an expert already familiar with the school system to work with the school staff in developing a plan.

Whether to utilize the assistance of HEW is ordinarily up to the district judge. Consultation in formulating the mechanics of a plan is not obligatory. The method used by the Judge in this case was certainly sufficient. Moreover, now that a plan has been created and it appears that there are no real alternatives, a remand for HEW's advice seems an exercise in futility.

bussing.[4] Indeed, straight line bussing promises to be quicker. The present average one-way trip is over 15 miles and takes one hour and fourteen minutes; under the plan the average one-way trip for elementary students will be less than seven miles and 35 minutes. The cost of all of the additional bussing will be less than one week's operating budget.[5]

C. *The Standard of Review*

In *Brown* II, the Supreme Court charged the district courts with the enforcement of the dictates of *Brown* I.

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[4] The only indication I have encountered that a serious traffic problem will be occasioned by the additional bussing is found in an affidavit by the City Director of Traffic Engineering. His statement is based on the exaggerated bus estimate prepared by the Board and rejected by the District Court. See note 5, *infra*. Moreover, he appears to have relied to a large extent on the erroneous assumption that under the plan busses would pick up and discharge passengers along busy thoroughfares, thus causing "stop-and-go" traffic of slow moving school busses in congested traffic."

A later affidavit of the same official, filed at the request of the District Court, affords more substantial data. It reveals that the total estimated number of automobile trips per day in Charlotte and Mecklenburg County (not including internal truck trips) is 869,604. That the 138 additional busses would gravely aggravate the congestion is dubious, to say the least.

[5] The District Judge rejected the Board's inflated claims, and found that altogether the Finger plan would bus 13,300 new students in 138 additional busses. The Board had estimated that 19,285 additional pupils would have to be transported, requiring 422 additional busses. This estimate is disproportionate on its face, for presently 23,600 pupils are transported in 280 busses. As indicated above, the direct bus routes envisioned by the Finger plan should accomplish increased, not diminished, efficiency. The court below, after close analysis, discounted the Board's estimate for other reasons as well, including the "very short measurements" used by the Board in determining who would have to be bussed, the failure of the Board to account for round-trips, staggering of opening and closing hours, and overloads.

The lower courts were to have "a practical flexibility in shaping * * * remedies." 349 U.S. at 300. Thus, in subsuming these cases under traditional equity principles, the Supreme Court brought the desegregation decree within the rule that to be overturned it "must [be] demonstrate[d] that there was no reasonable basis for the District Judge's decision." *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 634 (1953). This court has paid homage to this maxim of appellate review when, in the past, a district Judge has ordered less than comprehensive relief. *Bradley* v. *School Board of the City of Richmond,* 345 F.2d 310, 320 (1965), *rev'd,* 382 U.S. 103 (1965). What is called for here is similar deference to an order that would finally inter the dual system and not preserve a nettlesome residue. As the Supreme Court made clear in *Green, supra,* those who would challenge an effective course of action bear a "heavy burden." The Finger plan is a remarkably economical scheme when viewed in the light of what it accomplishes. There has been no showing that it can be improved or replaced by better or more palatable means. It should, then, be sustained.

III

Objections Raised Against the Court-Ordered Plan

A. *The "Illegal" Objective of the Plan*

My Brother Bryan expresses concern about the plan, regardless of cost, because it undertakes, in his view, an illegal objective: "achieving racial balance." Whatever might be said for this view abstractly or in another context, it is not pertinent here. We are confronted in this case with no question of bussing for mere balance unrelated to

a mandatory constitutional goal. What the District Court has ordered is compliance with the constitutional imperative to disestablish the existing segregation. Unless we are to palter with words, desegregation necessarily entails integration, that is to say integration in some substantial degree. The dictum to the contrary in *Briggs* v. *Elliott,* 132 F. Supp. 776 (E.D.S.C. 1955), was rejected by necessary implication by the Supreme Court in *Green, supra,* and explicitly by this court in *Walker* v. *County School Board of Brunswick Co.,* 413 F.2d 53, 54 n.2 (4th Cir. 1969).

As my Brother Winter shows, there is no more suitable way of achieving this task than by setting, at least initially, a ratio roughly approximating that of the racial population in the school system. The District Judge adopted this *ad hoc* measurement as a starting guide, expressed a willingness to accept a degree of modification,[6] and departed from it where circumstances required.

B. *The "Unreasonableness" of the Plan*

The majority does not quarrel with the plan's objective, nor, accepting the findings of the District Court, does it really dispute that the plan can be achieved. Rather, we are told, the plan is an unreasonable burden.

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[6] The District Judge wrote in his December 1 order that

> Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the 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 will 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.

This notion must be emphatically rejected. At bottom it is no more than an abstract, unexplicated judgment—a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional right does not rest in the school board's discretion, as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis. It is not for the Board or this court to say that the cost of compliance with *Brown* is "unreasonable."

That a subjective assessment is the operational part of the new "reasonableness" doctrine is highlighted by a study of the factors the majority bids school boards take into account in making bussing determinations. "[A] school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." But, as we have seen, distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal. As far as age is concerned, it has never prevented the bussing of pupils in Charlotte-Mecklenburg, or in North Carolina generally, where 70.9% of all bussed students are elementary pupils.

If the transportation of elementary pupils were a novelty sought to be introduced by the District Court, I could understand my brethren's reluctance. But, as is conceded,

bussing of children of elementary school age is an established tradition. Bussing has long been used to perpetuate dual systems.[7] More importantly, bussing is a recognized educational tool in Charlotte-Mecklenburg and North Carolina. And as the National Education Association has admirably demonstrated in its brief, bussing has played a crucial role in the evolution from the one-room schoolhouse in this nation. Since the majority accepts the legitimacy of bussing, today's decision totally baffles me.

In the final analysis, the elementary pupil phase of the Finger plan is disapproved because the percentage increase in bussing is somehow determined to be too onerous.[8] Why this is so we are not told. The Board plan itself would bus 5,000 additional pupils. The fact remains that in North Carolina 55% of all pupils are now being bussed. Under the Finger plan approximately 47% of the Charlotte-Mecklenburg student population would be bussed. This is well within the existing percentage throughout the state.

The majority's proposal is inherently ambiguous. The

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[7] For some extreme examples, see: School Board of Warren County v. Kelly, 259 F.2d 497 (4th Cir. 1958); Corbin v. County School Bd. of Pulaski County, 117 F.2d 924 (4th Cir. 1949); Griffith v. Bd. of Educ. of Yancey County, 186 F. Supp. 511 (W.D.N.C. 1960); Gains v. County School Bd. of Grayson County, 186 F. Supp. 753 (W.D.a. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960). *See also*, Chambers v. Iredell Co., —— F.2d —— (4th Cir. 1970) (dissenting opinion).

[8] The majority calculates the elementary school portion of the plan to mean a 39% increase in bussed pupils, 32% increase in busses; the whole package, it is said, would require a 56% pupil increase and 49% bus increase.

These figures are accurate but do not tell the whole story. If one includes within the number of students presently being transported those that are bussed on commercial lines (5000), the increase in pupils transported would not appear to be as large. Thus the plan for elementary schools would entail a 33% bussed pupil increment, the whole Finger plan, 47%.

court-ordered plan is said to be unreasonable. Yet the School Board's own plan has also been disapproved. Does the decision—that the Finger plan is unreasonable—depend on the premise that an intermediate course is available? Would the amount of segregation retained in the School Board's plan be avowedly sanctioned if it were recognized that nothing short of the steps delineated in the District Court's plan will suffice to eliminate it? Since there is no practicable alternative, must we assume that the majority is willing to tolerate the deficiencies in the Board plan?

These questions remain unresolved and thus the ultimate meaning of the "reasonableness" doctrine is undefined. Suffice it to say that this case is not an appropriate one in which to grapple with the theoretical issue whether the law can endure a slight but irreducible remnant of segregated schools. This record presents no such problem. The remnant of racially identifiable elementary schools, to which the District Court addressed itself, encompasses over half the elementary population. This large fraction cannot be called slight; nor, as the Finger plan demonstrates, is it irreducible.

I am even more convinced of the unwisdom of reaching out to fashion a new "rule of reason," when this record is far from requiring it, because of the serious consequences it would portend for the general course of school desegregation. Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and

deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Moreover, the opinion catapults us back to the time, thought passed, when it was the fashion to contend that the inquiry was not how much progress had been made but the presence or absence of good faith on the part of the board. Whether an "intractable remnant of segregation" can be allowed to persist, apparently will now depend in large measure on a slippery test: an estimate of whether the Board has made "every reasonable effort to integrate the pupils under its control."[9]

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[9] Both in its characterization of the facts and in its treatment of the case the majority implies that the actions of this Board have been exemplary. I feel constrained to register my dissent from this view although on no account do I subscribe to the proposition that the disposition of the case depends on this issue.

On April 23, 1969 the District Judge declared the Charlotte-Mecklenburg School District illegally segregated. He found it unnecessary at that time to decide whether the Board had deliberately gerrymandered to perpetuate the dual system since he believed that the court order to follow would promote substantial changes. The Board was given until May 15 to devise a plan eliminating faculty and student segregation.

A majority of the Board voted not to take an immediate appeal and the school superintendent was directed to prepare a plan. His mandate was hazy. According to the court below—

> No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal.
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> * * * * *
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> The staff were never directed to do any serious work on redrawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other

The Supreme Court having barred further delay by its insistent emphasis on an immediate remedy, we should not lend ourselves to the creation of a new loophole by attenuating the substance of desegregation.

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possible methods of making real progress towards desegregation.

The superintendent's plan was submitted to the Board on May 8. It was quite modest in its undertaking. Nevertheless, the Board "struck out virtually all the effective provisions of the superintendent's plan." The plan ultimately filed by the Board on May 28 was "the plan previously found racially discriminatory with the addition of one element—the provision of transportation for [majority to minority transfers.]" The Board also added a rule making a student who transfers to a new high school ineligible for athletics for a year. As the District Judge found,

> [t]he effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who show no desire for such transfers.

In the meantime the Board for the first time refused to accept a recommendation of the superintendent for the promotion of a teacher to principal. The reason avowed was that the teacher, who was black and a plaintiff in the suit, had publicly expressed his agreement with the District Court order. The job was withheld until the prospective appointee signed a "loyalty oath."

The District Judge held a hearing on June 16 and ruled on June 20. He declined to find the Board in contempt but did note that "[t]he board does not admit nor claim that it has any positive duty to promote desegregation." The Judge also returned to the issue of gerrymandering and found "a long standing policy of control over the makeup of school population which scarcely fits any true 'neighborhood school philosophy.' "

On July 29, the Board returned with a new plan. The District Judge was pleased to learn that "the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.' " In view of this declaration and of the late date, the court "reluctantly" approved for one year only a plan whereby seven all black inner-city schools would be closed and a total of 4245 black children bussed to outlying white schools.

Albert V. Bryan, Circuit Judge, dissenting in part:

The Court commands the Charlotte-Mecklenburg Board of Education to provide bussing 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. Bussing

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The Board was directed to file a plan for complete dsegregation in November.

By November, the District Judge was able to survey the results achieved under the plan adopted for the year. He found that "only 1315 instead of the promised 4245 black pupils" had been transferred. (Later information revealed that the number was only 767.) Furthermore, he found that

> The Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they intend not to do it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

On November 17, the Board filed a plan. It "discarded further consideration of pairing, grouping, clustering and transporting." Ostensibly "to avoid 'tipping,'" the plan provided that white students would not be assigned schools where they would find themselves with less than 60% whites. This was, as the District Court found, a one-way street in view of the fact that the plan contemplated no effort to desegregate schools with greater than 40% blacks. The plan also dropped the earlier provision of transportation for students transferring out of segregated situations. Thus the Board nullified the one improvement it had made in its May 8 plan. It also left those black students who had transferred to outlying schools pursuant to the July 29 plan without transportation. Understandably, the court labeled this "re-segregation."

In the face of this total lack of cooperation on the part of the Board, the court was compelled to appoint an expert to devise a plan for desegregation. The Finger plan was the result.

It appears from the record that on most issues the Board was sharply divided. Of course I mean to cast no aspersions on those members—and there were some—who urged the Board forthrightly to shoulder its duty. But the above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making "every reasonable effort" to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn.

to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of bussing for this or other reasons, and regardless of cost considerations 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 US 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 bussing 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 schools; . . . [and] to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." See his memorandum appended to Northcross v. Board of Education of the Memphis, Tennessee, City Schools, —— US ——, 38 USLW 4219, 4220 (March 9, 1970).*

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

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* On remand the District Court in *Northcross* has held there was no Constitutional obligation to transport pupils to overcome a racial imbalance. Northcross v. Board of Education of the Memphis City Schools, —— FS —— (W.D.Tenn., May 1, 1970) (per McRae, J.). In the same Circuit, see, too, Deal v. Cincinnati Board of Education, 419 F2d 1387 (6 Cir. 1969).

school by requiring the transportation of pupils or students from one school to another . . . to achieve such racial balance . . . ."

I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase.

WINTER, Circuit Judge, concurring in part and dissenting in part:

I would affirm the order of the district court in its entirety.*

In a school district in which freedom of choice has patently failed to overcome past state policy of segregation and to achieve a unitary system, the district court found the reasons for failure. They included resort to a desegregation plan based on geographical zoning with a free transfer provision, rather than a more positive method of achieving the constitutional objective, the failure to integrate faculties, the existence of segregated racial patterns partially as a result of federal, state and local governmental action and the use of a neighborhood concept for the location of schools superimposed upon a segregated residential pattern. Correctly the majority accepts these findings under established principles of appellate review. To illustrate how government-encouraged residential segregation, coupled with the discriminatory location and design of schools, resulted in a dual system, the majority demonstrates that in this locality busing has been employed as a tool to perpetuate segregated schools.

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* Certainly, if the district court's order with respect to high schools and junior high schools is affirmed, the district court should not be invited to reconsider its order with respect to them. The jurisdiction of the district court is continuing and it may always modify its previous orders with respect to any school upon application and for good cause shown.

In complete compliance with *Carter* v. *West Feliciana School Board,* —— U. S. —— (1970); *Alexander* v. *Holmes County Bd. of Ed.,* —— U. S. —— (1969); *Green* v. *School Bd. of New Kent County,* 391 U. S. 430 (1968), and *Monroe* v. *Bd. of Comm'rs.,* 391 U. S. 450 (1968), the majority concludes that the existing high school and junior high school system must be dismantled and that the constitutional mandate can be met by the use of geographical assignment, including satellite districts and busing.

The majority thus holds that the Constitution requires that this dual system be dismantled. It indicates its recognition of the need to overcome the discriminatory educational effect of such factors as residential segregation. It also approves the use of zones, satellite districts and resultant busing for the achievement of a unitary system at the high school and junior high school levels. Nevertheless, the majority disapproves a similar plan for the desegregation of the elementary schools on the ground that the busing involved is too onerous. I believe that this ground is insubstantial and untenable.

At the outset, it is well to remember the seminal declaration in *Brown* v. *Board of Education (Brown II),* 349 U. S. 294, 300 (1955), that in cases of this nature trial courts are to "be guided by equitable principles" in "fashioning and effectuating decrees." Since *Brown II* the course of decision has not departed from the underlying premise that this is an equitable proceeding, and that the district court is invested with broad discretion to frame a remedy for the wrongful acts which the majority agrees have been committed. In *Green* v. *School Board of New Kent County,* 391 U. S. at 438, the Supreme Court held that the district courts not only have the "power" but the "duty to render a decree which will, so far as possible, eliminate the dis-

criminatory effects of the past, as well as bar like discrimination in the future." District courts were directed to "retain jurisdiction until it is clear that disestablishment has been achieved." *Raney* v. *Board of Education,* 391 U. S. 443, 449 (1968). Where it is necessary district courts may even require local authorities "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Griffin* v. *School Board,* 377 U. S. 218, 233 (1964). Thus, the Supreme Court has made it abundantly clear that the district courts have the power, and the duty as well, to fashion equitable remedies designed to extirpate racial segregation in the public schools. And in fashioning equitable relief, the decree of a district court must be sustained unless it constitutes a clear abuse of discretion. *United States* v. *W. T. Grant Co.,* 345 U. S. 619 (1953).

Busing is among the panoply of devices which a court of equity may employ in fashioning an equitable remedy in a case of this type. The district court's order required that "transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about reduction of segregation, and who lives farther from the school to which they are assigned than the Board determines to be walking distance." It found as a fact, and I accept its finding, that "there is no way" to desegregate the Charlotte schools in the heart of the black community without providing such transportation.

The district court's order is neither a substantial advance nor extension of present policy, nor on this record does it constitute an abuse of discretion. This school system, like many others, is now actively engaged in the business of transporting students to school. Indeed, busing is a widespread practice in the United States. U. S. Commission on

Civil Rights, *Racial Isolation in the Public Schools* 180 (1967). Between 1954 and 1967 the number of pupils using school transportation has increased from 9,509,699 to 17,271,718. National Education Association, National Commission on Safety Education, *1967-68 Statistics on Pupil Transportation* 3.

Given its widespread adoption in American education, it is not surprising that busing has been held an acceptable tool for dismantling a dual school system. In *United States* v. *Jefferson County Board of Education,* 380 F.2d 385, 392 (5 Cir.) (en banc), *cert. den.* sub. nom. *Caddo Parrish School Bd.* v. *United States,* 389 U. S. 840 (1967), the court ordered that bus service which was "generally provided" must be routed so as to transport every student "to the school to which he is assigned" provided that the school "is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules." Similarly, in *United States* v. *School Dist. 151,* 286 F. S. 786, 799 (N.D. Ill. 1968), *aff'd.,* 404 F.2d 1125 (7 Cir. 1968), the court said that remedying the effects of past discrimination required giving consideration to "racial factors" in such matters as "assigning students" and providing transportation of pupils. In addition, the Eighth Circuit in *Kemp* v. *Beasley,* —— F.2d —— (8 Cir. 1970), recognized that busing is "one possible tool in the implementation of unitary schools." And, finally, *Griffin* v. *School Board, supra,* makes it clear that the added cost of necessary transportation does not render a plan objectionable.

I turn, then, to the extent and effect of busing of elementary school students as ordered by the district court.

Presently, 23,600 students—21% of the total school population—are bused, excluding some 5,000 pupils who travel to and from school by public transportation. The school

board operates 280 buses. The average cost of busing students is $39.92 per student, of which one-half is borne by the state and one-half by the board. Thus, the average annual cost to the board is about $20.00 per student. The total annual cost to the board for busing is approximately $500,000.00 out of a total operating budget of $51,000,000.00. The cost of busing is thus less than 1% of the total operating budget and an even smaller percentage of the $57,700,000.00 which this school district expends on the aggregate of operations, capital outlay and debt service and this cost also represents less than 2% of the local funds which together with state and federal money constitute the revenue available annually to the school board.

The total number of elementary school pupils presently bused does not appear, but under the district court's order an additional 9,300 elementary school pupils would be bused. The additional operating cost of busing them would not exceed $186,000.00 per year. They would require not more than 90 additional buses, and the buses would require an additional capital outlay of $486,000.00. The increased operating cost of the additional elementary school pupils required to be bused amounts to less than 1% of the board's school budget, and the one-time capital outlays for additional buses amounts to less than 1% of the board's total budget. The combined operational and capital cost represents less than 1.2% of the board's total budget. I am, therefore, unable to see how the majority could consider the additional cost unbearable.

Perhaps more importantly, the tender years of elementary school students requires a consideration of the impact of the district court's order on the average student. While this board transports 21% of the total school population, it is providing transportation to a far lower per-

centage of pupils than the average North Carolina school board. In North Carolina 54.9% of the average daily attendance in the public schools was transported by bus during the 1968-69 school year.

The average distance traveled by elementary school pupils presently bused does not appear, but the district court found overall with respect to the children required to be bused by its order that they "will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported * * *." While the district court did not make separate findings with regard to the average length of travel for the additional elementary school pupils required to be bused, it did find that the average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. In contrast, the court found that under its plan the average one-way trip for elementary school students would be less than 7 miles and would require not over thirty-five minutes.

When I consider that busing has been widely used in this system to perpetuate segregation, that some busing was proposed even under the unacceptable board plans, that the cost of additional busing to the system as required by the court's order, both in absolute terms and in relation to its total expenditures is so minimal, and that the impact on the elementary school pupils is so slight, I discern no basis for concluding that the district court abused its discretion with respect to the elementary school.

Two other aspects of the majority's opinion require my comment.

First, the majority attempts to answer the query of the Chief Justice in his separate opinion in *Northcross* v. *Board*

of Ed. of Memphis, —— U. S. —— (1970), as to whether "any particular racial balance must be achieved in the schools" by holding "that not every school in a unitary school system need be integrated * * *." To me, the holding is premature and unwise. There is not in this case either the intractable problem of a vast urban ghetto in a large city or any substantial basis on which it may be said that the cost or the impact on the system or on the pupils of dismantling the dual system is insupportable.

The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education,* 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County,* 391 U. S. at 439, "[t]here 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 light of the circumstances present and the options available in each instance." 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, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

In addition to *Montgomery,* the same conclusion can be deduced from the mandate of *West Feliciana* and *Holmes County* to dismantle immediately a dual system. Schools cease to be black or white when each reflects the overall pupil racial balance of the entire system. What imbalances may be justified after a unitary system has once been established, and what departures from an overall pupil racial balance may be permitted to accommodate special circumstances in the establishment of a unitary system, should be developed on a case-by-case basis and the facts of record which each case presents.

The other aspect of the majority's opinion which troubles me greatly is its establishment of the test of reasonableness. My objections to this test do not spring from any desire to impose *un*reasonable, irrational or onerous solutions on school systems; I, too, seek "reasonable" means with which to achieve the constitutionally required objective of a unitary system.

My objections are two-fold.

First, this is an inappropriate case in which to establish the test. On this record it cannot be said that the board acted reasonably or that there is any viable solution to the dismantling of the dual system other than the one fashioned by the district court. Neither the board nor HEW has suggested one. So that, again, I think the majority is premature in its pronouncement and I would find no occasion to discuss reasonableness when there is no choice of remedies.

Second, the majority sets forth no standards by which to judge reasonableness or unreasonableness. The majority

approves the district court's plan as to high schools and junior high schools, yet disapproves as to elementary schools. The only differences are increased busing with attendant increased cost, time and distance. The majority subjectively concludes that these costs are too great to permit the enforcement of the constitutional right to a unitary system. I would find them neither prohibitive nor relatively disproportionate. But, with the absence of standards, how are the school boards or courts to know what plans are reasonable? The conscientious board cannot determine when it is in compliance. The dilatory board receives an open invitation to further litigation and delay.

Finally, I call attention to the fact that "reasonableness" has more than faint resemblance to the good faith test of *Brown II*. The 13 years between *Brown II* and *New Kent County* amply demonstrate that this test did not work. Ultimately it was required to be rejected and to have substituted for it the absolute of "now" and "at once." The majority ignores this lesson of history. If a constitutional right exists, it should be enforced. On this record the constitutional rights of elementary school pupils should be enforced in the manner prescribed by the district court, because it is clear that the district court did not abuse its discretion.

Judge Sobeloff authorizes me to say that he joins in these views.

Judgment of Court of Appeals dated May 26, 1970

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from, in this case, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings.

Judge Bryan joins Haynsworth, C.J. and Boreman, J. in voting to vacate the judgment of the District Court, and to remand the case in accordance with the opinion written by Butzner, J. He does so for the sake of creating a clear majority for the decision to remand. It is his hope that upon reexamination the District Court will find it unnecessary to contravene the principle stated in Judge Bryan's dissent herein, to which he still adheres. Screws v. United States, 325 US 91, 135 (1945).

By direction of the Court.

SAMUEL W. PHILLIPS
Clerk

Order of Three-Judge District Court dated April 29, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM MCNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Order of Three-Judge District Court dated April 29, 1970

Civil No. 2631

MRS. ROBERT LEE MOORE, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to de-

segregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al.* v. *William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education,* in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al.* v. *Charlotte-*

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[1] On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

[2] There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.,* as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidtaed for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a

specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g., Green* v. *County School Bd. of New Kent County,* 391 U.S. 430, 439 (1968). In

support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except non-gerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and fredom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation

to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3]

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[3] § 2000c:

As used in this subchapter—

* * * * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without 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.

§ 2000c-6(a):

(2) [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.

Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown* v. *Bd. of Ed. of Topeka,* 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States* v. *School Dist. 151 of Cook Co.,* 404 F.2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not

to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner* v. *City of Memphis,* 369 U.S. 350 (1962); *Bailey* v. *Patterson,* 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green* v. *County School Bd. of New Kent Co.,* 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross* v. *Bd. of Ed. of the Memphis City Schools,* —— U.S. ——, 38 L.W. 4219 (1970); *Alexander* v. *Holmes*

Co. Bd. of Ed., 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[4]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's perfor-

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[4] The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 Harv. L. Rev. 564 (1965).

mance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown* v. *Bd. of Ed. of Topeka,* 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis

> of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students

> in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green* v. *School Bd. of New Kent Co.,* 391 U.S. 430 (1968), *Brown* v. *Bd. of Ed. of Topeka,* 349 U.S. 294 (1955) (*Brown* II), and *Brown* v. *Bd. of Ed. of Topeka,* 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction

that boards must take steps adequate to abolish dual systems. See *Green* v. *School Bd. of Kent Co.,* 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its systems, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross* v. *Bd. of Ed. of the Memphis City Schools,* —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green* v. *School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article 2 of the Constitution).

V

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.