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SCHOOL DESEGREGATION IN RICHMOND: A CASE HISTORY†

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The story of judicially administered school desegregation in Richmond is the story of *Bradley v. School Board of the City of Richmond*.[1] It began modestly with a district court decree which granted the individual claims of ten named plaintiffs but denied injunctive relief to the class.[2] Eleven years later it approached landmark status, with a district court decree directing consolidation of

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1. Bradley v. School Bd. of Richmond, 317 F.2d 429 (4th Cir. 1963), *modifying* 7 RACE REL. L. REP. 713 (E.D. Va. 1962) (*Bradley I*); Bradley v. School Bd. of Richmond, 11 RACE REL. L. REP. 1289 (E.D. Va. 1966), *enforcing* 382 U.S. 103 (1965), *vacating* 345 F.2d 310 (4th Cir.), *aff'g* 9 RACE REL. L. REP. 219 (E.D. Va. 1964) (*Bradley II*); Bradley v. School Bd. of Richmond, 325 F. Supp. 828 (E.D. Va. 1971) (*Bradley III*); Bradley v. School Bd. of Richmond, 412 U.S. 92 (1973), *aff'g by an evenly divided Court*, 462 F.2d 1058 (4th Cir. 1972), *rev'g* 338 F. Supp. 67 (E.D. Va.) (*Bradley IV*). Citations will be identified to the particular reporter volume.

Original defendants were the Richmond School Board, Richmond School Superintendent H. I. Willett, the Pupil Placement Board of the State of Virginia and its individual members, E. J. Oglesby, Edward T. Justis and Alfred L. Wingo.

2. *Bradley I*, 7 RACE REL. L. REP. 713.

the Richmond schools with those of surrounding Henrico and Chesterfield counties.[3] However, the landmark was not to be. The Fourth Circuit reversed the district court's decree,[4] and an evenly divided Supreme Court affirmed by default.[5] Richmond was left in the unenviable position of attempting to eradicate all vestiges of a formerly dual school system in a school district which is now 78% black.[6]

PHASE I: ENDING TOTAL SEGREGATION

The complaints of the individual plaintiffs in *Bradley I*[7] attacked all facets of the "feeder school" system then operating in Richmond.[8] Until 1963, this feeder system was a common device for

3. *Bradley IV*, 338 F. Supp. 67.

4. *Bradley IV*, 462 F.2d 1058.

5. *Bradley IV*, 412 U.S. 92. Mr. Justice Powell, a former member of the Richmond School Board, did not participate.

6. Whether such predominantly black schools are racially identifiable and whether the Richmond school system is presently a unitary system are among the questions left unanswered by the Supreme Court. For an analysis of the present pattern of school attendance in Richmond as well as the surrounding counties see Appendix C *infra*.

7. *Bradley I*, 7 RACE REL. L. REP. 713.

8. The basic elements of the feeder school system were described by the Fourth Circuit in a case concerning the Roanoke schools:

> The Virginia Legislature has by statute entrusted authority for the enrollment and placement of pupils in the state to the Pupil Placement Board located in Richmond. . . .
>
> In practice, the state Pupil Placement Board's role in the assignment of pupils is largely a formality . . . . City school officials make recommendations to the Pupil Placement Board as to the assignment of every pupil in the city. If the parents or guardians do not object to the recommended assignments, the recommendations are routinely approved by the state board. In fact, such recommendations are not even presented to the three members of the state board, but are automatically approved by the state board's staff. Nor do the state board members concern themselves with the criteria applied by the local school authorities in making recommendations.
>
> The scheme employed by the school officials . . . is aptly called the 'feeder' system. The city schools are divided into . . . sections . . . . A pupil, when he first enters the city's school system, is assigned to an elementary school in one of the sections. When he graduates from the elementary school, he is automatically assigned to the junior high school which serves that same section. Similarly, upon graduation from junior high school, he goes to his section's senior high school. Under this arrangement, the initial assignment of a pupil to an elementary school effectually determines what schools he will attend during his entire school career . . . . These sections, however, serve no specifically defined areas . . . . [W]hen it comes to Negro pupils, there is no relationship between these sections and . . . geographical neighborhoods . . . . [T]he 'neighborhood' . . . consists of the entire Negro community in the city. Green v. School Bd. of Roanoke, 304 F.2d 118, 120 (4th Cir. 1962)(citations omitted).

avoiding desegregation in Virginia. The *Bradley* plaintiffs alleged that the feeder system was successfully designed to perpetuate a system of total segregation.[9]

Each of the *Bradley* plaintiffs had requested assignment outside the routine pattern of the Richmond feeder system. Taken together, they challenged three aspects of Pupil Placement Board policy:

(1) An applicant for promotion to a higher level school other than the one to which he would routinely be assigned was required to meet additional academic criteria not imposed on children "fed" into that school in the ordinary course of placement.

(2) A test of proximity was imposed on students seeking placement out of the ordinary course.[10]

(3) All applicants for transfer between schools of the same academic level were required to meet certain academic requirements, determined by tests.

The district court found these policies discriminatory[11] and, therefore, constitutionally defective, relying in each instance on recent Fourth Circuit authority.[12] The individual prayers for relief were granted.[13] In finding Richmond's feeder system invalid, the court

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While some particulars of the scheme varied with local circumstances, the feeder system was a common phenomenon in Virginia cities with discernible black student populations. *Id.* at 120. In Richmond, there were a number of attendance areas for each race. The areas were linked to racially designated schools. Frequently, the Negro and white attendance areas overlapped. *Bradley I*, 317 F.2d at 431.

9. In the 1961-62 school year, 0.15% of Richmond's black children (37 of 23,177) attended school with whites. Thirty of these thirty-seven were in one school. Three blacks were enrolled in a bi-racial Cerebral Palsy Center. The remaining four were in two other schools. The school board operated 54 schools, 50 of which remained totally segregated. *Bradley I*, 317 F.2d 429, 431-33.

10. Thus, a black student seeking placement in a white high school could be refused on the ground that he lived closer to a black high school. A white living at the same address would have routinely been placed in the white school.

11. *Bradley I*, 7 RACE REL. L. REP. at 715.

12. In Jones v. School Bd. of Alexandria, 278 F.2d 72, 77 (4th Cir. 1960), the court indicated that the "proximity test" and "transfer requirements" were not in themselves unconstitutional but could not be used to frustrate the mandates of the Supreme Court. Dodson v. School Bd. of Charlottesville, 289 F.2d 439 (4th Cir. 1961), held that residence and academic achievement requirements when applied to blacks alone, and not whites, violated the fourteenth amendment. In Green v. School Bd. of Roanoke, 304 F.2d 118 (4th Cir. 1962), residence, aptitude and scholastic achievement criteria applied to blacks attempting to transfer from segregated schools were deemed a constitutional violation.

13. The court ordered the defendants to admit the individual plaintiffs to the schools to

was far from breaking new ground.[14]

Injunctive relief for the class was a different matter.[15] Apparently finding that certain noted ameliorations to the placement program[16] were a "reasonable start toward a non-discriminatory school system,"[17] the court concluded that defendants were entitled to the discretion "to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of 'feeder schools'."[18]

The Fourth Circuit[19] took a more skeptical view of the city's modest beginnings toward an integrated system. Detailing evidence from the record not mentioned in the district court's memorandum,[20] the appellate court put the Richmond situation in a very different light. Negro schools were seriously overcrowded; white schools were operating under capacity.[21] Faculties were completely segregated. Only four of fifty-four schools in the city had both black and white students.

In addition, the court took a hard look at the attitude expressed by school officials in their district court testimony. They had made no claim of a good faith start toward elimination of racially discriminatory practices, coupled with a need for additional time in the public interest. Rather, they attempted to evade all responsibility

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which they made application.

14. *See* cases cited note 12 *supra*.

15. The district court had previously intimated dislike for class relief in desegregation cases:

> There is no question as to the right of the infant plaintiff to be admitted to the schools of the City of Richmond without discrimination on the ground of race. She is admitted, however, as an individual, not as a class or group; and it is as an individual that her rights under the Constitution are asserted. Warden v. School Bd. of Richmond, 6 RACE REL. L. REP. 1025, 1027 (E.D. Va. 1961).

16. Black attendance at previously all-white schools had burgeoned in the 1962-63 term to 127. *Bradley I*, 7 RACE REL. L. REP. at 714.

17. *Id.* at 715.

18. *Id.*

19. *Bradley I*, 317 F.2d 429. The issues on appeal were whether an injunction should have been entered, and subsidiarily, whether an injunction should require the school board to present a plan "for a systematic transition to a unitary school system." Brief for Appellants at 7, *Bradley I*, 317 F.2d 429. The defendants did not appeal the portion of the district court ruling unfavorable to them regarding individual relief.

20. *Bradley I*, 317 F.2d at 431-33.

21. The excess capacity in the white schools was more than enough to handle the black overflow. *Id.* at 432-33.

for implementation of *Brown v. Board of Education*,[22] and place that responsibility on the state's Pupil Placement Board.[23] The placement board suggested disingenuously that it "kn[e]w of no reason why students should not be assigned to public schools without discrimination on the ground of race, color, or creed."[24]

The buck-passing did not work. The court of appeals noted that under Virginia law a locality could elect to assume sole responsibility for the assignment of its pupils.[25] Richmond had not. On the record, the court could "find nothing to indicate a desire or intention to use the enrollment or assignment system as a vehicle to desegregate the schools or to effect a material departure from present practices, the discriminatory character of which required the district court to order relief to the infant plaintiffs before it."[26] By denying injunctive relief, the district court left it open for the defendants to put the next set of applicants through the same tortuous litigation process. Past performance gave no basis for doubting that they would. The appellate court panel[27] concluded that an injunction prohibiting continuation of the discriminatory system was required.[28]

At the close of its opinion, the court of appeals set the stage for the next phase of the Richmond litigation.

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22. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

23. Dr. Willett, then Richmond school superintendent, has commented on the school board's dilemma at the time. In a personal communication to the authors, he stated:

> [A]t that time . . . the Richmond School Board and Administration were caught between conflicting state and federal law and . . . the federal law was not definite enough at that time to overcome the conflict and consequently the board had to act on legal opinion that was available to them from their local and state attorneys.

24. *Bradley I*, 317 F.2d at 435.

25. *Id.* at 436. The reference was to VA. CODE ANN. §§ 22-232.18 to -232.31 (Supp. 1960), *repealed by*, Va. Acts of Assembly 1966, ch. 590, at 867.

26. *Bradley I*, 317 F.2d at 437.

27. The case was heard before a three-judge panel consisting of Circuit Judges Boreman, Bryan and Bell.

28. *Bradley I*, 317 F.2d at 438. The circuit court stopped short of plaintiffs' request that defendants be compelled to come forward with a plan for effecting a unitary school system, saying only that if defendants desired to submit a plan "providing for immediate steps looking to the termination of the discriminatory . . . practices" they should be "encouraged" to do so. *Id.*

Apparently, if the district court chose a method of supervising the desegregation process which placed heavy "police" burdens on the plaintiffs, the appellate court would not disturb its choice.

> As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect a general intermixture of the races in the schools but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race*. The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and "feeder" system, if the initial assignments are to be on a non-discriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed.[29]

The court appeared to be suggesting without directing, that "freedom of choice" was the appropriate remedy for Richmond's segregated schools.

PHASE II: "FREEDOM OF CHOICE"

On March 16, 1964, the district court entered the order[30] which was the foundation for the *Bradley II* litigation. As directed by the Fourth Circuit, the district court on June 6, 1963, entered an injunction[31] restraining defendants from: (1) refusing student admission to any school on the basis of race, (2) placing students in schools on the basis of dual attendance areas, (3) assigning pupils upon promotion in accordance with the feeder school scheme, and (4) conditioning transfers on futile, burdensome or discriminatory administrative procedures. In the same order, the district court held out a carrot to the defendants. If they were to submit a plan providing for immediate steps to terminate racial discrimination in the operation of the schools, and the plan were approved by the court, the injunction would be dissolved.

On July 29, the school board submitted a desegregation plan in the form of a resolution of the board.[32] The essential provisions of

29. *Id.*
30. *Bradley II*, 9 RACE REL. L. REP. 219.
31. Brief for Appellants, Appendix at 1, *Bradley II*, 345 F.2d 310.
32. *Id.* at 7. The resolution was passed by the school board on March 18, 1963. Testimony

the plan were: (a) that initial assignments at each level of the system would be based on "the distance the pupils live from such schools; the capacity of such schools; availability of space in other schools; whether the program of the pupil can be met by such school; the school preference as shown on the pupil placement application form; and what is deemed to be in the best interest of such pupil," (b) that the school administration would recommend that pupils be assigned to the schools they attended the previous year, but the parents might request transfer, stating their reasons, and the school administration could recommend to the Pupil Placement Board that such application be approved "if it be deemed to be in the best interest of the pupil," and (c) that applications for transfer must be made before June 1 preceding the school year for which the transfer was requested.[33]

Plaintiffs attacked the proposed plan for its failure to eliminate dual attendance areas for initial assignments, its failure to end the feeder system, and for the administrative conditions attached to transfer requests.[34] Under the plan, the school administrators would still have broad and effectively unreviewable discretion in the assignment of students. Consequently, the court would have no means of appraising the practical impact of the plan on the segregated school system. Further, the plan contained no provision for assignment of teachers and staff.[35]

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by Superintendent Willett at the July 29 hearing indicated that the board was "guided in its action at that time, in part, by a decision of the United States Court of Appeals for the Fourth Circuit in the Charlottesville case. . . ." The case referred to was probably Dodson v. School Bd. of Charlottesville, 289 F.2d 439 (4th Cir. 1961). In *Dodson*, the Fourth Circuit indicated that the unequal application of the residence and academic achievement criteria in assigning students violated the Constitution but denied relief on the ground that the assignment measures were temporary and steps would be taken quickly to end discrimination. *See* note 12 *supra*.

33. *Bradley II*, 9 RACE REL. L. REP. at 220-21.

34. Brief for Appellant, *Bradley II*, 345 F.2d 310. The plan did not purport to do anything about the great majority of students who would continue in the next grade of the schools to which they had been assigned under the old system. While it was competent for students to request transfer, the board made no special effort to make them, or their parents, aware of this fact. The board relied on "the news media" to give notice. Brief for Appellant, Appendix at 15-16 (testimony of H. I. Willett, July 29, 1963), *Bradley II*, 345 F.2d 310. While plaintiffs were challenging the adequacy of the plan to desegregate the Richmond schools, school officials consistently denied any duty to do so. *Id.* at 26 (statement of Henry T. Wickham, Dec. 20, 1963).

35. *Bradley II*, 9 RACE REL. L. REP. at 222-23.

In granting qualified approval to the plan, the district court referred to *Jeffers v. Whitley*,[36] the case suggestively mentioned by the Fourth Circuit in its *Bradley I* opinion.[37] *Jeffers* addressed the requirements of a constitutionally adequate "freedom of choice" plan for eliminating state-compelled segregation. It held that such a plan "must, at reasonable intervals, offer to the pupils reasonable alternatives, so that, generally, those who wish to do so, may attend a school with members of the other race."[38] The reasonable alternatives could not be attended by administrative burdens which unreasonably limited their exercise. Furthermore, the school officials were under a duty to give notice of the rights created by the plan.[39]

The district court found that the Richmond plan had gone into effect in September, 1963, and, as administered, generally conformed with the *Jeffers* requirements.[40] Objections to the discretion which the plan gave school officials were met by the court limiting

36. 309 F.2d 621 (4th Cir. 1962).

37. *Bradley I*, 317 F.2d at 438. *See* text accompanying note 29 *supra*.

38. Jeffers v. Whitley, 309 F.2d 621, 627 (4th Cir. 1962).

39. *Id.* at 629.

40. *Bradley II*, 9 RACE REL. L. REP. at 222-23. This conclusion was based on findings which included:

> 1. Each child entering first grade may attend any school of his choice . . . . He is not assigned to any school until he makes application to a specific school.
>
> 2. Each pupil is assigned to the school where he is presently enrolled until he completes the grades offered in that school; but a pupil has the unqualified right to transfer for the next school year to any other school which has the capacity to receive him. At the present time no school is designated as filled to capacity and therefore this factor is not a restriction upon transfers.
>
> 3. The parents of each pupil who completes the last grade in an elementary or junior high school must indicate the school the pupil wishes to attend. Each pupil has an unqualified right to attend any school of his choice subject to capacity which presently is not a restrictive factor.
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> 4. Attendance areas have been abolished.
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> 5. The "feeder system" of schools has been abolished.
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> . . . .
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> 7. Forms and instructions are provided at each school to enable pupils to transfer. Principals are required to give pupils information about their rights to school assignments.
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> . . . .
>
> 11. Certain criteria mentioned in the resolution have not yet been applied to deny any pupil admission to a school. These pertain to the "distance the pupils live from such schools, whether the program of the pupil can be met by such school, and what is deemed to be in the best interest of such pupil." [Findings of fact numbered as in district court opinion]. *Id.*

its approval to the plan as administered, and a requirement that no change in interpretation or administration be made without the court's approval.[41]

The court noted that "assignment of faculty was a suitable element for inclusion in a school board's plan" but did not hold that its absence required rejection of the plan for assignment of pupils.[42] The court was satisfied to dissolve the June, 1963 injunction, retaining the case on the docket should further relief be required.[43]

The second *Bradley* appeal,[44] in its most fundamental aspect, concerned the nature of the duty which *Brown v. Board of Education*[45] imposed on local school boards, and hence on district courts. The school board's view on this matter was propounded by its counsel to the district court in a hearing on the plan:

> It is the duty of the School Board not to discriminate on account of race, and that is exactly what this plan is designed to do. It is not designed, per se, to desegregate . . . .
>
> . . . .
>
> It seems to me, and the cases so hold, that it is not the duty of the school board to desegregate or to promote integration. There is no constitutional right of the plaintiffs for such type of operation as that.[46]

The plaintiffs continued to insist, as they had in their 1963 brief, that the school board's obligation was to effect a "unitary," "nondiscriminatory," "desegregated" school system.[47] Exactly what would satisfy their claim was not made clear—perhaps could not be stated clearly in the face of the *Jeffers* dictum, repeated in *Bradley I*,[48] that plaintiffs were not entitled to an order requiring "a general

41. The court found the method of notice employed by the school board "not insufficient." It held itself open to "suggestions of the parties" should experience indicate a need for more notification. *Id.* at 223.

42. *Id.* This aspect of the opinion was to gain significance as the second phase of the *Bradley* litigation proceeded. *See* text accompanying notes 58, 64-68 *infra.*

43. *Bradley II*, 9 RACE REL. L. REP. at 223.

44. *Bradley II*, 345 F.2d 310.

45. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955)(*Brown II*).

46. Brief for Appellant, Appendix at 26 (statement of Henry T. Wickham, Dec. 20, 1963), *Bradley II*, 345 F.2d 310.

47. Brief for Appellants at 13-20, *Bradley II*, 345 F.2d 310.

48. *See* text accompanying note 29 *supra.*

intermixture of races in the schools," *i.e.*, integration. Nonetheless, it is entirely clear that the plaintiffs were not satisfied with an order permitting the board to deal straight off a carefully stacked deck. They argued:

> In view of the system of dual attendance zones which "has demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation," the defendant School Board should no longer be permitted to allow segregation to perpetuate itself as it must inevitably do if the initiative and the means for eliminating it will be limited to that of its victims. The Board should be required to disestablish the institution in accordance with the directive of the Supreme Court which indicates a necessity of revision of personnel policies and a revision of school districts and attendance areas into compact units.[49]

Responding to this, the defendants asked: "Why are the plaintiffs before this Court? The obvious answer is that they, or their attorneys, do not believe . . . in the freedom of an individual to choose."[50]

The plaintiffs asserted the long delay since *Brown* as one justification for their insistence that the school board be required to take *immediate* action to effectuate desegregation. The defendants responded that nothing more need be done; no student was then being denied by official action admission to the school of his choice.[51] The plaintiffs' argument to the court of appeals also focused on the continuing complete segregation of school faculties, and the resultant labeling of schools as black or white.[52]

As posed to the Fourth Circuit, the issue was whether the duty of the school board under *Brown* ended when it no longer engaged in

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49. Brief for Appellants at 19-20, *Bradley II*, 345 F.2d 310.

50. Brief for Appellee at 12, *Bradley II*, 345 F.2d 310. This came during a time when the NAACP and its attorneys were under general attack in Virginia. *See* Tucker, *Reflections on Virginia's Reaction to Brown*, 4 J. LAW & ED. 36 (1975).

51. Brief for Appellee at 12, *Bradley II*, 345 F.2d 310. The defendants pointed out Richmond was operating on a plan "similar to the one being followed in Baltimore." A copy of the Baltimore plan was appended to defendant's brief. They apparently saw no incongruity in asserting, in the face of a claim of inordinate delay, that they were following a plan adopted by Baltimore 10 years earlier.

52. Brief for Appellants at 10-11, *Bradley II*, 345 F.2d 310. Defendants chose to ignore this part of the argument.

practices which required segregation. A majority of the court, sitting *en banc*, was satisfied with the changes the local board, helped along by the district court's interpretation, had made. Speaking for the majority, Judge Haynsworth characterized the question before the court as "whether the School Board adequately discharges its duty under the law when it gives to every pupil an unrestricted right to attend the school of his choice, or that of his parents."[53] The court of appeals accepted the school board's view that the board resolution, as construed and limited by the district court, did provide such right.[54]

Having established the existence of its major premise, the court completed the syllogism. The fourteenth amendment did not prohibit segregation in the schools, as long as it was voluntary.[55] Even compelled segregation, as long as it resulted from racially neutral criteria such as inflexible geographic zoning, would not run afoul of the Constitution.[56] "Freedom of choice" became an appropriate method for complying with *Brown* in the Fourth Circuit. "The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous."[57]

The plaintiffs' complaint concerning teacher assignments was dismissed by the majority on the grounds that (1) the plaintiffs had failed to show that the racial assignments had effected a denial of their constitutional rights, and (2) the question whether to hold a hearing at which plaintiffs might establish such denial was within the discretion of the district court. That discretion was not abused if the hearing were put off until the district court had determined

53. *Bradley II*, 345 F.2d at 313.

54. *Id.* Plaintiffs' claim that notification of the right was inadequate was concluded to the effect that there was a district court *finding* of adequacy. *Id.* at 314. This has overtones of a finding of fact which cannot be overturned on appeal without a determination by the appellate court that the trial court conclusion was clearly erroneous. FED. R. CIV. P. 52(a). Because notice goes to the effectiveness of the remedy, the district court may have abused its discretion in not requiring more substantial notice efforts. While the different standard would not make reversal more likely, it could provide a vehicle for pointed and effective suggestion to the district court, consistent with the appellate court's supervisory responsibilities.

55. *Bradley II*, 345 F.2d at 316.

56. *Id.* at 317.

57. *Id.* at 316. There is a certain resonance between the concepts of freedom and voluntariness which gives surface plausibility to the court's statement. But once the surface is scratched, say by substituting "murder" for "discrimination" in the noted sentence, the resonance quickly fades.

the effect of other measures already taken.[58]

Judge Sobeloff and Judge Bell filed a separate opinion.[59] They were not content merely to give the local board a pat on the back. They expressed doubt that the school board's resolution qualified as a plan of desegregation. But in light of the district court's reservations and cautions to the board with regard to administration of the plan, they tentatively concurred with the majority's affirmance. Their concurrence was based on the assumption that the resolution was an interim measure only, and would be subjected to full review no later than the fall of 1965. Review was necessary to determine whether the plan represented a real change in the officials' attitude towards their constitutional duty, "or merely a strategic retreat to a new position behind which the forces of opposition [would] regroup."[60]

In setting forth their view of what an adequate plan required, the concurring judges said:

> The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma. This may involve considering, for example, the availability of transportation, the opportunity to participate on equal terms in the life of the school after the pupil's arrival, and any other circumstances that may be pertinent.[61]

The goal of the plan should be equal educational opportunity for all children.[62]

The concurrence did not extend to the majority's ruling on deseg-

58. *Id.* at 319-21. Plaintiffs' attorneys had been awarded $75 in the district court for their representation of two individual plaintiffs who had been given relief under the injunction. They were denied fees for their representation of the class. The denial was affirmed by the circuit court. Attorneys' fees were authorized only when the suit should have been unnecessary, except for the school board's "unreasonable, obdurate obstinancy." This was not such a case. *Id.* at 321.

59. *Id.* at 321-25. Judge Bryan also filed a separate opinion "only to accent the view that the Board's concern, consideration and action [had] been exemplary." *Id.* at 321.

60. *Id.* at 321-22. They noted the disingenuousness of the school board's assertion that theirs was the "Baltimore Plan." Context, as well as text, was significant. Baltimore adopted the plan immediately after *Brown*; Richmond's plan came ten years later—ten years of massive resistance and other official avoidance of the Supreme Court's mandate.

61. *Id.* at 323.

62. *Id.* at 324.

regation of faculty and staff, dissolution of the 1963 injunction, or attorneys' fees. Counsel fees should be required as a matter of simple justice, "whenever children are compelled by deliberate official action or inaction to resort to lawyers and courts to vindicate their clearly established and indisputable right to a desegregated education."[63] Continuation of the injunction was required to insure the good faith of the school board. The concurrence noted that questions concerning faculty assignment had been properly raised, and should be promptly heard rather than left hanging while the district court awaited results of the plan.

The plaintiffs petitioned the United States Supreme Court for a writ of certiorari, urging two questions related to continued segregation of faculties:

> 1. Whether the Richmond . . . school board's "freedom of choice" policy is adequate under *Brown v. Board of Education* to disestablish the system of racial segregation created by past compulsory pupil assignment policies in the context of a continuing practice of assigning all school teachers on the basis of race in a segregated pattern.
> 2. Whether Negro pupils are entitled to demand a prompt end to the school authorities' practice of racially segregating teachers by assigning them on the basis of race as a violation of the pupils' right to attend a non-discriminatory public school system.[64]

Similar issues were raised in *Gilliam v. School Board of Hopewell*,[65] decided by the Fourth Circuit on the same day as *Bradley II*. Petitions in both *Bradley* and *Gilliam* were granted "for the purpose of deciding whether it is proper to approve school desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis."[66] The Court chose to avoid the attack on "freedom of choice."

In a per curiam opinion, the Supreme Court held that the plaintiffs were entitled to full evidentiary hearings on their contention regarding faculty assignment, before any plan could be approved. Rejecting the circuit court's suggestion that the relation between

63. *Id.*
64. Brief for Petitioners at 2, *Bradley II*, 382 U.S. 103.
65. 345 F.2d 325 (4th Cir. 1965).
66. *Bradley II*, 382 U.S. at 103.

faculty assignment and the adequacy of a desegregation plan was entirely speculative, and rejecting the notion that resolution of the issue could abide further evidence on the success of the plan, the Court insisted that "[d]elays in desegregating school systems are no longer tolerable."[67]

The judgment of the court of appeals was vacated, and the cause remanded to the district court for evidentiary hearings on the teacher assignment issue.[68] No such hearings were held. On March 30, 1966, with the consent of the plaintiffs, the district court approved a desegregation plan for Richmond's schools.[69] The plan acknowledged the school board's responsibility to follow nondiscriminatory practices in the employment and assignment of teachers, to take steps to eliminate racial segregation of faculties, and to take positive steps to make the freedom of choice method of pupil assignment work to desegregate the schools.[70]

The plaintiffs gave their consent reluctantly. There was no practical alternative open while "freedom of choice" remained a constitutionally acceptable remedy for formerly dual school systems. Progress in desegregating Richmond's schools under the consent decree was minimal. The energies of plaintiffs' counsel were consumed in efforts in other localities to eliminate "freedom of choice" from the arsenal of resistance devices.[71] With no immediate pressure from either court or counsel, the board's promise to consider other procedures remained an empty cup.

PHASE III: TOWARD A "UNITARY" SCHOOL SYSTEM

The third phrase of *Bradley* was initiated by a motion of plaintiffs' counsel to withdraw.[72] By 1970, with subsequent Supreme

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67. *Id.* at 105.

68. *Id.*

69. The text of the board's resolution and the court's order of approval are reported at Bradley v. School Bd. of Richmond, 11 RACE REL. L. REP. 1289 (E.D. Va. 1966).

70. *Id.* at 1290-92. The board also acknowledged that freedom of choice might not be enough:

> If the steps taken by the School Board do not produce the significant results during the 1966-67 school year, it is recognized that the freedom of choice plan will have to be modified, with consideration given to other procedures such as boundary lines in certain areas. *Id.* at 1292.

71. *E.g.*, Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968).

72. The motion was filed on February 29, 1970.

Court decisions,[73] the legal situation as regards "freedom of choice" plans was substantially changed.[74] On March 10, 1970, plaintiffs filed a motion for further relief seeking an order directing prompt conversion of Richmond's school system to a unitary, nonsegregated system.[75] The district court directed the defendants to advise it within ten days "if it is their position that the public schools of the City of Richmond, Virginia, are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court."[76]

The defendants responded that "they had been advised that the public schools of the City of Richmond are not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States . . . ."[77] Uncertain of the effect of the defendants' statement that they "had been advised" of the inadequacy of their attempts at desegregation, the district court offered them a hearing on the adequacy of the 1966 freedom of choice plan. They declined the invitation, admitting that the operation of the system did not meet constitutional standards.[78]

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73. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971).

74. Henry Marsh, III had undertaken the *Bradley* case in 1961, shortly after graduating from law school. When the Supreme Court refused to decide the Bradleys' challenge to "freedom of choice" as a means of eliminating segregated school systems, Marsh accepted the consent decree of March 30, 1966, as the best that could be done under existing law. By the time the legal situation changed, so had Marsh's position. As a member of the Richmond City Council, he could not continue the case because of a possible conflict of interest. Marsh's possible conflict of interest had inhibited him from pursuing the case after the United States Supreme Court decided *Green* in 1968. Between the Court's opinion in *Green* and its opinion in *Bradley IV*, 412 U.S. 92, the composition of the Court had changed as well as the climate of the country. Marsh's delay ironically operated to frustrate the Bradleys' quest for a judicial remedy to desegregate the Richmond public schools.

75. The motion was presented to Judge Robert R. Merhige, Jr., who had replaced Judge Butzner on the district court bench in 1968 when the latter was elevated to the Fourth Circuit. Judge Merhige was not a newcomer to school desegregation litigation, having handled the implementation aspects of *Green v. County School Bd. of New Kent County* on remand, and having been the trial judge in the "splinter district" cases, Wright v. Emporia, 407 U.S. 451 (1972).

76. Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 558 (E.D. Va. 1970).

77. *Id.*

78. At a later point in the litigation, an intervening citizen group, the Bellevue - Ginter Area Civic Association, attempted to challenge this admission. *Id.* at 558-59. The court

Based on the admission, the court vacated the 1966 consent decree, mandatorily enjoining defendants to disestablish the dual school system it was then operating and replace it with a unitary system "the components of which are not identifiable as either 'white' or 'Negro' schools."[79] The school board was directed to file a plan to that end; assistance in preparing such a plan had already been requested of the Department of Health, Education and Welfare. Hearings on an HEW prepared plan, a plan proposed by the plaintiffs (the Foster plan) and various plans presented by intervenors whose primary concern was preservation of neighborhood schools were held in June, 1970.[80] In addition to considering these plans, the

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rejected the challenge, both because intervention had been allowed on a "take the litigation as it is" basis, and because evidence received clearly justified the admission. *Id.* at 559.

79. *Id.* at 558.

80. The HEW team had assisted the school board in preparing its plan which had not taken into account either transportation facilities available to the school district or the race of the students who were being assigned. The result was basically a neighborhood school plan, relying on zoning and some clustering of schools. Reviewing projected attendance patterns of the proposed plan, the court decided there were too many "racially identifiable" schools. A "unitary" school system, according to the court, required the use of any and all reasonable means to eliminate such schools—to achieve the greatest possible degree of desegregation. This did not mean racial balance in each school, *i.e.*, that each school must reflect the racial character of the entire system. But it did require more desegregation than the HEW plan provided.

At the same time the court rejected the HEW plan, it evaluated the adequacy of the plaintiffs' Foster plan for reaching the unitary system objective. The Foster plan was prepared at the plaintiffs' behest by Dr. Gordon Foster, director of the Florida School Desegregation Consulting Center at the University of Miami. The plan used contiguous pairing, and both public and school-owned transportation. After extensive consideration of the substantial transportation requirements of the Foster plan, the court found that the plan would be a reasonable means of achieving a unitary system. The court, however, declined to order implementation of the Foster plan for the impending 1970-71 school year, on the ground that the plan "might well result in a system which would be detrimental to the educational values which the court [believed could] be maintained by less precipitous action." In other words, the Foster plan was submitted too late (June 22) for smooth implementation by September.

After rejection of both the HEW and Foster plans, the court moved on to consider a second plan submitted by the school board which called for a certain amount of transportation in connection with satellite zoning. This was accepted on an interim basis; but the court explicitly stated that the plan would not ultimately be sufficient. Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 574 (E.D. Va. 1970). It was acceptable only because the beginning of the new term was too near for acquisition of the buses needed to effectuate a plan such as Foster's. In addition, important rulings on the extent of a school board's responsibility to desegregate were expected, the most important being the appeal of Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971). Since the district court's view of the school board's responsibility to implement more transportation was in accordance with the Fourth Circuit opinion in *Swann*, it believed constraint was

court, on the plaintiff's motion, entered an injunction against most school construction projects in Richmond. The construction injunction was predicated on the fact that school boards were required to use all reasonable means at their disposal, including building construction, to eliminate segregation. The board could not attempt this until it knew the features of the plan under which its schools would operate.[81]

Faculty assignment had also been at issue and the court, consistent with *United States v. Montgomery County Board of Education*,[82] ordered faculty assignments in each school to substantially replicate the racial ratio of faculty in the entire system.

On November 4, 1970, history was made when the Richmond School Board moved the court to compel joinder of the members of the state Board of Education, the state Superintendent of Public Instruction and the school boards and boards of supervisors of Henrico and Chesterfield counties as defendants. The motion was granted, thus initiating the "interdistrict" aspect of *Bradley*.[83]

The school board, on November 18, asked the court to vacate or modify the school construction injunction.[84] This motion induced the court to consider whether alternative building sites would be more suitable for pupil assignment plans designed to desegregate. The issue raised was whether the court's approval of the board's building program would tend to eradicate rather than entrench segregation.[85] After carefully considering a number of sites, the court decided to lift the injunction that blocked construction of two proposed middle schools and one high school. The court stood firm, however, when it came to building new elementary schools. Elementary school segregation had proved to be the most intractable, due to size and location of buildings and age of children. It appeared to the court that the particular sites selected for elementary schools

appropriate while the Supreme Court's opinion remained inchoate, if not undetectable. *See* Northcross v. Board of Educ. of Memphis, 397 U.S. 232, 236 (1970) (Burger, C.J., concurring).

81. Bradley v. School Bd. of Richmond, 315 F. Supp. 325, 328 (E.D. Va. 1970).

82. 395 U.S. 225 (1969). In the *Montgomery County* decision, the Supreme Court approved a district court order that the ratio of white to black faculty in each school reflect the ratio throughout the system. *Id.* at 235-37.

83. Bradley v. School Bd. of Richmond, 51 F.R.D. 139 (E.D. Va. 1970).

84. *See* Bradley v. School Bd. of Richmond, 324 F. Supp. 456, 461-69 (E.D. Va. 1971).

85. *Id.* at 462.

might hinder further desegregation efforts. This undesirable potential was enough to shift the burden to the school board to justify its choice of sites. The board offered only "bare conclusions," and did not meet its burden.[86]

On December 9, plaintiffs moved for implementation of the Foster plan[87] for the second semester of the 1970-71 school year. The court declined once again to order its implementation. While clearly troubled by the apparent inconsistency of further delay with the Supreme Court's insistence on immediacy in *Alexander v. Holmes County Board of Education*[88] and *Carter v. West Feliciana Parish School Board*,[89] and the Fourth Circuit's admonition in *Stanley v. Darlington County School District*,[90] the district court found justification in the doctrine of reasonableness outlined in *Swann v. Charlotte-Mecklenburg Board of Education*[91] and the possibility that forthcoming Supreme Court rulings might affect the school board's duties.[92]

While skirmishes concerning the interdistrict aspect of the case flourished, hearings were held on three plans proposed by the school board for operation of the district in the 1971-72 term. The court issued its ruling on April 5, 1971[93] and announced that it was no longer troubled by whatever dislocations might result from pending decisions in the Supreme Court.[94] Even though the *Swann* decision was expected soon, the court was most concerned that a plan be approved in sufficient time for implementation in the fall.

The board had submitted three plans for the court's consideration. Criteria for the adequacy of a plan were set by *Green v. School Board of Roanoke*:[95]

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86. *Id.* at 468-69.

87. *See* note 80 *supra*.

88. 396 U.S. 19 (1969).

89. 396 U.S. 290 (1970).

90. 424 F.2d 195 (4th Cir. 1970).

91. 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971).

92. Bradley v. School Bd. of Richmond, 324 F. Supp. 456, 458-59 (E.D. Va. 1971). The district court reviewed the activity of other courts on desegregation matters since submission of *Swann* to the United States Supreme Court on October 6, 1970, and concluded that most lower courts were waiting to see what would be wrought. *Id.* at 460.

93. *Bradley III*, 325 F. Supp. 828.

94. *Id.* at 831.

95. 428 F.2d 811 (4th Cir. 1970).

> The school board in devising its plan and the district court in considering whether or not it is adequate must explore every reasonable method of desegregation, including rezoning, pairing, grouping, school consolidation, and transportation, including a majority to minority transfer plan. In short, any and all reasonable means to dismantle the dual system and eliminate racial characteristics in the . . . schools must be utilized . . . .[96]

Plan I was "obviously deficient."[97] The school board limited itself in that plan to the technique of proximal geographic zoning. The result would be a system in which over half the students of each race would attend racially identifiable schools.[98]

Plan II was similar to the interim plan in effect for the 1970-71 term, a plan which the court had held could not create a unitary system.[99] The plan was most significantly defective at the elementary level. In addition to the proximal zones of Plan I, Plan II used contiguous pairing and majority to minority transfers; but it left 19 elementary schools more than 90% one race. In rejecting Plan II, the court noted its striking similarity, both as to techniques used and results achieved, to a plan already found insufficient by the Fourth Circuit in *Swann*.[100]

Plan III represented the board's best effort "to remove from the public schools all vestiges of racial identity," using all means at the board's disposal including "extensive busing of students, proximal geographic zoning, pairing, clustering, satellites, and racial balance among faculties."[101] Plan III was the Board's refined version of the Foster plan.[102] The parameters of racial identifiability of schools established by Plan III were that all schools would have a minority-majority ratio in which each group would be at least one half of the projected city-wide ratio for that group.[103]

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96. *Id.* at 812.

97. *Bradley III*, 325 F. Supp. at 833.

98. Specifically, 10,074 of 17,652 white students and 19,272 of 30,153 black students would attend schools with 90% or more of their own race. *Id.*

99. *See* note 80 *supra*.

100. *Bradley III*, 325 F. Supp. at 834.

101. *Id.*

102. The court noted that "the Foster plan would [not] result in a 'more unitary' system at any level . . . ." *Id.* at 844. The court also concluded the Board's plan was educationally superior. *Id.* at 845.

103. *Id.* at 834. Working on an assumption of a 66% black, 34% white city-wide ratio, each

The court found that, if it succeeded as planned, Plan III would eliminate the racial identifiability of each school to the extent feasible within the City of Richmond. The result was in accord with the board's responsibility "to do away with a system under which one may confidently predict those schools which a given child may attend, and those from which he is effectively barred, by reference to his race."[104]

In conjunction with the interim plan, the court had directed that faculty and staff be assigned so that each school reflected the racial composition of the system as a whole. On reviewing data submitted concerning faculty and staff assignments under the interim plan, the court found some significant deviations from its "rule of approximate parity," and, therefore, directed that in 1971-72 the deviations be cured and that any further staff assignments giving rise to such deviations be submitted for court approval.[105]

The school board had not yet presented detailed plans for the student transportation required by Plan III. Nonetheless, the court assessed the reasonableness of probable transportation costs based on the board's "most exaggerated estimates both for capital outlay and operating costs."[106] Considered from the perspective of a statewide system in which 60% of the school children rode buses to school, the requirement that 43% of Richmond's children ride buses was not unreasonable.[107] Nor did it appear, though exact informa-

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school would be at least 17% white or at least 33% black (except Kennedy High School which was physically located in Henrico County). In the high schools, all but one would be majority black. White attendance would range from a 21% minimum to a 57% maximum. At the middle school level, Plan III used non-contiguous pairing and satellite zoning. Two of the pairs would be majority-white pairs, but the court concluded once again that no more could be accomplished within the confines of the district. The elementary school portion of Plan III used extensive pairing, both contiguous and non-contiguous. Four of thirty-six elementary schools would have majority white enrollments; three would be over 75% black. The range of white enrollment was projected to run from 20% minimum to 66% maximum. The system-wide ratio at the elementary level was expected to be 39% white/61% black. *Id.* at 835-37.

104. *Id.* at 835.

105. *Id.* at 838.

106. *Id.* at 844. The court found that transportation costs attributable to Plan III would in the first year amount to $517,000, $420,000 of which would be capital investment in new buses. In light of the fact that the city had received $614,000 in federal grants to assist in integrating the schools, and the fact that the board's yearly capital and operating budget was $60 million, the transportation costs of Plan III were not unreasonable. *Id.* at 840-41.

107. *Id.* at 841. Each of the counties bordering on Richmond already transported about the

tion was not available, that the times or trip distances involved would be unreasonable.[108] The court did not assert that either the cost or dislocation involved in transporting students was insubstantial; but without its use, the city's segregated housing pattern made achievement of a unitary school system impossible. The board was bound to use every reasonable means, including transportation, to achieve that end.

Having concluded that Plan III would, to the extent feasible within the city, establish a unitary system, the court ordered the school board to proceed promptly with its implementation in time to operate the city schools under the plan commencing with the 1971-72 school year.[109] The court noted that its approval of the plan went only to its results—that if in operation actual enrollments were not as projected, the court would not hesitate to order revisions.[110] Having accomplished what it could within the boundaries of the city, the court turned its attention, at the behest of the Richmond School Board in the first instance, to the surrounding counties.

PHASE IV: CONSOLIDATION

A. *The Geographical and Social Setting*

The counties of Henrico and Chesterfield and the City of Richmond are discrete units of local government within the Commonwealth of Virginia. Virginia cities are not part of counties. Cities expand at the expense of the territory of an adjacent county. Expansion is accomplished by a judicial annexation proceeding, in which the county is awarded damages for the land and capital improvements taken from its jurisdiction.[111] Since becoming a city, Richmond has enlarged itself by annexation eleven times.

Including the land acquired in a 1970 annexation,[112] Richmond covers approximately 63 square miles. It is completely surrounded by Henrico (244 square miles) and Chesterfield (445 square miles).[113]

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same number of students as would the city under Plan III, yet each served approximately 10,000 fewer students.

108. *Id.* at 842.

109. *Id.* at 846.

110. *Id.* at 847. At present, Plan III remains in operation within the City of Richmond. *See* note 273 *infra*, and accompanying text.

111. *See* Holt v. City of Richmond, 459 F.2d 1093, 1094 (4th Cir. 1972).

112. *Id.* at 1095.

113. *Bradley IV*, 338 F. Supp. at 178.

Richmond is near the geographic center of the area.

The highways into Richmond are good and traffic is not a major or time-consuming problem. By automobile, most of both counties are within thirty minutes travel time of the center of Richmond, even during peak hours.[114] For a substantial number of people, the travel time is less because the more densely populated areas of each county are closer to Richmond. In 1968, almost half of the employed residents in Chesterfield and almost two-thirds of those in Henrico worked in Richmond.[115]

In 1970, following annexation, Richmond's population was 249,621, Henrico's 154,364 and Chesterfield's 76,855.[116] The total area population was 480,840. In recent decades, annexation aside, Richmond has been losing population while the counties have gained.

While the overall population figures have decreased in Richmond and increased in the counties, the percentage of blacks in each jurisdiction has changed inversely.[117] Containment of blacks within Richmond, rather than significant black immigration, accounted for the increased percentage of blacks in the city. Although black immigration exceeds emigration,[118] and the black birth rate since 1956 has been higher than the white birth rate,[119] the primary factor responsible for the increased proportion of blacks is continual white emigration.[120]

In 1968, the Richmond School Board received a study, prepared by a federally-funded team of educators and social scientists headed by Dr. James Sartain of the University of Richmond, which dealt

114. Exhibits at 13e, *Bradley IV*, 412 U.S. 92.

115. *Id.* at 5e.

116. *Bradley IV*, 338 F. Supp. at 178.

117. From 1940 to 1970, the black population fell from 20% to 11.5% in Chesterfield, and from 16.6% to 6.8% in Henrico. Despite annexation of a 97% white portion of Chesterfield, the percentage of blacks in Richmond increased from 31.8% to 42.3% for the same years. During this period, the percentage of blacks in the entire metropolitan area has remained remarkably stable; 28% in 1940, 26% in 1970. Exhibits at 7e-8e, *Bradley IV*, 412 U.S. 92.

118. In the ten year period prior to the interdistrict phase of the *Bradley* case, the net immigration of blacks and other minority groups was 782 persons. *Bradley IV*, 338 F. Supp. at 220.

119. Bureau of Vital Statistics, Richmond, Va. 1950-70.

120. See Appendix A *infra*, for discussion of the factors affecting residential segregation in the Richmond metropolitan area.

with the problem of resegregation in Richmond's schools.[121] Among other things, the team suggested that the school board:

> Resolve the annexation issue. With the school-aged population in the city of Richmond approaching the point where it will be 70 percent or more Negro, while the surrounding county areas are virtually all white it is obvious that no really meaningful and stable racial balance is possible in the public schools unless the annexation issue is settled. If annexation is not forthcoming in the immediate future in areas of substantial size, this group recommends that either a multi-governmental unit school system be established with Chesterfield and Henrico Counties or that the city of Richmond give up its charter entirely, creating two metropolitan county governments. *This recommendation is a crucial one, and the others are largely dependent upon the successful implementation of this one in order to be fully beneficial.*[122]

The city school board was fully aware of the "white flight" phenomenon, as manifested in a general exodus of whites from the central city, and in withdrawal of white children from predominantly black schools and school systems. In fact, a privately acknowledged justification of the board's go-slow policy under freedom of choice was to ameliorate this problem. The Sartain report had documented the coincidence of school integration and "blockbusting" activity by real estate agents, followed by resegregation of the schools.

Soon after the *Bradley* litigation was reopened, when it became apparent that whatever power the board had to ameliorate white flight would be taken from it, serious consideration of a desegregation plan involving the counties began.[123] Even before the interim plan was ordered into effect for the 1970-71 school year, the Richmond School Board had voted to authorize its counsel to seek consolidation.[124]

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121. Urban Team Study on Northside Schools (November 21, 1968) prepared for the Richmond Public Schools pursuant to a grant from the U.S. Dept. of Health, Education and Welfare, Office of Education, under Title IV, sec. 405, Civil Rights Act of 1964, 42 U.S.C. § 2000c-4 (1970) [hereinafter cited as Urban Team Study].

122. Urban Team Study, *supra* note 121, at 4 (emphasis in original).

123. At least one board member had been thinking along these lines since 1962.

124. The City Attorney had filed a motion for leave to file a third party complaint addressed to the school boards of Henrico and Chesterfield before the board vote. The complaint was never served and was subsequently withdrawn. Further action to implement the board's

B. Motion for Joinder

On November 4, 1970, the Richmond School Board sought to join the county school boards and boards of supervisors of Henrico and Chesterfield counties, members of the state Board of Education and the state Superintendent of Public Instruction as parties necessary to afford the school children of Richmond, both white and black, full relief.[125] That relief entailed the formulation of a community-wide plan for the City of Richmond and the counties of Henrico and Chesterfield.[126] The motion was granted December 5, 1970, and the plaintiffs were ordered to file an amended complaint consistent with the motion.

The plaintiffs were somewhat surprised by the Richmond School Board's interest in consolidation. They had not opposed the joinder motion, but they were planning to wait for the *Swann* decision on the legitimacy of transportation as a tool for desegregation before taking their next step: a request for interdistrict transportation. Realizing that consolidation of school divisions, particularly in this instance involving separate political subdivisions, went beyond what the United States Supreme Court had previously authorized, the plaintiffs' amended claim for relief was in the alternative: consolidation *or* an order directing the defendants to enter into agreements for assignment and transportation of students across division

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decision was delayed until ratification of Virginia's new constitution, which contained a guarantee of quality education for every child, was assured.

125. *See* FED. R. CIV. P. 19(a).

126. The motion for joinder alleged, *inter alia*:

> 8. There is an established trend toward the resegregation of the Richmond public school system caused in large part by the movement of white families from Richmond to the Counties of Henrico and Chesterfield. It can be reasonably anticipated that this established trend will be greatly accelerated as a direct result of the plan now being implemented within the city limits of Richmond by order of this Court. This accelerated resegregation will lead to the frustration of any unitary plan developed solely with reference to the city of Richmond, and the plaintiffs and others similarly situated will be unable to obtain complete and effective relief in this cause unless they are included within a unitary plan encompassing the City of Richmond and the Counties of Henrico and Chesterfield.
>
> 9. Under the equal protection clause of the Fourteenth Amendment, the plaintiffs and all other Richmond school children are entitled to the opportunity to participate in a unitary school system which reasonably reflects the racial composition of the City of Richmond and the Counties of Henrico and Chesterfield, the community in which they live. Appendix, Vol. I, at 93a-94a, *Bradley IV*, 412 U.S. 92.

See also Bradley v. School Bd. of Richmond, 51 F.R.D. 139 (E.D. Va. 1970).

lines.[127] The alternative request was never withdrawn, but it was generally disregarded in subsequent proceedings.

C. Positions of the Parties

The school board believed it was sufficient to show that the long-standing policies and practices of the state and county defendants condoned and contributed to the predominantly black schools in Richmond surrounded by a sea of white schools in the adjoining counties. The board's cross-claim revealed that counsel did not believe it essential to show a direct causal relation between state and county action and the segregated condition of the area schools. Nor did counsel deem it essential to prove that misfeasance by particular state agencies had a measurable interdistrict effect, or that there was an invidious conspiracy among the joined parties. Rather, the board and the plaintiffs sought only to show that the generally segregated condition of the city schools was aggravated by the combined contributions of various governmental agencies and the entrenched customs of the community.

In cases involving southern school systems, the Supreme Court had never required the party seeking desegregation of schools to prove that deliberate acts of the state were designed to impede the mandate of *Brown II*.[128] On the contrary, the burden was on the state to show that an action did not interfere with dismantling the formerly dual school system. It appeared to the school board that the underlying logic of those cases would induce the court to hold that the state's self-imposed restrictions preventing it from restructuring local school divisions was a violation of its affirmative constitutional duty to end state-supported school segregation. The board and the plaintiffs hoped that the school division boundaries would not be the line at which the duty to desegregate stopped. If that were the case, Richmond's efforts to desegregate would be Sisyphean, resulting only in accelerated white flight beyond invisible but, for most black students, impenetrable barriers.

The fundamental contention of the county and state defendants was that side-by-side existence of predominantly black and predom-

127. Appendix, Vol. I, at 99a, 107a-109a, *Bradley IV*, 412 U.S. 92.

128. *See, e.g.*, Wright v. Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

inantly white school divisions could not, by itself, justify judicial consolidation of the divisions. Nor would proof of governmental activity which had fostered the segregated conditions justify such action. In their view, only invidious discrimination in the creation and maintenance of the boundary lines, or joint segregative activity between the city and counties which breached the boundaries, would warrant crossing or eliminating them. Predominantly black schools were not necessarily unconstitutional. Reference was made to New Kent County, Virginia, where enforcement of the Supreme Court's mandate[129] had produced a "unitary", though predominantly black, thus "racially identifiable" school system.

Plaintiffs, on the other hand, saw racial identifiability as a function of the perceptions of members of a relevant community. Thus, an 80% black school in a sparsely populated and predominantly black rural county would just be the local school, while Richmond's 93% black Kennedy High School, physically located in Henrico and only five miles from 96% white Henrico High School, would be racially identifiable.

Despite extensive efforts by the state and county defendants to delay the trial,[130] the consolidation phase of *Bradley* went to trial on August 16, 1971.[131]

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129. Green v. School Bd. of New Kent County, 391 U.S. 430 (1968).

130. *See, e.g.*, Appendix to Petition for Certiorari, Vol. I, at 94a, 98a, 107a, 156a, 163a, *Bradley IV*, 412 U.S. 92. One such effort was a motion to recuse the judge on grounds of bias. The motion to recuse was based on a letter, dated July 6, 1970, from the judge to plaintiffs' counsel, with copies to all counsel of record. *See* Bradley v. School Bd. of Richmond, 324 F. Supp. 439, 451 (E.D. Va. 1971)(Appendix C). The letter noted that it "may be that it would be appropriate for the defendant school board to discuss with the . . . counties . . . the feasibility or possibility of consolidation of school districts . . . ." It was alleged in the motion to recuse that the motion for joinder was "filed as a result of the suggestion made by Judge Merhige" and "he cannot impartially pass upon his own suggestion." The motion was denied, on the ground that the factual allegations of the petition were not sufficient, under 28 U.S.C. § 144, to support a claim of personal bias or prejudice with regard to any party. *See* Bradley v. School Bd. of Richmond, 324 F. Supp. 439 (E.D. Va. 1971). The motion to recuse may have had a greater effect than intended. During oral argument before the Supreme Court, Justice Stewart asked if the joined parties were contending that the trial judge had made up his mind before he tried the case. They acknowledged that they had contended that the judge did not appear impartial. Justice Stewart was one of the "swing" votes to which the defendants had directed their case.

131. Consistent with the view that the plaintiffs had an extremely heavy burden of proof, the state and county defendants were mostly concerned with avoiding the introduction of evidence which would inadvertently advance the plaintiffs' case. *See* Appendix to Petition

D. The District Court Decision

In a 325-page memorandum opinion entered January 10, 1972,[132] the district court ordered consolidation of the Richmond, Henrico and Chesterfield school divisions, under a single school board. The length of the opinion reflects the court's efforts to fully record the basis for its conclusion that such unprecedented relief was constitutionally required.

A summary of the district court's findings of fact and conclusions of law indicated the state of school desegregation in the Richmond metropolitan area. In the three political subdivisions, all of which had a history of one race schools, there remained numerous individual facilities which were perceived by the community to be racially identifiable. In addition, each of the three school systems was racially identifiable.[133] Racial identifiability resulted when a school or school system was not effectively desegregated; it was a function of both the racial composition of the school community[134] and the assignment scheme for the individual schools.[135] When racially identifiable schools remained in a school system formerly operated on a *de jure* segregated basis, the school authorities had an affirmative duty to dismantle the dual system.[136]

The district court found that prior to the opening of the school term which took place before trial, each local school division was in some respects racially identifiable and therefore non-unitary; unitary status in the county systems "ha[d] not been shown" as of the current school term during trial.[137] Schools which contained a disproportionate number of blacks in a non-unitary system were per-

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for Certiorari, Vol. I, at 163a, *Bradley IV*, 412 U.S. 92. Early in the trial, however, counsel for the defendants perceived that they were likely to lose at the trial level. To strengthen their position on appeal, they introduced evidence, in the form of communications from the Department of Health, Education and Welfare which indicated that the county schools were operating within HEW guidelines on desegregation. They also presented expert testimony on the educational and financial difficulties which would attend an attempt to consolidate the divisions.

132. *Bradley IV*, 338 F. Supp. 67.

133. *Id.* at 80, 231-42 (appendix to opinion).

134. A similar view had been expressed by the plaintiffs regarding New Kent County, Virginia. *See* text accompanying note 129 *supra*.

135. *Bradley IV*, 338 F. Supp. at 81.

136. *Id.* at 82.

137. *Id.* at 104.

ceived by the community to be inferior.[138] The stigma of such inferiority affected the cognitive and affective development of pupils and had adverse effects on the faculties as well as the entire school community. These damaging effects were heightened by the public understanding that school officials continued to view segregation with "favor and satisfaction."[139]

The boundaries of the individual political subdivisions were found to be unrelated to any school administrative or educational need because: (a) school division lines had not been an obstacle in the past for the travel of students under various pupil assignment schemes, "some of them centrally administered, some of them overtly intended to promote the dual system;"[140] and (b) the state Board of Education had previously approved the merger of two political subdivisions into single school divisions and had successfully used the joint system of school management by committees, composed of representatives from different school divisions.[141]

On the other hand, the boundary lines did relate to "strict housing segregation patterns, maintained by public and private enforcement and owing their genesis in substantial part to the manner in which the three school divisions had been operated and expanded." Thus, the court noted, by the maintenance of the existing school division lines, the state could take advantage of private enforcement of discrimination and could prolong the effects of past discriminatory acts of its own agents.[142] The current segregated housing conditions were directly traceable to pupil attendance zones drawn by school authorities having knowledge that different attendance zones would have produced less segregation in both housing and schools.[143]

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138. *Id.* at 81.

139. *Id.*

140. *Id.* at 83.

141. *Id.* As the district court noted, earlier judicial opinions witnessed "Virginia's policy permitting the transportation of pupils across political subdivision lines for the purpose of maintaining segregation." *Id. See* Buckner v. County School Bd. of Greene County, 332 F.2d 452 (4th Cir. 1964); School Bd. of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958); Goins v. County School Bd. of Grayson County, 186 F. Supp. 753 (W.D. Va. 1960); Corbin v. County School Bd. of Pulaski County, 177 F.2d 924 (4th Cir. 1949).

142. *Bradley IV*, 338 F. Supp. at 84.

143. *Id.* at 84-85. In addition, the district court noted:

> When school authorities, with knowledge that other available opportunities for pupil assignment will produce less segregation, deliberately select one employing zones

The school division lines "work[ed] to confine blacks on a consistent, wholesale basis within the city, where they reside in segregated neighborhoods."[144] School authorities in an area where segregatory housing patterns prevail could not constitutionally arrange a pupil assignment system which served only to reproduce in school facilities that segregated pattern, particularly where officially mandated segregation in schools was once enforced. In the absence of clear and convincing evidence, the segregatory intention of school authorities was inferable from their selection of attendance zones drawn in coincidence with housing segregation.[145]

As intended, school construction policies had contributed, substantially and immediately, to the current segregated conditions within each school division.[146] The construction policies of school officials also caused segregatory patterns to develop in the metropolitan community, not just within each individual political subdivision. Racial considerations had definitely played a part in the school construction program.[147] The racial disproportion between the city and the neighboring counties had been exaggerated by the purposefully segregative school construction. The school division lines were obstacles to pupil assignment while facilitating "white flight" from Richmond, thereby causing resegregation when the city attempted intradistrict desegregation.[148] Because the metropolitan area's overall population was expanding, the policy of building and maintaining black schools and white schools not only hindered the elimination of housing segregation but encouraged and fostered its extension. The intensity and magnitude of racial separation having increased as a result of these school construction policies,[149] the district court concluded that the desegregation of city and county

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drawn in coincidence with housing segregation, their action by inference is discriminatory, and evidence to rebut such a finding must be "clear and convincing." Brewer v. School Board of City of Norfolk, 397 F.2d [37,] 41 [(4th Cir. 1968)]. No such showing has been made in this case . . . . *Bradley IV*, 338 F. Supp. at 85.

144. *Id.* at 84.

145. *Id.* at 84-85.

146. *Id.* at 86.

147. *Id.* at 87, 131, 138.

148. *Id.* at 86-87, 185.

149. *Id.* at 88-89. Citing *Swann*, the district court quoted that portion of the Supreme Court's opinion which stated that "racially neutral" assignment plans were constitutionally inadequate when they failed to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites. *Id.*

schools could not be achieved within each of the individual school divisions.[150]

The decisions on school site location in the three metropolitan systems had been matters for central as well as local control, the court finding that the state Board of Education played a very substantial role in the construction policies of the three localities involved.[151] In addition to this very substantial role, the district court found that from 1954 to the present, "the State's primary and subordinate agencies with authority over educational matters ha[d] devoted themselves to the perpetuation of the policy of racial separation."[152] Since the Supreme Court's decision in *Brown*, the reticence of that state board to help local school boards comply with their obligation to desegregate disclosed an intention to preserve the greatest amount of racial segregation possible.[153] At best, the desegregation policies of the state board and the state Superintendent of Education were designed to convert the formerly *de jure* dual system into one that was facially unitary but still run primarily for and by whites.[154] The state board had surreptitiously played a major role in causing the area's school facilities to become divided into racially identifiable sectors separated by political boundaries.[155] These policies had a known and foreseeable effect of perpetuating the state's formerly *de jure* dual school system.[156] The state board therefore was guilty of continuing *de jure* segregation.[157]

The sum total of these findings was that officials of the City of Richmond, the counties of Chesterfield and Henrico and the Commonwealth of Virginia had by their actions directly contributed to the continuing existence of the dual school system in the metropoli-

150. *Id.* at 103.

151. *Id.* at 91.

152. *Id.* at 93.

153. *Id.* at 95-96. In support of these findings, the court cited an earlier holding in Allen v. County School Bd. of Prince Edward County, 207 F. Supp. 349 (E.D. Va. 1962), that "the operation of schools was a cooperative venture by local and central officials exercising powers of State law . . . ." *Bradley IV*, 338 F. Supp. at 92.

154. *Id.* at 94.

155. *Id.* at 100.

156. *Id.* at 96.

157. *Id.* at 100. As the district court stated: "The fact that [the development and growth of a segregated situation] came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil." *Id.*

tan Richmond area.[158]

The district court next turned to the political barriers preventing consolidation of the predominantly black city school system and the predominantly white system of the counties. The Federal Constitution recognized only the federal and state units of government. Although a state could delegate its power and authority to local units of government, it could not delegate its constitutional responsibility to administer public schools consistent with the fourteenth amendment.[159] The state's self-imposed restrictions[160] had created obstacles effectively barring the state board from fulfilling its duty to dismantle a formerly dual system by consolidating segregated school divisions.[161] The firm policy of resistance, at both the state and local levels, to consolidation or other methods of cooperative pupil assignment across division lines, while undertaken in the name of "local control" had been related at each level to racial motives and was intended to burden the plaintiff class in the attainment of their rights.[162] In the management of the state's school system, "the concept of local autonomy ha[d] several times received short shrift, especially in the matter of racial policy" within the school system.[163]

The area consisting of Richmond, Henrico and Chesterfield was "a single urban community."[164] Yet resegregation within Richmond had occurred to such a degree that the city's entire school system was perceived to be identifiably black, while the county systems were identifiably white.[165] The racial disparities in the metropolitan area were so great as a result of what the district court found to be *de jure* segregation that the only remedy promising any immediate success—not to speak of stability—involved crossing the boundaries

158. *Id.* at 168.

159. *Id.* at 92-93, 99, 102.

160. *See* Appendix B *infra*. The court noted that prior to 1971, the state Board of Education had the power to create a consolidated school division. *See* VA. CODE ANN. § 22-100.2 (Repl. Vol. 1969), *repealed by* Va. Acts of Assembly 1971 Ex. Sess., ch. 161, at 314. Even under current law, pursuant to the 1971 constitution, the state board could have established a single school division comprising more than one political subdivision. In both instances, the state board declined to exercise its authority. *Bradley IV*, 338 F. Supp. at 99.

161. *Bradley IV*, 338 F. Supp. at 99-103.

162. *Id.* at 92.

163. *Id.*

164. *Id.* at 180.

165. *Id.* at 90.

of the political subdivisions.[166]

The duty of the court as perceived by the district judge was to make every effort to achieve the greatest possible degree of actual desegregation; the greatest concern was to eliminate what was perceived and identified as one-race schools.[167] This duty could not be circumscribed by school division boundaries, particularly when such lines were created and maintained by the cooperative efforts of local and state officials who had operated a formerly dual system,[168] and when such boundaries were unrelated to any school administrative or educational needs.[169] The political convenience of school district lines and the advantages of local control of schools, in view of the past discriminatory practices, could not override reasonable and feasible steps toward eradication of such past unlawful discrimination.[170]

The district court concluded that it was its responsibility and duty to order implementation of the Richmond Metropolitan School Plan, particularly when the state officials had failed to do so because of what they perceived to be the response of their constituents.[171] Means were available under Virginia law to consolidate the school divisions and to afford representatives of each political subdivision a role in the management of the combined school system.[172] Existing flexible state law provisions also provided for financing of such a system.[173]

The only plan submitted to the court to remedy the condition of segregated schools was the Richmond Metropolitan School Plan submitted by the Richmond School Board. The state and county defendants submitted no alternative proposals, nor did they suggest any improvements to the city plan either during trial or afterwards. The plaintiffs submitted no plan, preferring a court order directing the joined parties to formulate a desegregation plan of their own.[174]

166. *Id.* at 100.
167. *Id.* at 82.
168. *Id.* at 79-80.
169. *Id.* at 83.
170. *Id.* at 102, 104-05.
171. *Id.* at 115.
172. *Id.* at 84.
173. *Id.*
174. Personal communication from Louis Lucas, Esq.

The city plan contemplated the consolidation of the three school divisions into a single division to be administered and operated under the auspices of a school board composed of representatives from each political subdivision.[175] The school properties held by each separate school division as the public property of its citizens would be transferred to the joint school board.[176] The consolidated school division's enrollment was approximately 104,000 pupils.[177] The planners divided the entire area into six geographical subdivisions which, with one exception, enrolled a student population varying from approximately 17,000 to 20,000.[178] The exception, a sparsely populated area in Chesterfield, enrolled approximately 9000 pupils.[179] Certain administrative and curriculum decisions were delegated to a separate board for each subdivision to make the system more responsive to special needs of smaller areas.[180]

The objective of the desegregation plan was to achieve a "viable racial mix" for each school in the metropolitan community within the limitations of administrative and operational feasibility.[181] Each subdivision was gerrymandered to contain a racial mix fairly close to the overall racial proportions in the community. The plan eliminated all one-race schools, and each school would enroll a black population varying from 17% to 40%.[182] The district judge "found" such ratios were not tantamount to the imposition of a fixed racial quota.[183] The court was satisfied that the ratio was established by the "existing demographic proportions in the Richmond area"[184] and was below the tipping point at which "white students tend to disappear from the school entirely at a rapid rate."[185] Furthermore, such ratios were within what the Richmond School Board's experts de-

175. *Bradley IV*, 338 F. Supp. at 191.
176. *Id.* at 245.
177. *Id.* at 188, 191.
178. Brief for Petitioner at 50, *Bradley IV*, 412 U.S. 92 (1973); *See also Bradley IV*, 462 F.2d at 1072 (Winter, J., dissenting).
179. *Bradley IV*, 338 F. Supp. at 186.
180. *Id.* at 191.
181. *Id.* at 186.
182. Brief for Petitioners at 53, *Bradley IV*, 412 U.S. 92. This fell slightly short of the district court's goal of having 20 to 40% black students. *Bradley IV*, 338 F. Supp. at 186.
183. *Bradley IV*, 338 F. Supp. at 186.
184. *Id.*
185. *Id.* at 194.

scribed as an optimal range yielding educational benefits for black and white children.[186]

The court rejected the testimony of educational experts retained by the state and county defendants, that the consolidated system would be too large, more costly, likely to result in conflicts over appropriations, unresponsive to parental wishes and essentially paternalistically racist since blacks would be prevented from achieving control over the school system;[187] the court did not believe that educational disadvantages in an "arbitrary dehumanizing racial mix," or disorientation would occur when people were transported out of their neighborhoods.[188] Instead, the court held the Metropolitan Plan to be educationally sound and one which "would indeed result in a unitary system."[189]

With respect to the details of implementation, the court found that the aspects of the plan requiring free transportation were reasonable in terms of time and distance.[190] Students selected for busing would be chosen objectively by a lottery system utilizing dates of birth.[191]

The district court order specified in detail the elements of planning and adjustment that were required to be completed in order to prepare for implementation of desegregation throughout the metropolitan area.[192] In its order, the court reiterated its willingness to consider other plans to eliminate racially identifiable schools in the region, asking for the submission

> to this Court within seventy (70) days from the date of this Order the modifications required by paragraph g(1) above as well as any other modifications, changes or recommendations, as may be desired by

186. *Id.*
187. *Id.* at 198-202.
188. *Id.* at 202-04.
189. *Id.* at 230.
190. *Id.* at 188. A substantial majority of the students were assigned to a school located within the particular subdivision where they resided; in no instance were there assignments between non-contiguous subdivisions. Approximately 36,000 students would be exchanged between the city and the two counties with about 1000 more whites than blacks involved in this exchange. Brief for Petitioners at 52, *Bradley IV*, 412 U.S. 92. *See also Bradley IV*, 338 F. Supp. at 188.
191. *Bradley IV*, 338 F. Supp. at 187.
192. *Id.* at 244-48.

the State Board of Education, the State Superintendent of Public Instruction, the acting school superintendent or the school board created pursuant to paragraph b. above.[193]

E. In the Fourth Circuit Court of Appeals

The state and county defendants obtained a stay of the district court order, pending appeal, but were directed by the Fourth Circuit to continue the planning for consolidation.[194] The appellate court advanced the case on its docket, dispensed with the rule requiring printed briefs and heard oral arguments *en banc* approximately two months after the district court order was entered.

The court of appeals was not disturbed about the busing aspects of the consolidation plan; it stated, "[t]his is not a bussing [sic] case"[195] and agreed that the evidence seemed to indicate the plan's "workability in practice."[196] The court, however, held the plan to be the equivalent of a fixed racial quota, for the plan indicated to the Fourth Circuit that the district judge was requiring a particular degree of racial balance as if it were a substantive constitutional right.[197] The district court had not distinguished plainly between some of the incidental advantages of the plan (the "viable racial mix") and its primary thrust (realistic stabilized desegregation). This lack of clarity proved to be fatal. It evidenced to the Fourth Circuit a desire by the district judge to achieve, not a greater degree of desegregation, but a fixed racial quota. However, the appellate court did not remand the case with instructions to investigate the feasibility of alternative interdistrict desegregation plans. Instead, it held, in effect, that there were no constitutional violations by the state and county defendants that would justify any interdistrict remedy.

The Fourth Circuit held that, absent a constitutional violation in the establishment and maintenance of the school division boundaries, or "any unconstitutional consequence of such maintenance,"[198]

193. *Id.* at 246.

194. *In re* Bradley, 456 F.2d 6 (4th Cir. 1972).

195. *Bradley IV*, 462 F.2d at 1061 n. 2.

196. *Id.* at 1064.

197. *Id.* This directly contradicted the district court's "finding." *See* text accompanying note 183 *supra*.

198. *Bradley IV*, 462 F.2d 1069.

the tenth amendment precluded the district judge from ordering the consolidation[199] of three unitary school divisions.[200]

The decision rested its conclusion that the Richmond system was unitary on the district judge's earlier opinion approving Plan III.[201] At that time, the district judge noted Plan III, if successfully implemented, would "eliminate 'the racial identifiability of each facility to the extent feasible within the City of Richmond.' "[202] But in his later assessment of the situation under review, Judge Merhige noted that Richmond had lost 39% of its white students within the past two years[203] and concluded: "Momentary unitary status—assuming it existed here, which has not been shown—will not insulate a school division from judicial supervision to prevent the frustration of the accomplishment [of a unitary system]."[204] The Fourth Circuit did not refer to this subsequent opinion. The court of appeals also ignored the district court's determination that the county and city school systems, in some respects, were not unitary before trial.[205] The Fourth Circuit was apparently content to rest its conclusion regarding unitary status on the district judge's earlier contingent assessment of the Richmond situation and HEW's satisfaction with the counties' desegregation efforts.[206] Having established the premise of three unitary systems existing side by side, the issue was narrowed to "whether the maintenance of three separate unitary school divisions constitute[d] invidious racial discrimination in violation of the Fourteenth Amendment."[207]

The majority of the circuit court "searched the 325-page opinion

199. *Id.* at 1068.

200. *Id.* at 1061.

201. *See* text accompanying notes 101-10 *supra*.

202. *Bradley III*, 325 F. Supp. at 835.

203. *Bradley IV*, 338 F. Supp. at 103.

204. *Id.* at 104.

205. *Id. See also* text accompanying note 137 *supra*.

206. *Bradley IV*, 462 F.2d at 1065. Both counties had complied with HEW requirements, in all respects, *after* the district court granted the state and county motions for a continuance. The defendants' motion for a continuance was granted on April 16, 1971. Appendix, Vol. I, at 37a-38a, *Bradley IV*, 412 U.S. 92. The court of appeals referred to HEW's satisfaction that Henrico was operating a unitary system as of June 30, 1971, and to Chesterfield's discontinued association with the all-black Matoaca facility—which occurred during the hearings of the district court case. *Bradley IV*, 462 F.2d at 1065. *See Bradley IV*, 338 F. Supp. at 171.

207. *Bradley IV*, 462 F.2d at 1065.

of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintained either long ago or recently for the purpose of perpetuating racial discrimination in the public schools."[208] To the extent that the district court found interdistrict discrimination, those findings were dismissed as such "broad brush" strokes as to "make it difficult on review to say precisely what the violation, if any, was."[209] The Fourth Circuit concluded in effect that there was no constitutional violation sufficient to justify an interdistrict remedy; the district court decision was reversed.[210]

The assumption that there must be purposeful interdistrict discrimination in order to constitute a constitutional violation was the dominant theme of the Fourth Circuit opinion. Without such, the district court was not empowered to restructure political subdivisions. Absent a specific finding of joint interaction between one or more of the defendants, the findings relating to the alleged symbiotic relationship between school segregation and patterns of residential housing were rendered irrelevant. The record disclosed to the court that what insignificant action the counties might have taken was slight compared to the myriad of economic, political and social reasons for the concentration of blacks in Richmond.[211] Because the pattern in Richmond was typical of other metropolitan areas, the court, while deploring the housing discrimination, cited *Swann v. Charlotte-Mecklenburg Board of Education*[212] for the maxim that "a school case, like a vehicle, can carry only a limited amount of baggage."[213] Whatever the basic cause of housing segrega-

208. *Id.* at 1064.

209. *Id.*

210. Because we think the last vestiges of state-imposed segregation have been wiped out in the public schools of the City of Richmond and the Counties of Henrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action, we conclude there is no constitutional violation and that, therefore, the district judge exceeded his power of intervention. *Id.* at 1070.

The court noted that "neither the record nor the opinion of the district court even suggests that there was ever joint interaction between any two of the units involved [or by higher state officers] for the purpose of keeping one unit relatively white by confining blacks to another." *Id.* at 1065.

211. *Id.* at 1066.

212. 402 U.S. 1 (1971).

213. *Bradley IV*, 462 F.2d at 1066, *quoting* Swann v. Charlotte-Mecklenburg Bd. of Educ.,

tion may be, "it has not been school assignments, and school assignments cannot reverse the trend."[214]

The reference to *Swann* disclosed that the Fourth Circuit required much more than a showing that housing policies of county officials were discriminatory. At the very least, proof that deliberate actions of the county school officials had an "impact upon movement by blacks out of the city and into the counties" was required.[215]

The district court found that the county school board's policy of selecting building sites contributed, as intended, to the segregated patterns in the metropolitan community.[216] The Fourth Circuit, however, found this irrelevant. The policies of the county school officials in selecting building sites did not operate as a disincentive for blacks to move from Richmond because the policies of county school officials in assignment of pupils made it likely that the blacks would still attend segregated schools.[217]

The Fourth Circuit concluded that there was no suggestion in the record that there was any joint interaction for "the purpose of keeping one unit relatively white by confining blacks to another."[218] The

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402 U.S. 1, 22 (1971).

214. *Bradley IV*, 462 F.2d at 1066. This was, of course, directly contrary to the district court's findings. *See, e.g.*, text accompanying notes 142-43 *supra*.

215. *Bradley IV*, 462 F.2d at 1066.

216. *Bradley IV*, 338 F. Supp. at 86. *See* text accompanying notes 152-55 *supra*.

217. Bradley IV, 462 F.2d at 1066. The appellate court chose not to refer to the district court findings that the deliberate selection of attendance zones by county officials was done in such a manner as to make the conclusion of segregatory intention unavoidable. *See* text accompanying notes 143, 145 *supra*. The court appears to be saying that there must be purposeful interaction between the county officials assigning students and higher state officials. None of the practices of the state Board of Education were held to be the kind of joint interaction the court contemplated when it referred to that as a precondition of interdistrict relief, even though the practices of the state board included: (a) the recent establishment of school division lines; (b) the board's approval of school construction sites which were intended to prolong segregated conditions; (c) the board's resistance to desegregation efforts after *Brown* and its later refusal to exert strong public leadership to encourage pupil assignment plans designed to bring about desegregation; and (d) the board's reticence to help local boards comply with the obligation to desegregate. *See generally Bradley IV*, 338 F. Supp. at 89, 92, 94, 95-96, 99. The Fourth Circuit also made no reference to the massive resistance period and the state's active role in impeding desegregation during that "sordid period," presumably because the court held "the last vestiges . . . have been wiped out . . . ." This characterization is by Judge Winter in his dissenting opinion. *Bradley IV*, 462 F.2d at 1075 (Winter, J., dissenting). *Compare Bradley IV*, 462 F.2d at 1075 *with Bradley IV*, 338 F. Supp. at 138-46, 167-68, 171-73.

218. *Bradley IV*, 462 F.2d at 1065.

record did disclose that the counties vigorously resisted any effort to bus Richmond children into the suburban areas.[219] But this resistance, according to the appellate court, was a legitimate attempt to resist the unwarranted intrusion of a federal court into matters reserved to the states.[220]

The resistance of the counties had been legitimated by a 1971 statute[221] that would have required the consent of the local governing bodies before the state board could have effected the consolidation of the school systems under the control of a single board.[222] In addition, the Fourth Circuit cited longstanding Virginia law which provided that local governing bodies would be empowered to approve the school budgets even if consolidation was ordered.[223] Since local consent was still required to support the consolidated school division's budget, coercion by a federal court would result in problems of "budgeting and finance that boggle the mind."[224]

The court was convinced that the segregation problem was intractable, its root causes unknown, and that the consolidation remedy was impractical to the point of utter confusion. In short, whatever constitutional violation there might be, it was not the right kind. The Fourth Circuit adopted the position of the amicus brief of the United States which pointed out that *Bradley* was "not pri-

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219. *See, e.g., Bradley IV*, 338 F. Supp. at 115.

220. The court indicated its approval of the counties' resistance by inserting as its appendix the resolution of the Chesterfield County School Board dated January 10, 1972, which read in part:

> 7. Whereas, if the members of this Board remained free to vote in accord with their independent and collective judgment and will, they would unanimously refuse to request the State Board of Education to create a single division to be composed of the Counties of Chesterfield and Henrico and the City of Richmond; and
>
> . . . .
>
> 9. Whereas, our attorney . . . has advised us that the Order of January 10, 1972, mandatorily directs that we cast our vote in favor of a "request" that the State Board of Education create a single division . . . under pain of punishment for contempt by fine or imprisonment should we fail to do so.
>
> 10. Now, therefore, acting under the duress, coercion, and compulsion of the penalties consequent upon doing otherwise, and acting contrary to our individual and collective judgment and wills, . . . we do adopt and vote [to comply with the court order directing us to request consolidation]. *Bradley IV*, 462 F.2d at 1070-71.

221. VA. CODE ANN. § 22-30 (Repl. Vol. 1973). *See* Appendix B *infra*.

222. *Bradley IV*, 462 F.2d at 1067.

223. *Id.*

224. *Id.* at 1068. *Compare Bradley IV*, 338 F. Supp. at 84.

marily a case about segregation required by law, because state law never has required segregation as between Richmond and the neighboring school systems."[225]

Judge Winter, the lone dissenter, wrote a cogent opinion.[226] His argument emphasized that "the fourteenth amendment, as spelled out in *Brown I* is directed to the State of Virginia, not simply individually to its various subdivisions; . . . it most certainly does not depend on its operation on how a state may have elected to subdivide itself . . . ."[227]

The plaintiffs focused on the rationale of the dissenting opinion in their petition for certiorari to the United States Supreme Court.[228] Certiorari was granted on January 15, 1973.[229] The question posed to the Supreme Court was whether a conspiracy between various levels or units of state government was an essential precondition to interdistrict relief in an area where, in 1954, the state constitution had mandated school segregation." The question, of course, remains largely unanswered because of the Supreme Court's split decision[230] that resulted in the affirmance of the Fourth Circuit opinion by default. It is noteworthy, however, that the Supreme Court refused to grant the petition for reargument[231] despite the earlier concession by the plaintiffs and the Richmond School Board that interdistrict relief short of outright consolidation would be acceptable.[232] Although such relief would not create the mind-boggling problems of

225. *Bradley IV*, 462 F.2d at 1065.

226. *Id.* at 1071-80 (Winter, J., dissenting).

227. *Id.* at 1076-78. This rationale corresponded to the view of the district court. *See* text accompanying note 159 *supra*.

228. Petition for Certiorari at 4, *Bradley IV*, 412 U.S. 92. The questions presented asked the Court to decide:

> 1. The extent to which the effectiveness of relief in *de jure* metropolitan communities may be dependent upon the manner in which a state may choose to align its local school divisions.
>
> 2. Under what circumstances the remedial powers of a district court may be limited by existing school division boundaries.
>
> 3. Whether, in the formulation of effective relief, district courts are permitted to utilize means coextensive with those used by school authorities in the past to establish and perpetuate a statewide system of dual schools.

229. Bradley v. School Bd. of Richmond, 409 U.S. 1124 (1973).

230. *Bradley IV*, 412 U.S. 92.

231. Bradley v. School Bd. of Richmond, 414 U.S. 884 (1973).

232. Petition for Rehearing at 13-16, *Bradley IV*, 412 U.S. 92; Personal communication from George Little, Esq.

consolidation, the concession did not persuade a fifth justice to remand the case for findings whether less drastic relief would be appropriate. Therefore, the Fourth Circuit decision that there was no constitutional violation, and hence no relief, is law.

The law is that the relevant unit of equality is not the metropolitan area but each discrete political subdivision created by the state.[233] Absent invidious discrimination, these division lines are the limits over which a federal judge could not trespass. By the Fourth Circuit's standards, there was no invidious discrimination, as the reasons for segregation in the Richmond area did "not support the conclusion that it ha[d] been invidious state action which ha[d] resulted in the racial composition of the three school districts."[234] No attempt was made to spell out the nature of the "economic, political and social" factors resulting in the substantially disproportionate number of blacks in the city schools;[235] rather, the court of appeals explained that no relief was warranted because the basic, root causes of the concentration of blacks in the inner cities were not known.[236] The district court opinion, however, did spell out many of the underlying causes of the area's segregation. At bottom was the state's traditional policy to defer to the "attitudes held throughout the citizenry" and the customs of racial separation.[237] More specifically, the district court found that desegregation was impeded by the hostility and resistance of the community,[238] and the interaction between local officials and the wishes of their constituents.[239] Exacerbating these root causes of the segregation were the state's policies of action and inaction which worked in tandem with the community customs.[240] These customs had a force as great as any law, particularly when officials in Virginia complied with their mandate.

The Fourth Circuit implied that these customs of the people are not to be attributable to state officials in a fourteenth amendment

233. *See generally* Note, *School District Consolidation: The Constitutional Unit of Equality*, 30 WASH. & LEE L. REV. 369 (1973).

234. *Bradley IV*, 462 F.2d at 1066.

235. *Id.*

236. *Id.*

237. *See Bradley IV*, 338 F. Supp. at 81.

238. *Id.* at 92, 100, 115.

239. *Id.* at 115.

240. *See, e.g., id.* at 89, 92, 102, 115, 145-55.

case. As the appellate court pointed out, the authority of state officials is fragmented in accordance with another time-honored tradition in the Commonwealth: local control.[241] As one attorney representing a defendant stated, "local control saved us."[242]

Local control proved to be a more compelling interest than the value of desegregating across the lines of the state's political subdivisions. To flatly approve or disapprove of local control as an abstract concept would be a primitive way of looking at a complicated situation. It would be unfair to dismiss the invocation of local control as a euphemism for aversion towards blacks. The very idea of local control, particularly in Virginia, has emotional content of great significance, and is a legitimate and substantial state interest. In Virginia, however, the record discloses that the concept of local control has in fact received short shrift when it comes to matters of racial policy.[243] It appears therefore that the court of appeals engaged in a covert form of balancing instead of openly and candidly justifying its implicit value judgment that the consequences of disregarding the customs of the community outweighed the value to be gained in extending *Brown* to encompass cross-district remedies.[244] Local officials, found to be unresponsive to needs of blacks owing to the wishes of white constituents, were held not to be amenable to judicial control. This decision followed from the court's formulation of the "purposeful joint interaction" test. The practical effect of the new test perpetuates the same system of white schools and black schools that existed in the Richmond area before *Brown* and during the freedom of choice era.

The Fourth Circuit, in effect, passed the buck back to the statewide political process. Its opinion relegated blacks to the General Assembly in order to seek relief. The General Assembly, in turn,

241. *Bradley IV*, 462 F.2d at 1066-67.

242. Personal communication.

243. *Bradley IV*, 338 F. Supp. at 92. *See* text accompanying note 163 *supra*.

244. The fact that this is not a thirteenth amendment case which would prevent custom from interfering with the civil rights of blacks guaranteed by statute, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), does not undermine the district court findings that custom and state action worked in tandem to produce racial isolation of students in Richmond. Blacks are isolated in the inner city and whites are isolated in each inner city school. This is the situation the Fourth Circuit apparently determined was not important enough to warrant judicial relief when balanced against the advantages and values inherent in local control.

cannot give relief because it needs the consent of local officials.[245] Of course, this is a self-imposed restriction.[246] Moreover, the General Assembly has delegated the state Board of Education no power to force school divisions to desegregate within or across division lines. Thus statewide officials in general have proven to be as unresponsive to blacks as local officials. Nevertheless, the Fourth Circuit held statewide officials are not amenable to judicial control because of the tradition of local control. This is the vicious circle condoned by the court's construction of the fourteenth amendment.

F. Summary and Analysis of District Court Involvement

Until the interim plan was ordered into effect for the 1970-71 school year,[247] there was little "judicial administration" of school desegregation in Richmond. The district court did not have much to do in connection with enforcement of its decrees. An injunction prohibiting discriminatory assignment was in effect briefly,[248] but responsibility for assuring compliance with the subsequent plan[249] as approved by the court was left to plaintiffs. No provision was made for periodic review, as suggested by the Fourth Circuit dissent in *Bradley II*.[250]

This lack of control can perhaps best be explained by the murky state of the law during the "freedom of choice" period. The hesitant, uncertain, and sometimes illogical path of Supreme Court doctrine in school desegregation cases during this period has been directly traced to the Court's failure to resolve an ambiguity in *Brown*—namely, whether racial assignment of students, or the existence of segregated schools, or both, were the basis for finding a denial of equal protection of the laws.[251]

The Supreme Court was given an opportunity to resolve this issue in *Bradley II*. In the petition for writ of certiorari, plaintiffs invited the Court to address itself to the adequacy of freedom of choice as

245. VA. CODE ANN. § 22-30 (Repl. Vol. 1973).
246. *See* Appendix B *infra*.
247. *See* text accompanying note 32 *supra*.
248. *See* text accompanying note 31 *supra*.
249. *See* text accompanying notes 32-33 *supra*.
250. *Bradley IV*, 345 F.2d at 321 (Sobeloff and Bell, JJ., dissenting).
251. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILO. & PUB. AFFAIRS 1, 3-4 (1974).

a tool for complying with the mandate of *Brown*. As long as the Court refused to address this question, it left open for lower courts the opportunity to understand their duty simply as preventing purposeful assignment of students on the basis of race.

The district court in Richmond justifiably believed that it had fulfilled this limited duty by approving a non-discriminatory assignment plan agreed to by the plaintiffs, and maintaining the case on the docket to permit the plaintiffs to raise objections concerning its operation. The plaintiffs' counsel recognized this open question; they agreed to the consent decree only because they knew they could not accomplish more until "freedom of choice" was laid alongside "separate but equal" in the graveyard of discredited constitutional doctrines.[252]

The one substantial victory won by plaintiffs in the early years of *Bradley*, concerning faculty and staff assignments,[253] remained mostly hollow until the litigation was reopened.[254] The district court had a clear mandate on this point,[255] and should have exercised control over defendants' compliance by requiring periodic reports. The consent decree, however, left the entire job of overseeing the defendants' compliance efforts to the plaintiffs and their counsel. Plaintiffs' counsel, meanwhile, were busy elsewhere trying the series of actions which eventually led to the end of "freedom of choice" in *Green*.

The reticent posture taken by the district court appears to have kept it out of trouble with vocal opponents of desegregation, particularly the Richmond newspapers, which had played an instrumental role in Virginia's massive resistance to *Brown*, and which to this day have opposed judicial efforts to desegregate the Richmond schools.[256]

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252. Personal communication from Henry Marsh, Esq.

253. *See* text accompanying notes 66-68 *supra*.

254. As of May 1, 1970, four Richmond schools had 100% white faculty and staff; thirteen had 100% black faculty and staff; sixteen others had 90% or better white faculty and staff; twelve others had 90% or better black faculty and staff; eight others had 80% or better white faculty and staff; four others had 80% or better black faculty and staff. Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 560-61 (E.D. Va. 1970).

255. *See* text accompanying notes 66-68 *supra*.

256. As editor of the *Richmond News-Leader*, James J. Kilpatrick, Jr. had led the battle for a resolution in the Virginia General Assembly "interposing" the sovereignty of the Commonwealth between the Federal Constitution and the Supreme Court's decision in *Brown*.

Of course, the court's restraint was seen in a very different light from the other side of the issue. From the plaintiff's viewpoint, "[t]he lower federal courts [had] invented a fiction that persons of different races had always had, and hence would continue to have, the right of choosing the schools they would attend and that 'voluntary' segregation might be continued notwithstanding what the Supreme Court had held to be the requirement of the Constitution."[257] Numerous factors tended to make the Richmond freedom of choice plan an illusory mode of desegregation, free only in theory. Free transportation was not provided to students. In order to exercise their "free choice", they had to pay fares to the city's public transit system. Counsellors and faculty in the formerly all-white schools remained nearly all-white which operated as a disincentive to blacks to change schools. Meanwhile, white school children were not electing to change to black schools. Black children, with already ingrained feelings of inferiority or insecurity, tended not to switch to an environment which seemed alien and strange, and where discrimination, sometimes subtle and sometimes not so subtle, intensified their feelings. Some black principals, teachers and administrators, previously in all-black schools, felt threatened and actively sought to undermine the system of free choice by discouraging blacks from transferring. In the transitional neighborhoods, shortly after a school became desegregated, it was resegregated. Yet counsel for the school board advised the board that it was in compliance with the decisions of the United States Supreme Court even after *Green*.[258] Freedom of choice as implemented in Richmond was plainly not designed to integrate the schools.

Even after *Green*, the plaintiffs hesitated to attack the Richmond situation, knowing that a busing order would result in more white flight. The case was finally reopened[259] to establish a principle that students in cities as well as rural counties should have the benefits

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As recently as March 28, 1975, the *Richmond Times-Dispatch* editorially inveighed against "federal court decrees [which] determined where and how far children would be shipped to school" without regard to "popular will". *See* Richmond Times-Dispatch, March 28, 1975, at A-14, col. 1-2.

257. Tucker, *Reflections on Virginia's Reaction to Brown*, 4 J. LAW & ED. 36 (1975).

258. Personal communication from A. C. Epps, Esq., former Richmond School Board member.

259. *See* text accompanying note 75 *supra*.

of meaningful integration.[260]

During the proceedings which resulted in the formulation of the interim plan,[261] the community was emotionally aroused. After the school board was ordered to implement the interim plan, the white community became irate. Although no violence actually occurred, there were threats of violence and the federal judge required the protection of bodyguards. No public official openly supported busing; the local newspapers howled vehemently as in the massive resistance days.

The interim plan, of course, caused many logistical problems for a city that did not have its own school buses. There were complaints that the public transportation took too long and was too confusing for students not used to travelling by public transit. Merchants and homeowners became outraged by an increase in vandalism and theft by children invading their neighborhoods.

There were complaints of cultural shock as well. Both students and teachers lost the sense of identity that they had previously had with their schools.[262] Teachers, previously accustomed to discussions of literature, had to cope with students unable to read. For some, the dramatic change in school composition was just too much, too fast.[263]

Soon after the interim plan was implemented, the board prepared three plans[264] based on various directions the Supreme Court might take in the then pending appeal of *Swann*.[265] Plan I was basically a neighborhood school plan designed to go in effect if the Supreme Court disapproved of busing as a legitimate tool.[266] Plan II was basically similar to the interim plan and was designed in case the Court

260. Personal communication from S.W. Tucker, Esq.

261. *See* note 80 *supra*.

262. Personal communication from Thomas Little, then Associate Superintendent of the Richmond City school system.

263. *See* J. DOHERTY, RACE AND EDUCATION IN RICHMOND 119 (1972).

264. Personal communications from Thomas Little and Conard B. Mattox, Jr., Richmond's City Attorney.

265. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *aff'd in part*, 402 U.S. 1 (1971).

266. The Richmond Board filed an Amicus Brief in *Swann*, written in part by Lewis F. Powell, Jr. which *inter alia* extolled the virtues of the neighborhood school which would be impaired by busing.

approved of busing as a limited tool consistent with Fourth Circuit rulings in *Swann* and *Brewer*.[267] Plan III was designed in case the Supreme Court decision in *Swann* legitimated more extensive busing than that approved by the Fourth Circuit. Judge Merhige ordered Plan III into effect before *Swann* was decided by the Supreme Court. While his legal position was ultimately vindicated, his public image was not enhanced; he could not point to a Supreme Court ruling which compelled him to act. The city's application for a stay of Plan III was billed by the local newspapers as the City of Richmond versus the federal judge who, as the newspapers delighted in pointing out, was sending his child to private school.

Again, the logistical problems of the district court's order proved burdensome but the shockwaves were not over. The Richmond School Board asked for consolidation with the counties. A newspaper cartoon showed Richmond trying to spread its "poison" into the counties. A third busing order and pupil reassignment in as many years became a distinct possibility. This took its toll on quality education in the Richmond area.

By the 1970-71 school year, the school system was vulnerable to shocks and the subsequent busing orders provided a major trauma. Hardly anyone in office or running for office spoke out in favor of forced busing. Few would deny that the busing orders accelerated the perceived as well as the actual deterioration in the school system's discipline, morale, achievement levels and community support.

The public turmoil resulted in instability. Racial intermixing resulted in more interracial incidents each of which was unduly highlighted by the press. The school administrators were increasingly unable to recruit effectively. Attendance at Parent-Teacher Association meetings in both black and white neighborhoods fell. There were few innovative programs introduced to maintain either educational standards or discipline.

Despite these developments, chances for consolidation looked good after Judge Merhige's decision.[268] Those who desired consolida-

267. Brewer v. School Bd. of Norfolk, 444 F.2d 99 (4th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972).

268. *Bradley IV*, 338 F. Supp. 67.

tion were not even surprised by the "predictable" decision of the Fourth Circuit.[269] But the system, in the process of preparing itself for consolidation, sustained more trauma when the Fourth Circuit decision was affirmed by an evenly divided Supreme Court,[270] and, again when the Court held that the Detroit interdistrict remedy was an abuse of discretion by the district court.[271]

During the 1974-75 year, however, the system began to stabilize. A new and effective remedial reading program went into operation. Morale improved. A sense of identity with one's school was again apparent. There were signs that the business and banking community were becoming concerned with improving public education within Richmond.[272]

Although the *Bradley* case had been removed as an active case from the district court docket, many detect the scent of more litigation in the air. For many concerned parents, quality education still means a return to the neighborhood school concept.[273]

The judicial supervision of the desegregation process in Richmond has achieved compliance with the mandate of the Supreme Court; there is desegregation to the greatest degree possible within the confines of Richmond. The district court orders following *Green* created substantial disruption in Richmond, but whether the job could have been done in a way which would have ameliorated this disruption is difficult to assess. Given the attitude of the community towards busing, we think not.

Both the pluses and minuses of the desegregation process in Richmond appear to be caused by circumstances largely out of the district court's control. There has been no major violence during the process, which is a tribute to moderate leadership, both white and black.

There is a dispute as to whether racial attitudes have changed.

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269. *Bradley IV*, 462 F.2d 1058.

270. *Bradley IV*, 412 U.S. 92.

271. Milliken v. Bradley, 418 U.S. 717 (1974).

272. Personal communication from Thomas Little.

273. Although the Fourth Circuit found Richmond to be a unitary system, *Bradley IV*, 462 F.2d at 1061, its opinion did not affect the prior implementation of Plan III by the district court. *See* text accompanying note 109 *supra*. Obviously the massive busing required by Plan III is the antithesis of any neighborhood plan.

One view, even held by some blacks, is that there is more polarization and mistrust now than during the freedom of choice era.[274] Others say the children are getting along fine; it is the parents who are the problem. The school superintendent argues that the system is adequately fulfilling the needs of the children of Richmond, and that the program is realizing the potential of each pupil.[275] But the public by and large believes the white county schools are better. There is little doubt that the city schools are perceived by the entire community as inferior black schools. The public reads the test scores of the city and county children which show the latter's ability and achievement tests place in higher percentiles. The meaning of these scores, and their relevance to the issue of school desegregation are, of course, open to debate. The pertinent point is that the schools in Richmond are still regarded not only as inferior, but inferior *black* schools.

274. Personal communications from Melvin Law, a black community leader who supports a return to a "modified" neighborhood school system of pupil assignment.

275. Personal communication from Thomas Little.

APPENDIX

A. FACTORS AFFECTING RESIDENTIAL SEGREGATION IN THE RICHMOND METROPOLITAN AREA (RACIAL CONTAINMENT)

One of the basic distinctions between the opinions of the district court and the circuit court in *Bradley IV* was the presence of other factors traceable to school segregation, whether such factors amounted to "purposeful joint interaction," and whether consolidation would be a viable cure for their effects. The following is a summary discussion of the factors giving rise to racial residential segregation within Richmond, and between Richmond and the surrounding counties.

Socio-Economic Factors

Blacks in Richmond are generally in the low income groups. In 1960, over 40% of Richmond's black resident families earned less than $3,000.[276] Lack of public transportation outside of Richmond operated to hinder the migration of low income groups into the counties.[277] Owing to the high cost of housing in the counties, families earning less than $3,000 per year usually could not find housing outside of Richmond.[278] In contrast, less expensive housing was available to blacks in Richmond.

The city has always permitted higher population densities in black neighborhoods.[279] The city has also located its public housing and federally-assisted, low-income, multi-family projects in the black areas of Richmond.[280]

For these economic reasons, suburban county areas are, practically speaking, closed to blacks.

It is therefore not surprising that as the years go by, "life in the Richmond metropolitan area is becoming *more* segregated with time, rather than less segregated."[281] Consistent with patterns ob-

276. U.S. CENSUS 1960.
277. Appendix, Vol. II, at 862a, *Bradley IV*, 412 U.S. 92.
278. Exhibits at 50e, *Bradley IV*, 412 U.S. 92.
279. *Bradley IV*, 338 F. Supp. at 73.
280. *Id.*
281. Exhibits at 49e, *Bradley IV*, 412 U.S. 92.

servable in many other parts of the nation, the established black neighborhoods are expanding within the city to encompass peripheral areas that are in the process of transition from white to black.[282] The evolving pattern does not change the fact that most blacks in Richmond are isolated in ghetto areas-albeit an expanding ghetto within city limits.

Federal Government Activities

The practices of the federal government have been a major factor leading to racially identifiable neighborhoods.[283] That is, federally-sponsored activities have contributed to the confinement of blacks in center city Richmond, and the migration of middle class whites into the suburban counties.[284] In particular, the policies of the Federal Housing Administration, the Veterans Administration (VA) and the Federal National Mortgage Association have fostered segregated residential patterns in the metropolitan area. For example, the VA has been "neutral" toward builders and lenders who chose to discriminate.[285] The federal government's lower interest terms have operated to aid the development of the white suburbs. Until 1950, the FHA was willing to insure mortgages on property burdened with restrictive racial covenants. FHA-insured, multi-family housing continues to be highly segregated with many all-white units located in the suburbs and a few predominantly black units in the central city.

Despite the enactment of recent laws, such as the Fair Housing Act of 1968,[286] "the situation regarding housing segregation has actually gotten worse . . . despite the laws."[287] Even since 1968 most blacks gain access to homes and apartments in the city while new housing units in the suburbs are sold primarily to moderate income whites.[288]

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282. Appendix, Vol. II, at 666a-67a, *Bradley IV*, 412 U.S. 92.

283. *Id.* at 501a.

284. *See generally Bradley IV*, 338 F. Supp. at 215-23.

285. *Id.* at 217.

286. 42 U.S.C. § 3601 *et seq.* (1970).

287. Appendix, Vol. II, at 753a, *Bradley IV*, 412 U.S. 92.

288. *See generally* Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of Milliken v. Bradley*, 21 WAYNE L. REV. 751 (1975) [hereinafter cited as Taylor]; Appendix, Vol. II, at 606a-15a, *Bradley IV*, 412 U.S. 92.

Local Government Activity

Local officials in the metropolitan area of Richmond also followed policies which restricted the availability of county housing to blacks. Housing patterns both in Henrico and Chesterfield are and have been segregated.[289]

Although Richmond officials together with county officials are members of a regional commission with legal authority to construct low cost developments in the counties, the Richmond officials cannot obtain the cooperation of the county officials.[290] Both counties have openly opposed public housing within their borders.[291] Zoning practices operate to exclude low income groups who cannot afford large lots on which houses can be built.[292] In many areas of the counties, the building of low-cost, multi-family dwellings is not permitted or is discouraged. For example, a black developer was not successful in convincing Henrico officials to give him permission to engage in a federally-subsidized, low-income housing program.[293]

The director of the Regional Housing and Development Authority testified that his inability to locate public housing outside the city tended to reinforce the overall segregated residential patterns.[294] Furthermore, public employment opportunities in the counties have been available almost exclusively to whites.[295]

Within Richmond, official policies have contributed to a residential pattern of development "in which there has been a total isolation and segregation of the Negro."[296] Housing segregation has been supported by the city's subdivision approval practices.[297] Moreover, in Richmond, public housing projects were built either for black or white occupancy prior to 1964.[298] Zoning requirements in Richmond

289. *Bradley IV*, 338 F. Supp. at 224, 226.
290. *Id.* at 220.
291. *Id.*
292. *Id.* at 226-27.
293. Appendix, Vol. II, at 749a-51a, 799a-801a, *Bradley IV*, 412 U.S. 92. *See generally* Taylor, *supra* note 288, at 757-69.
294. Appendix, Vol. II, at 617a, Bradley IV, 419 U.S. 92.
295. Exhibits at 85e-92e, *Bradley IV*, 412 U.S. 92.
296. Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 561 (E.D. Va. 1970).
297. *Bradley IV*, 338 F. Supp. at 229.
298. *Id.* at 73.

are actually more restrictive than in Chesterfield;[299] there are still areas of Richmond to which blacks, as a practical matter, cannot move.[300]

The problems which residential segregation presents for meaningful school desegregation were noted in the 1968 report to the school board on resegregation in the schools.[301] The report suggested, *inter alia*, that the board lend its support to passage of a meaningful open housing law, construction of low-rent housing throughout the city and investigation of unethical "blockbusting" practices by real estate interests.

State Activity

The policies of the state Board of Education had an impact on the degree of housing segregation in the metropolitan area.[302] The board was extremely deferential when the local school divisions requested its approval for school construction sites. The state's approval had the effect of maintaining the pattern and practice of racial separation in the area.[303] But the responsibility for segregated housing patterns stems more from its inaction rather than its activities. The state did not have a fair housing law until 1972,[304] and during the 1960's there was little reason to believe that it would enact such a law.[305] In addition, the state has failed to restructure political subdivisions or to encourage the existing subdivisions to work together to eliminate the problems of the core city area.[306]

Private Action

Housing segregation is in large part the product of private racism.[307] Although restrictive covenants were enforced by state courts until 1948,[308] the custom of maintaining segregated areas was so

299. Appendix, Vol. I, at 176a, *Bradley IV*, 412 U.S. 92.
300. Brief for Petitioners at 33, *Bradley IV*, 412 U.S. 92.
301. Urban Team Study, *supra* note 121.
302. *Bradley IV*, 338 F. Supp. at 92.
303. *See* text accompanying note 151 *supra*.
304. VA. CODE ANN. § 36-86 *et seq.* (Cum. Supp. 1975).
305. *See* Exhibits at 49e, *Bradley IV*, 412 U.S. 92.
306. Appendix, Vol. II, at 498a-500a, *Bradley IV*, 412 U.S. 92.
307. *Bradley IV*, 338 F. Supp. at 84.
308. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

strong that no white seller attempted to breach his covenant in the counties.[309] This custom tended not only to keep blacks in the transitional and ghetto areas within the city, but it induced new white arrivals to settle in accordance with existing social patterns.[310] Perhaps the best evidence of the entrenched custom of racial discrimination in housing is the fact that the newspapers, until 1968, designated which houses were for "colored."[311] There had been some rather obvious discriminatory treatment of black prospective buyers of county properties.[312] Fears engendered by blockbusters accounted for panic selling by whites in Richmond and the eventual resegregation of many public schools.[313] In fact, private discriminatory practices in the region have been a major source, perhaps *the* major source, of the problem of finding workable solutions to the historic residential housing patterns.[314]

It would be speculative to say just how much responsibility belongs to private, rather than official discrimination. The following general finding of the district court appears to be accurate and was undisturbed on appeal:

> The city of Richmond's present pattern of residential housing contains well defined Black and White areas, which undoubtedly is a reflection of past racial discrimination contributed in part by local, state and federal government.[315]

B. THE STRUCTURE OF EDUCATION IN VIRGINIA (LOCAL CONTROL)

The Constitution of Virginia charges the General Assembly with the responsibility for providing a system of free public education for school age children throughout the Commonwealth, and ensuring that an educational system of high quality is established and maintained.[316]

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309. *See* Exhibits at 94e-95e, *Bradley IV*, 412 U.S. 92.

310. Appendix, Vol. II, at 666a, *Bradley IV*, 412 U.S. 92.

311. *Id.* at 770a.

312. *Id.* at 465a.

313. Urban Team Study, *supra* note 121.

314. Appendix, Vol. II, at 497a-98a.

315. *Bradley IV*, 338 F. Supp. at 72, *Bradley IV*, 412 U.S. 92.

316. VA. CONST. art. VIII, § 1. This discussion concerns the legal structure of education in Virginia as established by the 1971 constitutional revision, and subsequent revisions of the

Standards of quality for the school divisions are set by the state Board of Education, subject to revision by the General Assembly.[317] General supervision of the public school system is vested in the Board of Education, which is appointed by the Governor, subject to confirmation by the General Assembly.[318] The duties of the board include dividing the Commonwealth into school divisions,[319] subject to such criteria and conditions as the General Assembly may prescribe.[320]

The constitution also provides for appointment by the Governor of a Superintendent of Public Instruction, for a term coincident with the Governor's. This appointment is subject to confirmation by the General Assembly.[321] The superintendent's duties are prescribed by statute. Generally, he is chief administrative officer of the state Department of Education, and serves as secretary of the state Board of Education.[322]

Supervision of the schools in each school division is vested in a school board.[323] Methods of selecting members of school boards vary,[324] with the only provision of the Virginia Code applicable to all being that they shall not be selected by popular vote.[325] In the three school divisions involved in the *Bradley* litigation, three different schemes of appointment are utilized. In Chesterfield, board members are appointed for four-year terms by a school trustee electoral board, which is itself appointed by the circuit court of the county. Henrico's board is appointed by the county board of supervisors, and members serve at the pleasure of that body. In Richmond, board members are appointed by the city council, and serve for five years.

Primary responsibility for financing education falls on local political divisions. By statute, each county, city and town is "authorized,

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general law. Significant departures from the prior law will be noted where appropriate.

317. *Id.* at § 2.

318. *Id.* at § 4.

319. *Id.* at § 5.

320. *See* VA. CODE ANN. §§ 22-42 to -44 (Repl. Vol. 1973).

321. VA. CONST. art. VIII, § 6.

322. *See, e.g.*, VA. CODE ANN. §§ 22-2, -22 to -29 (Repl. Vol. 1973).

323. *Id.* at §§ 22-2, -72, -97 (Repl. Vol. 1973), *as amended*, (Cum. Supp. 1975).

324. *See generally id.* at §§ 22-61, -79.1 to -79.6, -80, -89, -100.3.

325. *Id.* at § 22-57.1 (Repl. Vol. 1973).

directed and required to raise money by a tax on all property subject to local taxation at such rate as will insure a sum which, together with other available funds, will provide that portion of cost apportioned to such county, city or town by law for maintaining an approved educational program . . . meeting the standards of quality prescribed by the State Board of Education . . . ."[326]

Should a local governing body fail to raise or appropriate the requisite funds, upon notification of such fact by the local school board, the Attorney General is required to bring a mandamus action compelling the governing body to make the appropriation.[327] Local school boards do not have any power, in and of themselves, to levy taxes or appropriate funds. But the statutes are structured so as to assure them at least enough money to meet the state board's criteria of quality.

It is clear that, at least since 1971, the state Board of Education acting alone cannot consolidate school divisions. The Commission on Constitutional Revision had recommended that the state board have virtually unfettered power to consolidate divisions.[328]

The General Assembly did not follow the Commission's recommendation. As the Commission's Executive Director stated:

> The legislators showed a special sensitivity about the question of consolidation of school divisions, a subject which they thought might rouse intense feelings among the people back home. Not only did the [rejected] Commission's draft provide no check over the Board's power to draw school division lines (save the requirement that lines be drawn so as to promote realization of prescribed standards of quality); section 7 provided that each school division was to have one, and only one, school board. Unwilling to give such unfettered power to the Board to consolidate school divisions, and with them school boards, the Assembly added to section 5(a) the qualification that in drawing school division lines the Board is to act "subject to such

326. VA. CODE ANN. § 22-126.1 (Repl. Vol. 1973).

327. *Id.* at § 22-21.2.

328. 2 A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 918 (1974) [hereinafter cited as HOWARD'S COMMENTARIES]. Although the state board had power to consolidate divisions pursuant to the 1902 constitution, each county and city would retain its local board unless they agreed to establish a single board for the consolidated division. *Id.* at 920.

criteria and conditions as the General Assembly may prescribe."[329]

The proposal of the Commission was considered to be politically impossible. Indeed, during the General Assembly's debate, one senator speculated: "Suppose the Board of Education told the city of Norfolk that they had to combine their school division with Virginia Beach. I do not know whether there are enough National Guardsmen in the State to stop the revolution you would have."[330]

The Commission's version was not reported to the floor.[331] Rather, the reported resolution provided that the General Assembly be empowered to prescribe to the board the "criteria" on which a decision to consolidate must be based. Presumably such criteria related to standards that would promote quality education.[332]

An amendment was proposed which would require as one of the "criteria" a local referendum to approve any action by the state board regarding its power to create school divisions.[333] Proponents explained that a local referendum would prevent the state board from acting contrary to local sentiment by entering a community and disrupting local life as had been the experience with HEW.[334] Opponents objected, however, pointing out that consolidation would be impossible if the voluntary consent of the various divisions affected were required.[335]

The Senate adopted the amendment requiring a local referendum as a precondition to consolidation.[336] The House of Delegates in-

329. *Id.* at 919.

330. *Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution* 1969 Ex. Sess., at 230 (Senator Stone) [hereinafter cited as *Senate Amendment Proceedings*].

331. *See id.* Appendix at 746.

332. *Id. See also* 2 HOWARD'S COMMENTARIES, *supra* note 328, at 921.

333. *Senate Amendment Proceedings*, *supra* note 330, 1969 Ex. Sess., at 228-29 (Sen. Stone).

334. *Id.* at 523 (Sen. Davis).

335. *Id.* at 231 (Sen. Moody). Senator Moody stated: "They [the local electorate] do not concern themselves so much with the merits of the problem and the necessity for the consolidation . . . as they do with . . . political consideration . . . ." The senator, referring to those situations where political considerations were crucial, also noted: "Just as in the situation now existing in Richmond and the surrounding area, there are always many considerations that get involved in these things that have nothing to do whatever with the merits of the problem."

336. *Id.* Appendix at 746.

sisted that the General Assembly reserve for itself what "criteria and conditions" would be required before school divisions were established and hence consolidation were allowed.[337] A conference committee agreed to the House version. The section was adopted by the General Assembly on April 15, 1969, with the clear understanding that the "criteria and conditions" of consolidation would include either a local referendum, or approval by the local school boards.[338]

Under the 1902 constitution, the state board was charged with discretionary power to divide the Commonwealth into appropriate school divisions, limited only by provisos that the divisions should comprise not less than one county or city each, and that no county or city be divided in the formation of the divisions.[339] The 1971 provision clearly established another potential limitation on this power. The General Assembly moved quickly to create an actual limitation from this provision. It provided temporary conditions which prohibited divisions composed of more than one county or city, without a request from the school boards and governing bodies of the affected jurisdictions.[340] Of course, neither Chesterfield nor Henrico rushed forward with a request for consolidation with Richmond.

One other aspect of Virginia school law is worthy of at least historical note. During the years of massive resistance immediately following the *Brown* decisions, the General Assembly passed a number of laws which gave state officials, including the Governor, authority to directly intervene in local school matters in order to avoid integration.[341] These laws were generally held unconstitutional by the

337. *See Proceedings and Debates of the House of Delegates of Virginia Pertaining to Amendment of the Constitution* 1969 Ex. Sess., Appendix at 858. *See generally Senate Amendment Proceedings, supra* note 330, 1969 Ex. Sess., at 525, 527, 529.

338. The provision as finally ratified provided:

> Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose. VA. CONST. art. VIII, § 5(a).

339. VA. CONST. § 132 (1950) *amending* VA. CONST. § 132 (1902).

340. VA. CODE ANN. § 22-30 (Repl. Vol. 1971).

341. *E.g.*, VA. CODE ANN. §§ 22-188.30 to -188.40 (Cum. Supp. 1958), *repealed by*, Va. Acts of Assembly 1959 Ex. Sess., ch. 74, at 176.

Supreme Court of Appeals of Virginia in *Harrison v. Day*,[342] but not before a number of schools had been closed and a substantial amount of money had been paid out of state coffers in the form of tuition grants to students attending private "segregation academies."[343]

To this day, the state has never committed itself legislatively to a program which would promote disestablishment of the formerly dual school system, once mandated by the state constitution. Perhaps the most noteworthy aspect of Virginia's educational structure is the lack of insulation between the schools and the political arena. This extends from the appointment of the state Board of Education and Superintendent of Public Instruction by the Governor, to the fact that local divisions are dependent on local governing bodies for funding, and must often get popular support through bond issues for school construction.

C. PRESENT PATTERN OF SCHOOL ATTENDANCE IN THE RICHMOND METROPOLITAN AREA (RACIAL IDENTIFIABILITY)[344]

The Supreme Court opinion in *Bradley IV*[345] left unanswered a number of questions vital to the future of school desegregation in Richmond.[346] What is clear is that vestiges of a formerly dual school system remain.[347] The following summary of data shows the extent to which the city and county school systems remain identifiable by race.

City of Richmond

The Richmond public schools lost about 12 per cent of their white enrollment from mid-September 1974 to September 15, 1975,

342. 200 Va. 439, 106 S.E.2d 636 (1959).

343. *See, e.g.*, Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

344. The following analysis shows the present pattern of school attendance by race in Richmond, Henrico and Chesterfield. The information upon which the analysis is based has been provided by the local school officials of the respective school divisions. Also instrumental in the research and analysis was a study by the Virginia Office of School Integration Services, Department of Education.

345. 412 U.S. 92.

346. *See* note 6 *supra*.

347. *See, e.g., Bradley IV*, 338 F. Supp. at 80.

leaving ten of the 52 regular schools with a black enrollment of 90 per cent or more. There are only 7,156 whites in the system, down from 12,622 when the Bradley litigation was reopened in 1970.

No elementary school is majority white. No middle school is majority white. The high school with the most balanced racial composition is in the annexed area. It has a 50-50 ratio. The city is approximately 58 per cent white (as of 1970).

The large percentage of black students at each school has caused some school officials to say they are simply busing black children from one area to another.

Data for 1973-74 shows that 60.8% of Richmond's elementary classroom teachers and 55.3% of its secondary classroom teachers were black. Breakdowns for individual schools were not made available to the authors. However, there has been no charge of lack of compliance with the district court's mandate that each school reflect the black/white ratio of all schools at its level.[348]

Chesterfield County

In the past school year (1974-75), the elementary schools of Chesterfield were 7.7% black; the middle/high schools, 6.0% black.

At the elementary level, one school was majority black; one was 1/3 black; one was 1/5 black. The remaining sixteen were in the 1-10% black range. Fifty-six percent of the black students were in the three schools with more than 20% black enrollment.

One high school was 43% black, and enrolls 45% of the black students at the middle-high levels. The remaining eleven middle-high schools range from .4% to 12.7% black.

Approximately 6% of the elementary school faculty for 1974-75 was black. All but one school had black teachers; the faculty of the majority black school was 21% black. The latest available data for the middle-high schools (1972-73) showed an overall 7.6% black faculty.

Henrico County

According to statistics provided by the Henrico County Schools,

348. *See* text accompanying note 82 *supra*.

black students comprised approximately 12% of the school population in 1974-75. Of the 33 elementary schools operated by the county, one was majority black (54%) and five were 30-50% black. Sixty-one percent of the black elementary pupils attended these six schools. Fifty-four percent of the white elementary pupils attended schools with less than 5% black enrollment. This included sixteen schools with 1% or less black enrollment.

At the middle school level, 54% of the black students attended one of five schools. Two schools, with 46% of the division's white pupils, were less than 1% black.

One high school enrolled 43% of the black students at that level. Thirty-eight percent of the white students were in schools with 1% or less black enrollment.

The county employed 115 black teachers, approximately 6% of the system total. At the elementary level, every school had at least one black teacher; no school had more than four.