School Desegregation Problems in the South: An Historical Perspective

Frank M. Johnson Jr.
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I was pleased to accept the invitation of the University of Minnesota Law Forum to be with you and to speak to you today. Most of you are probably aware that federal judges rarely make public statements outside of the courtroom or judicial opinions. This is as it should be because it is virtually impossible for a judge who has been completely removed from the political and business world—in order more nearly to maintain an impartiality necessary for the performance of his duties—to say anything that will not be interpreted as an official position or judicial attitude. I have usually made an exception to this rule when invited to speak to university and college groups and especially to law students.

My topic—School Desegregation Problems in the South—seems particularly appropriate because so much of the progress accomplished in the field of school desegregation has been brought about through the efforts and courage of lawyers and young people. The recent Supreme Court decisions and President Nixon's statement have made this topic a timely one as well.

When the Supreme Court handed down its unanimous decision in Brown v. Board of Education¹, (Brown I), no one had given much thought to the problem of implementation. Argument had focused on whether segregated schools were inherently unequal and on the circumstances surrounding the adoption of the fourteenth amendment in 1868. The Court asked for further argument on the nature of the relief to be granted, saying:

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity.²

Surely one of the great understatements in the literature of the law!

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* Address delivered before the University of Minnesota Law Forum, April 17, 1970.
** Chief Judge, United States District Court, Middle District of Alabama.
2. Id. at 495.
The questions propounded by the Court indicated that the Justices were considering several alternative approaches in May of 1954. The Court asked whether a decree should be entered permitting Negro children to attend forthwith the schools of their choice or whether the Court could “in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?” Assuming the gradual approach were taken, the Court asked, should the Supreme Court formulate detailed decrees; if so, what specific issues should the decrees reach; should the Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees, or should the Court remand to the courts of first instance with directions to frame decrees?

On May 31, 1955, the Supreme Court delivered its opinion on how and when desegregation would be required, adopting the now famous “all deliberate speed” formula. The key features of the decision were:

All provisions of federal, state or local law requiring or permitting such discrimination must yield to this [Brown I] principle. Full implementation of these constitutional principles may require solution of varied local school problems . . . . [T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

The cases were remanded to the courts which had originally heard them because those courts, owing to “their proximity to local conditions and the possible need for further hearings,” could best perform the judicial appraisal of the good faith of the school systems' proposals for the “solution of varied local school problems” which might arise in the full implementation of the Brown I principles.

Although the Court twice made it clear that desegregation was not to be blocked because of disagreement with constitutional principles which required it, the Justices clearly expected cooperation and compliance from both the local school boards

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3. Id. at 496 n.13.
5. Id. at 298-300.
6. Id. at 299.
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and the lower courts. There are some who believe it received precious little from either.

I would like to describe to you some impressions of the Fifth Circuit's experience with school desegregation litigation, and, more particularly, my experiences in the Alabama statewide case—Lee v. Macon County Board of Education. 7

The first thing which impresses the student of school desegregation in the deep South is the slowness with which it has proceeded. No Negroes attended white primary or secondary schools in Alabama until 1963. The record elsewhere was little better. When resistance finally began to crumble, the meager result of massive litigation was tokenism. In the 1963-64 school year, the 11 states of the Confederacy had 1.17 percent of their Negro students in schools with white students. In 1964-65, the percentage doubled, reaching 2.25 percent. In 1965-66, with increasing pressure from the Fifth Circuit, a few district courts, and the Department of Health, Education and Welfare (HEW) Guidelines, the percentage climbed to 6.01 percent. The border states had a higher percentage of desegregation, but Alabama, Louisiana and Mississippi still had fewer than 1 percent of their Negro students attending schools with white students. By 1965, 56 percent of the South's school districts had desegregation policies but only about 11 percent of the total Negro enrollment attended desegregated schools. In 1966, 97 percent of the school districts were in official compliance with the HEW Guidelines or under court order, but the actual attendance of Negroes in formerly all-white schools was less than 16 percent for the border and deep South states.

There are many reasons for the long delay between the declaration of the right to attend desegregated schools and its implementation. The profound disagreement of most regions of the deep South is probably the most important single factor. School board members, regardless of their personal feelings, were pressured to resist by their constituencies. Opposition to "Washington" and the federal courts soon became political issues, and unscrupulous politicians quickly learned to exploit the problem instead of attempting to deal with it. The political aspects of this problem were aggravated by the disenfranchise-ment of the Negroes until recently.

For example, the Board of Education in Little Rock had prepared a stair-step integration plan for the Arkansas capital

before any litigation had begun. The federal district court rejected a challenge to the plan brought by Negro parents who argued that the plan was too drawn out. When it came time for the entrance of the Negro students into Central High School in the fall of 1957, Governor Faubus stepped in to block their admission. The furor that was unnecessarily created led to a severe setback for desegregation and the defeat at the next election of those incumbent members of the Board of Education, not to mention Congressman Brooks Hays, who had voted for the desegregation plan.

Resistance took many forms; some were spectacular, like sending state troopers and governors to stand in schoolhouse doors. Others were mere bombast, like the interposition and nullification resolutions passed by several state legislatures. Of some effect, certainly, was the pressure applied by the white community against Negro parents and children who brought legal actions and tried to exercise their right to attend desegregated schools.

The Alabama Legislature was particularly active. That august body did not even wait for the Brown decision, but took notice of the pendency of the cases in the Supreme Court and in a Joint Resolution, adopted September 21, 1953, appointed an interim committee to prepare

such legislation, including submission of Constitutional amendments, as may be required to protect the interests of the State and its citizens in the event of a decision by the Supreme Court of the United States which destroys or impairs the principle of separation of the races in the public schools of this State.

The committee reported to the Legislature at the next regular session in 1955 and proposed the repeal of section 256 of the Alabama Constitution, which expressly prohibited the operation of desegregated schools, and the enactment of a panoply of legislation designed to replace the constitutional provision which so obviously would have acted as a lightning rod for Negro plaintiffs and the federal courts. The Legislature responded enthusiastically. A pupil assignment law was enacted that session, which included several ingenious provisions. Among them was a grandfather clause which required students to continue in their old schools unless their parents applied for a transfer. The assignment law provided for a system of ad-

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ministrative review and appeal to the state courts, which would effectively render any application moot by the time it could be reviewed by a federal court because the school year would be over before a final determination would have been made. The 1955 Act did not make integration illegal, as had been done in several other states, but it permitted any parent to keep his child out of any school "in which the races are com mingled" and promised State assistance for children who withdrew from integrated schools.

The next year, in special session, the Legislature passed a Resolution of Interposition and Nullification which was more colorful than efficacious. A three-judge district court declared that "[i]t amounted to no more than a protest, an escape valve through which the legislators blew off steam to relieve their tensions" and declined to dignify it with a declaration of its unconstitutionality. In 1957, the Legislature repealed the compulsory school attendance laws and authorized school districts to close any of their schools if the local board determined that

the continued operation of such school will be accompanied by such tensions, friction or potential disorder or ill will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and good will in the community, school district, or county involved . . . .

The local boards were authorized to turn the closed physical plants over to "private" schools set up to avoid desegregation or to provide support for parents who sent their children to private schools. Another statute declared the school boards to be "judicial" bodies and granted them "the immunities of all other judicial tribunals" of the State. The Alabama Supreme Court ruled that a county personnel board could not be sued for refusing to allow a Negro to take a competitive examination to become a policeman because, acting as a judicial body, it was immune from suit.

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13. See note 8 supra.
The ultimate weapon in the State's arsenal was the threat to close the public schools rather than desegregate. This potential bomb was not defused until 1965 when the Supreme Court held, in *Griffin v. County School Board of Prince Edward County*, that Negro students' constitutional right to the equal protection of the laws had been denied when the Prince Edward County, Virginia, public schools were closed to avoid desegregation and the State gave tuition grants and tax concessions to assist white students to attend private segregated schools.

Today the threat is that white students will flee to private segregated schools leaving an all-black public school system. Desegregation will have been defeated and, once the white students have left the system, the local white government, it is argued, will refuse to support the public schools which will then deteriorate. The Supreme Court has held that the district courts may not yield to the threat that white students will abandon the public schools. But the Court has not indicated what a district court faced with a now all-black public school system should do. *Griffin* may provide authority for keeping the public schools open and tax supported up to an acceptable standard, although there was a dissent by Justices Clark and Harlan on that question. To the extent that whites flee in those districts where they are a minority, the problem of adequate financial support for the public school system will solve itself if and when Negroes gain control of local governments in areas where they are in the majority. This process has begun and local school boards in Negro-controlled areas are attempting to maintain and upgrade their school systems. After the predominantly black National Democratic Party of Alabama won the local elections in Greene County, Alabama, last summer, the local school board with a black majority, began to submit remarkably different and more cooperative proposed plans for disestablishing the county dual school system. Foreseeing this possibility, whites in some predominantly black counties are encouraging the emigration of Negroes so that the Negroes' voting power will be reduced enough to prevent any change in local government.

A second important factor in the long delay was the lack of clarity in the Supreme Court's *Brown II* decision. The decision was designed to make it clear that the Court was not encouraging or condoning unnecessary delay. Nevertheless, school boards and some judges were slow to respond. Much of the delay in the courts was due to disagreement with the *Brown I* decision on the part of almost everyone involved, including some judges, except the plaintiffs.23

Real desegregation—beyond tokenism—was held up for a while when the Fifth Circuit was sidetracked and followed24 the dictum in *Briggs v. Elliott*25 to the effect that the Constitution forbade discrimination but did not require integration and left undisturbed the people's "freedom to choose the schools they attend."26 No court now disputes that the correct statement of the law is that the school districts must take affirmative action to disestablish the former dual school systems and eliminate the effects of state imposed segregation.

These difficulties aside, there were other legal stumbling blocks. An entire new area of the law had been opened up in 1954 and many questions had to be answered before courts could order the relief sought. Questions of standing to sue took years to solve. For example, the Fifth Circuit quickly decided that it was not necessary that the plaintiffs exhaust their administrative remedies before they turn to the federal courts, at least in those cases where the school system had a policy of segregation,27 but the Fourth Circuit denied standing to plaintiffs who had not done so.28 Not until 1965 was it decided that Negro students and parents have standing to challenge faculty segregation.29 The availability of class actions, one of the most effective devices used by plaintiffs, had to be thrashed out in each circuit.

Each of the state laws enacted to block desegregation had to be laboriously attacked. The long legal battle between civil rights attorneys and the attorneys for southern governors and

26. Id. at 777.
27. *Gibson v. Board of Pub. Instruction of Dade County*, 246 F.2d 913 (5th Cir. 1957); *Holland v. Board of Pub. Instruction of Palm Beach County*, 258 F.2d 730 (5th Cir. 1958).
legislatures is still not over. The freedom-of-choice laws passed in Alabama and Georgia this spring are only the most recent episodes in the contest.

Moreover, the plaintiffs often had to prove that the statutes were unconstitutional as applied, frequently a difficult task. For example, a three-judge district court held that the Alabama Pupil Placement Law was not unconstitutional on its face in 195830 and civil rights attorneys did not successfully demonstrate that it was being applied unconstitutionally until 1964.31

The second striking feature of southern school desegregation is the immense amount of litigation which has been necessary for the enforcement of the fundamental legal and moral right declared in Brown I. There are, and will continue to be, a tremendous number of cases before the courts. For example, more than 50,000 complaints of discrimination in employment have been filed under section 706 of the Civil Rights Act of 1964 during the past three years!32 From 1956, when the first school case after Brown reached the Fifth Circuit Court of Appeals, through 1966 the district courts in this Circuit considered 128 school cases while the Court of Appeals reviewed 42, many more than once.33 The number has increased significantly since then. I have before my court 107 school districts which have either disestablished their dual school systems or will within the next 30 days be under a terminal order to do so effective September, 1970. You can imagine the time and effort required of the plaintiffs, the Justice Department as a plaintiff-intervenor, the school boards and their attorneys and the court to prepare, present and decide all the issues which must be resolved in moving from dual to unitary systems. During the past 18 months these cases have occupied approximately 50 percent of my time. In addition to the desegregation suits, every district court is subjected to a steady stream of ancillary cases arising from the problems of transition to a unitary system. For example, school boards ask for injunctions to pre-

vent mobs from blocking integration. One of the disadvantages of a dual school system is the wasteful duplication of faculty and facilities. School districts which could scarcely afford one set of schools used to try to maintain two complete systems. Both white and black students suffered, but the black children inevitably suffered more. One of the unintended benefits of desegregation has been the elimination of this costly duplication. Consolidation of the school systems has meant the elimination of redundant faculty and staff. Although most desegregation orders require equal treatment of black and white personnel, there has been a considerable amount of litigation arising out of alleged discriminatory dismissals and demotions. When a white and a black school are consolidated, there is room for only one principal and vice-principal. Almost invariably it is the black principal who is demoted or dismissed. Teaching staffs face the same problem. When North Carolina began large scale consolidation in 1965, over 500 Negro teachers were dismissed. Many of the dismissed or demoted teachers come to court for protection. Not all the claims are justified because many of the faculties were not qualified and the school districts often use consolidation to upgrade their teaching staffs, but the courts must sort out the valid claims from the specious ones.

Black plaintiffs are no longer satisfied with access to formerly all-white schools. They often insist on a voice in the curriculum to be offered. The demand for black studies has moved south. When the school officials are unresponsive to requests for special programs, the plaintiffs often turn to the courts. For example, in one of the reversals of the district court in the Stell case, the Fifth Circuit ordered the Savannah, Georgia, schools to provide remedial education programs to overcome the past inadequacies in the education of the transferring Negro students.

Segregation has been so thoroughly ingrained in the South that its effects touch almost everything. The courts


have had to forbid segregated P.T.A.s, buses and bus routes, extracurricular activities, athletic associations, libraries, faculties and staffs.

The number of judges on the Court of Appeals was expanded in order to handle the increased case load; the Fifth Circuit now has more active appellate judges than any other circuit. Senate Bill 952, to increase the number of district judges in the country, includes several new judgeships in the Fifth Circuit.

The mass of litigation resulted in major disparities among court approved plans. In order to eliminate the variations, the Fifth Circuit prepared a model decree in 1966, which served as a minimum standard for the school boards and district courts.

I shall not go into the details of the decree because subsequent Supreme Court and Fifth Circuit decisions have made it obsolete, but basically it called for faculty desegregation and freedom-of-choice pupil placement combined with the closing of inferior Negro schools effective by the beginning of the 1967-68 school year. The decision was important because it emphasized the affirmative duty of the school districts not merely to end segregation but to eliminate discrimination and its effects. Tactically, it was important because it meant that the delay inherent in litigation and appellate review was cut to a minimum. The courts now had a standard against which to evaluate proposed plans. For example, shortly after the model decree was issued two school cases reached the Court of Appeals. The district courts had approved plans which lacked the safeguards provided in the model decree and waived the choice form mailing requirement. Within four days the court summarily reversed and remanded the cases with instructions to the district courts to enter decrees containing desegregation plans conforming to the Jefferson decree. The district court on remand entered a decree almost identical to the model decree within a month.

Of course, a model decree, although denominated a minimum, may soon come to be the maximum for all practical purposes. This danger did not materialize because the Jefferson

40. Id.
decree went much further than the majority of district court judges had been willing to go theretofore.\textsuperscript{42} When it became evident that freedom of choice was not going to work, the courts turned to other, more effective means. District courts are now attempting to follow the standards set in Singleton v. Jackson Municipal Separate School District,\textsuperscript{43} although no model decree as such was made part of that decision. The Court of Appeals directed the district courts to approve only those plans which provided for immediate and complete desegregation of faculty and staff, transportation, facilities, athletics and other extracurricular activities. Commencing in September, 1970, the student bodies are to be merged into a unitary system. No more delay is to be tolerated by the courts.

All this has been very abstract and intellectual. In order more adequately to understand some of the problems, let me describe in some detail one case, Lee v. Macon County Board of Education.\textsuperscript{44} It began as an ordinary school desegregation case when 13 Negro children brought a class action in the United States District Court for the Middle District of Alabama seeking admission to the white high school in Tuskegee. Tuskegee is located in Macon County just east of Montgomery. The county is predominantly black but until recently the whites controlled all the political offices, including the Board of Education. In July, 1963, the Department of Justice entered the suit to represent the public interest and in August 1963, I entered an order requiring the school board and its superintendent to make an immediate start in the desegregation of the Macon County public schools.\textsuperscript{45} The Board assigned the 13 Negro plaintiffs to the until then all-white Tuskegee Public High School.

When the school opened Labor Day morning it was surrounded by over 100 State highway troopers dispatched during the night by Governor Wallace, who had ordered that the school opening be delayed one week because the "forced and unwarranted integration" had produced a condition in Alabama "calculated to result in a disruption of the peace and tranquillity of this state and to occasion peril to the lives and property of the citizens thereof." Governor Wallace had also sent State troopers to block court-ordered desegregation in Birmingham

\textsuperscript{42} Gozansky, Gignilliat & Horwitz, \textit{School Desegregation in the Fifth Circuit}, 1968 Houston L. Rev. 946, 959 n.100.
\textsuperscript{43} 419 F.2d 1211 (5th Cir. 1969).
\textsuperscript{44} 221 F. Supp. 297 (M.D. Ala. 1963).
\textsuperscript{45} Id.
and Mobile schools. All five federal district judges in Alabama joined in issuing a temporary injunction restraining Governor Wallace and others from enforcing the Governor's orders forbidding school desegregation. Nevertheless, the harm was done: the tensions and fears aroused by the Governor's inflammatory statements and actions undid the efforts of the Macon County school board to prepare the community for desegregation. When the high school finally opened, only 35 of the 250 white students appeared for classes. Within three days public pressure forced all of them to withdraw. Some of the whites organized a private school, called the Macon Academy, and applied for tuition grants from the State under a statute enacted to cover such emergencies as the one in Tuskegee. The others transferred to all-white schools in neighboring towns, using the public school buses. After the County Board was ordered to cease the transportation of white students to nearby Shorter and Notasulga High Schools, State highway patrol cars and a school bus previously used by a State public vocational school were pressed into service by the State. In January and February 1964, the State Board ordered the Macon County Board to close Tuskegee High and transfer the students to the nearest school—which meant the all-black Tuskegee Institute High School—and to provide grants-in-aid to the students who had enrolled in Macon Academy. The State Board of Education concluded by resolving that

the State Board . . . deplores the order of Judge Johnson and pledges every resource at our command to defend the people of our State against every order of the Federal courts in attempting to integrate the public schools of this State and will use every legal means at our command to defeat said integration orders . . . .

Acting pursuant to a court order after Tuskegee High was closed, the Negro students attempted to enroll at Shorter and Notasulga High Schools on February 5. However, the Mayor of Notasulga prevented the entrance of six Negro students to the Notasulga School, claiming that their attendance would create a fire hazard in violation of a city ordinance enacted the night before. Mayor Rea yielded to an injunction; meanwhile, the State Department of Education expedited accreditation of Macon Academy.

The massive intervention by the Governor and other State officials provided the means to shortcut in Alabama

the slow district-by-district litigation which was taking so much time and effort all over the South. The plaintiffs asked for the convening of a three-judge district court to declare the State grant-in-aid law unconstitutional and requested the court to find that the Governor as ex officio president of the State Board of Education had "asserted a general control and supervision over all public schools of the state." They prayed for a single desegregation order directing the State officials to carry out the desegregation of all the public school systems not then under court order.

The three-judge court held the grant-in-aid payments unconstitutional and forbade the State to close schools in some areas while maintaining them in others.\footnote{Id. at 754.} It found that the State of Alabama continued to have an official policy favoring racial segregation in public education and that the State Board of Education and Superintendent of Education enforced that policy through their control of funds, textbooks, transportation and school construction. The court ordered the Macon County Board to prepare a plan for the implementation of further desegregation in the county and enjoined the State officials from interfering with the local board, but the court refrained at that time from issuing a state-wide desegregation order on the representation of the defendant State officials that they would not interfere with local school systems in the future.

Early in 1965, several counties, which have such a low Negro population that the maintenance of a dual school system was very burdensome, had submitted compliance plans for all twelve grades even though the Office of Education Guidelines then only required four grades. The Governor sent telegrams urging the county boards of education to reconsider their action. Most of the boards yielded to the pressure from the Governor's office. The State Board of Education, using its power over school construction and transportation, required local boards to continue to maintain dual school systems.

The local boards of education throughout the State that were not under court order (102 of them) were now caught between HEW and the new State statutes. When the superintendent of the Tuscaloosa schools assigned two Negroes to teach white students, he received an indignant telephone call from the Governor's legal advisor who threatened that the Governor might use his "police power to enforce the law." When the superintendent refused to back down, the State Board of Education announced that it would allocate additional teacher units to any school which had an integrated faculty so that students could have a choice of the race of their teacher.

In *Lee v. Macon County Board of Education*, plaintiffs returned to court, now able to demonstrate beyond peradventure that the State had usurped the power of the local school boards and was likely to continue to do so in the interest of maintaining segregation unless enjoined by the court.

The three-judge court found that the State officials had used their authority as a threat and as a means of punishment to prevent local school officials from fulfilling their constitutional obligation to desegregate the schools, and ... they have performed their own functions in such a way as to maintain and preserve the racial characteristics of the system.51

The court brought under its injunction all 102 of the State's 120 school districts which were not already under court order, and placed upon the new State Superintendent of Education, Ernest Stone, the duty of carrying out the court's order. Each local district was required to begin desegregation upon pain of losing State funds and to make periodic progress reports. The court specified the steps the local districts were to take in a Jefferson-type order. The tuition grant law was declared unconstitutional.

The vast majority of school districts complied with the order and continue to do so with significant results. In 1966 only 0.34 percent of the Negroes in Alabama attended integrated schools; for the 1967-68 school year the number increased to 6.3 percent. In this school year the percentage jumped to over 33 percent. With the commencement of the next school year in September 1970, it will reach over 90 percent.

Supervising 102 school systems is a tremendous task for three federal judges who have been obliged to become experts in desegregation and education almost overnight. There is a multi-

licity of details to be taken into account. For example, in April 1968, the court ordered the merger of the two high school athletic associations, one black and one white. Only recently have black athletic teams begun to play white teams.

The volume of litigation has become so great that the attorneys for the original Negro plaintiffs have been forced to rely, to a considerable degree, on the Justice Department to handle the bulk of the preparation and presentation of the cases. This problem was alleviated somewhat when the black teachers' organization, Alabama State Teachers Association (ASTA) was permitted to intervene as a plaintiff to protect the rights of the black teachers. ASTA had a litigation fund, and it engaged Fred Gray and the other civil rights lawyers who had been handling the desegregation suits. ASTA has now merged with the Alabama white teachers organization, but NEA, the national teachers organization, replaced ASTA as a plaintiff-intervenor.

Freedom of choice, the plan adopted by almost all of the school districts, really began to work only after the court began ordering the closing of substandard Negro schools, leaving the Negroes no place to go but the nearest white school. In 1968, the plaintiffs and the Justice Department asked the court to order the abandonment of freedom of choice in 76 of the 102 school systems. In August 1968, the court denied the motions, but permitted continued operation of freedom of choice only on condition that faculties be integrated on a one to six basis, certain Negro schools be closed, and minimum percentages of Negroes choose or be assigned to white schools.

In October 1968, the court entered an order finding that most of the school systems had complied with the faculty desegregation provision of the August order, but that some 19 systems had failed to comply. The Boards of Education and the superintendents for these systems were made parties-defendant and ordered to show cause why the court should not require the systems to adopt some plan other than freedom of choice. The remaining school systems then brought themselves into compliance.

Last summer, after motions for further relief were filed by the government and the plaintiffs, the court required all those systems which had not fully disestablished their dual school systems to submit a terminal plan no later than December 1, 1969,

whereby complete disestablishment was to be accomplished by September 1970. The court has spent most of this winter and spring evaluating the plans and holding formal hearings and conferences on the merits of the plans and objections submitted by the plaintiffs, the Justice Department and the school boards.

In 1969-70—the current school year—approximately 33 percent of Negro students in the 102 school districts in Lee attended desegregated schools and 32 school systems completely abolished their dual systems prior to this school year. Most of these districts had a relatively low percentage of black students and accomplished disestablishment by closing their Negro schools and assigning the black students to white schools. The black teachers and staff were absorbed into the now unitary school systems.

The terminal plans the court is approving usually provide for zoning and/or consolidation and pairing of black and white schools. It is difficult to predict what the reaction to the implementation of the plans next fall will be. No one expects anything like the ugly violence that has occurred in Lamar, South Carolina. Because the remaining questions before the court in the systems where unitary plans have been formulated and ordered are local in nature and the State officials have stopped resisting, the three-judge court just two weeks ago transferred approximately 50 of these systems to the Northern and Southern Districts of Alabama, pursuant to title 28, section 1404a, United States Code. This decentralization will make the school boards’ task of reporting to the court easier and relieve the three-judge court of much of the administrative detail with which it has been dealing heretofore.

Perhaps it is possible to extrapolate from the experience of the school districts which were ordered to disestablish their school systems this January and February by the Supreme Court and the Fifth Circuit. Of course, it must be remembered that some of the problems those systems incurred may have been due to the disruption caused by the speed and unexpectedness with which they were required to complete the desegregation process. The general pattern has been that in those schools where the whites are a majority of 60 percent or more, the desegregation has been accomplished without serious incident. Where the whites are in a minority, they have withdrawn from the public schools and established private schools. The cost of tuition is a staggering burden for many parents. Some of the states are resurrecting grant-in-aid laws and contemplating
tax relief for parents and donors.\textsuperscript{53} State tuition aid laws have been held unconstitutional by the courts many times on the ground that they are merely a device for perpetuating segregated schools. In effect the state aid was available only to white children because the statutes or school board policy limited the aid to whites who refused to attend integrated schools or because only white private schools had been established.

Many private schools have managed to maintain successful operations in Alabama so far, but it is not clear whether they will be able to continue to do so when every county has its own academy or academies. Many people all over the State contribute on principle to the private schools already in existence. When these contributions have to be spread over many more schools, each school will be much less well off. Macon and Lowndes Academies, for example, have been receiving support from all over Alabama. When that support is diverted to nearer schools, the academies will suffer. If the Internal Revenue Service denies the charitable deduction benefit to contributors to segregated schools, the amount of support the schools can expect will decrease further. There will be a large number of private academies in Alabama next year, in any case. There are several counties in Alabama where the whites are in the minority. Even in a county like Montgomery, where the whites constitute 62 percent of the population, there are plans for four new private schools to open next fall, supplementing the existing six private schools.

The South is beginning to confront the problem of de facto segregation. Although there is less residential segregation than in large Northern cities and their suburbs, the amount in the South is increasing and court-ordered desegregation is speeding up the process as whites whose children have been assigned by zoning to majority black schools move to neighborhoods where the schools are majority white.

Neither the Supreme Court nor the Fifth Circuit has ruled on the constitutionality of de facto segregation. In \textit{Jefferson} the Court of Appeals left "the problems of \textit{de facto} segregation in a unitary system to solution in appropriate cases by the appropriate courts."\textsuperscript{54} It is ironic and tragic that as the end of State imposed segregation in the South comes into view, the perhaps more intractable problem of \textit{de facto} segregation looms ahead.

\textsuperscript{53} Birmingham Post Herald, January 12, 1970.
\textsuperscript{54} 380 F.2d at 389 n.1.