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THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT: A PERSONAL PERSPECTIVE

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As we began our presentation on a motion for a preliminary injunction, Judge Harold Cox leaned back in his chair behind the bench and observed: "I don't see why you fellows come to this court. Why don't you just go directly to one of those emergency panels in New Orleans to give you what you want?" My partner, Mel Leventhal, quickly responded: "We came here to make a record, your honor." Such was the relationship between the civil rights bar, the United States District Court for the Southern District of Mississippi, and the United States Court of Appeals for the Fifth Circuit in the 1960s and early 70s. The District Court, led by Chief Judge Harold Cox, took a view of the law most consistent with resistance to change. Hope for the plaintiffs lay only in the chance that the progressive thinkers on the Fifth Circuit would be able to marshal yet another majority and provide relief.

Managing civil rights litigation across the Deep South, the Fifth Circuit Court of Appeals was innovative, sensitive, steadfast and persistent. Its work, the courage and determination of some of its leading judges, and its importance in our history have been well chronicled in countless articles as well as in such works as the classic *Unlikely Heroes* by Jack Bass,[1] *A History of the Fifth Circuit* 1891-1981 by Harvey Couch,[2] *Let Them Be Judged*, by Frank Read and Lucy McGough[3] and *A Court Divided* by Deborah Barrow and Thomas Walker.[4] This Article is intended as a reflection upon that work of the court from the perspective of one who labored there in the field of civil rights law from 1968 until 1985.

I. SCHOOL DESEGREGATION

In May of 1968, the United States Supreme Court handed down *Green v. School Board of New Kent County*[5] which signaled the end of "freedom of choice" plans for desegregating public schools. The Court demanded plans that

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* Justice, Supreme Court of Mississippi, 1991-present; B.S., 1965, Howard University; J.D., 1968, Howard University. The author wishes to thank Cathleen Price for her editorial assistance in preparing this Article.

1. JACK BASS, UNLIKELY HEROES (1981). This work focuses on the Fifth Circuit in the 1960s with particular focus on integration in the public schools and universities of the Deep South. Bass reports that Judges Elbert Parr Tuttle, John Minor Wisdom, John Brown, and Richard Rives were referred to, disparagingly, as "The Four" by a fellow judge who saw them as destroyers of the Old South. *Id.* at 23. Of particular significance to this Article, Bass also presents the history of the appointment of William Harold Cox to the United States District Court for the Southern District of Mississippi and relates events giving the flavor of this jurist, described as a "vituperative obstructionist." *Id.* at 164-70. Although he was not a pleasant judge for any lawyer to practice before, civil rights attorneys regularly felt his wrath.

2. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 (1984).

3. FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978).

4. DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988).

5. 391 U.S. 430 (1968).

promised to work immediately, that is, plans which dismantled the formerly dual school systems "root and branch" and created a unitary system in which no school could be identified as intended for one race.[6] The Court's decision had been clearly presaged by the landmark opinion of Judge John Minor Wisdom for the Fifth Circuit Court of Appeals in *United States v. Jefferson County Board of Education*,[7] which was later ratified by the full court in an en banc decision.[8] There, the court announced the command to "eradicate the dual educational system lock, stock and barrel."[9]

The *Jefferson* opinions abandoned the *Briggs*[10] dictum that the Constitution did not require integration, but merely forbade discrimination. They recognized the affirmative duty of school officials to eradicate a state-created discriminatory system of education by integrating faculties, facilities, activities, and students. Judge Wisdom observed:

> [T]here was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.
>
> Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern States' general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place.[11]

The court went on to recognize a confluence of the three branches of our federal government in the promulgation of desegregation guidelines by the Department of Health, Education, and Welfare which was charged with administering the Civil Rights Act of 1964, as that act related to discrimination in education.[12] The court found the guidelines consistent with the statutory and constitutional commands and fashioned a uniform decree for use in school desegregation cases in the circuit.[13]

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6. *Id.* at 438.
7. 372 F.2d 836 (5th Cir. 1966).
8. 380 F.2d 385 (5th Cir. 1967).
9. Williams v. City of New Orleans, 729 F.2d 1554, 1576 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part).
10. Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955).
11. *Jefferson County*, 372 F.2d at 866.
12. The Department of Health, Education, and Welfare no longer exists, but has been replaced with the Department of Education and the Department of Health and Human Services.
13. *Id.* at 896.

It fell to me, as a June 1968 law school graduate, to assist in seeing that *Jefferson* and *Green* were implemented throughout the State of Mississippi. After joining the Mississippi office of the NAACP Legal Defense and Educational Fund, Inc.,[14] and gaining admission to practice that year, my primary work for the next several years entailed securing plans of desegregation which promised to accomplish the task of dismantling the *de jure* dual school systems in the State of Mississippi, and attending to the myriad problems that accompanied the implementation of those plans. While *Jefferson* and *Green* had fairly well cleared the path, obstacles remained to be overcome on the road to eliminating dual school systems.

Filing the motions was a fairly routine task. There was little variation from the pattern of failure of freedom-of-choice plans to achieve any meaningful desegregation. Only a handful of courageous black families dared to face physical and economic intimidation and to subject their children to danger, insult, and isolation by choosing to send them to otherwise white-only schools. No white parents chose black schools for their children. There was no faculty or administrative desegregation, and extracurricular activities were conducted on a segregated basis and managed by two segregated state-wide associations. The proof that freedom of choice, as was then practiced in the great majority of districts in Mississippi, had not worked was virtually inescapable.

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14. The Mississippi office of the NAACP Legal Defense and Educational Fund, Inc. (sometimes referred to in civil rights circles as the "Inc. Fund" and referred to herein as the "Legal Defense Fund") was first staffed in 1964 by Marian Wright, now Marian Wright Edelman, who currently heads the Children's Defense Fund that she founded. Edelman was assisted at the Legal Defense Fund by Henry Aronson. In 1968, Edelman left the state and the office was thereafter staffed by Reuben V. Anderson and Melvyn R. Leventhal, both 1967 law school graduates. Anderson, the first African-American to graduate from the University of Mississippi Law School, later became the first African-American to serve as a judge in Mississippi at a level higher than justice of the peace, and the first African-American supreme court justice in the history of the state. He is now in private practice in Jackson, Mississippi, and was recently elected president of the Mississippi Bar Association, another first for an African-American. Leventhal, a graduate of the New York University School of Law who had spent his summers in Mississippi as a civil rights worker, was at that time married to the writer Alice Walker. He later served as Deputy Director of the Office for Civil Rights, United States Department of Health Education and Welfare during the Carter Administration and as Deputy First Assistant Attorney General of the State of New York. He is now in private practice in New York City. I joined the office in July 1968.

The Mississippi office operated semi-autonomously and handled substantially all Legal Defense Fund litigation in Mississippi. In 1968, all plaintiffs in privately brought school desegregation cases in the state were represented by that office except for the plaintiffs in the Marshall County school case. That office conducted all litigation in the district courts and the Fifth Circuit Court of Appeals, with occasional assistance from the Legal Defense Fund national office, primarily at the appellate level.

In 1970, the office fully converted to a private law firm, Anderson, Banks, Nichols, and Leventhal. It was the first multi-racial law firm in the state. The next year, Nausead Stewart joined the firm as a civil rights litigator. Stewart was a 1970 University of Mississippi Law graduate, where she was a member of the law journal. The fourth partner was John A. Nichols, a 1968 graduate of the Emory University Law School who, along with Anderson, worked primarily in areas other than civil rights after 1969.

Nevertheless, the responses of the two United States District Courts in Mississippi were markedly different.[15] In the Northern District, where the judges were William Keady and Orma Smith, our motions were routinely scheduled for hearing. Just as routinely, the school districts were ordered to develop new plans, despite the vigorous protests of the local school officials in the court room and substantial social ostracism of the judges at home. Most of these school districts were in the overwhelmingly black Mississippi Delta. Nevertheless, litigants seldom had to appeal to the Fifth Circuit for an order directing that a new plan be developed.

In contrast, the judges in the Southern District, Harold Cox, Dan Russell, and Walter Nixon, implemented a most unusual mechanism for managing school desegregation litigation for the thirty school districts involved.[16] Instead of addressing each motion in turn, they scheduled all of the motions, including those filed by the United States Department of Justice, for a joint hearing before all three judges. At the conclusion of the hearing, the judges issued a joint opinion and order in which they refused to direct that new plans be developed for any of the districts, finding that freedom of choice was the only plan which could work.[17]

On appeal, the Fifth Circuit wasted little time in vacating that order. Viewing a record that no white student had ever attended an historically black school as well as numerous other indicia of a dual school system, the panel of Chief Judge John R. Brown and Judges Homer Thornberry and Lewis Morgan remanded the cases to the United States District Court for the implementation of interim plans of desegregation.[18]

After plans were developed for the 1969-70 school year, the district court scheduled August 11, 1969 as the date for presentation and hearing on the proposals. In the meantime, political forces were at work. Shortly before the hearing, the government lawyers indicated that they did not intend to go forward. We

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15. We never completely understood how these two Mississippi Districts could be so different in their response to civil rights cases. Judge Claude Clayton, who served as the lone judge in the Northern District prior to his elevation to the Fifth Circuit shortly before his death, was perceived as fair. Judge Sidney Mize from the Southern District who served before and with Judge Harold Cox fit the mold of southern federal judges who were bent on resistance. The general speculation was that the Southern District judges were selected by Senator Eastland, and that those in the Northern District were selected by Senator Stennis; the different personalities and predilections of the senators accounted for the difference. For whatever reason, Judges Clayton, Keady, and Smith were viewed positively as judges of a decidedly different stripe than the judges of the Southern District.

16. Because of a variety of circumstances, a few districts were not included in the grouping. The City of Jackson school desegregation case, the first one filed in the state that went to judgment and originally filed by the martyred Medgar Evers, was pending in the Fifth Circuit Court of Appeals on a school construction issue, and no motion for new trial was filed with respect to that district for that reason. Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211 (5th Cir. 1969). Other Legal Defense Fund cases omitted were Mason v. Biloxi Mun. Separate Sch. Dist., 443 F.2d 1365 (5th Cir. 1971), Gladney v. Moss Point Mun. Separate Sch. Dist., and Adams v. Rankin County Bd. of Educ., 485 F.2d 324 (5th Cir. 1973). Motions filed in those cases were handled individually. The districts involved may be found under United States v. Hinds County Board of Education, 417 F.2d 852 (5th Cir. 1969).

17. This action was not atypical for that district court. *See, e.g.*, Singleton v. Jackson Mun. Separate Sch. Dist., 348 F.2d 729, 730 n.1 (5th Cir. 1965) (chronicling the delays encountered before the district court); *see also* LEON FRIEDMAN, SOUTHERN JUSTICE, 188-189 (1963) (describing the delaying tactics used by Judges Harold Cox and Sidney Mize).

18. United States v. Hinds County Sch. Bd., 417 F.2d 852, 858 (5th Cir. 1969).

learned that President Nixon had struck a deal with Senator John Stennis of Mississippi, who was the Chief of the Senate Armed Forces Committee. As a result, during the hearing, the Justice Department and the Department of Health, Education, and Welfare, which had together developed the plans, asked the district court to delay their implementation until the following school year.

We were outraged by what we viewed as a politically-motivated retreat on the threshold of victory. Mel Leventhal, on behalf of the private plaintiffs, immediately moved that the United States be realigned as a party defendant in the Legal Defense Fund cases.[19] The district court denied the motion and promptly acceded to the request of the Department of Justice.

An appeal to the Fifth Circuit followed. That court upheld the delay in an order entered without opinion.[20] The stage was thus set for the United States Supreme Court decision in *Alexander v. Holmes*,[21] which declared an end to the era of "all deliberate speed" and required that every school district "operate now and hereafter only unitary schools."[22] The Supreme Court vacated the order of the Fifth Circuit and remanded the case back to that court for issuance of an order effective immediately requiring the cessation of the operation of a dual school system.[23] In view of the actions of the district court, the Supreme Court, at the request of the Legal Defense Fund, then took the unprecedented step of ordering that the Fifth Circuit retain jurisdiction of the cases to assure "prompt and faithful compliance with its order."[24] The Court sent a clear and forceful message that political interference, even at the presidential level, would not be countenanced.

On remand, the Fifth Circuit substituted Judge Griffin B. Bell[25] for Chief Judge Brown. That panel issued an order on November 7, 1969, designating Judge Dan M. Russell of the Southern District as a sort of special master to receive suggest-

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19. The episode provided the basis for a fundraising poster for the Legal Defense Fund featuring a black child with a single tear and the caption, "On August 11, 1971, the Department of Justice broke its promise to the children of Mississippi."

20. Robert Finch, Secretary of Health Education and Welfare had sent a letter directly to the Fifth Circuit expressing the opinion that immediate implementation of the plans would prove chaotic and requesting additional time. Chief Judge Brown acquiesced but later confided to Mel Leventhal that "I knew soon after we took the step that it was wrong." Interview with Melvyn Leventhal (Feb. 28, 1996).

21. 396 U.S. 19 (1969). *Alexander* was one of the school cases from the United States District Court for the Southern District of Mississippi handled during this period in the Fifth Circuit under the caption United States v. Hinds County School Board. *See* United States v. Hinds Co. Sch. Bd. 417 F.2d 852 (5th Cir. 1969). The petition for writ of certiorari filed by the Legal Defense Fund listed *Alexander* as the lead case. Read and McGough accurately describe *Alexander* under the caption, "A political sellout boomerangs." READ & MCGOUGH, *supra* note 3, at 479. The government's actions and Leventhal's motion to realign it as a party defendant were major political events garnering front page coverage in the NEW YORK TIMES and other newspapers across the country.

22. *Alexander*, 369 U.S. at 20.

23. *Id.*

24. *Id.* at 21.

25. Presumably, Judge Brown was instrumental in ordering this substitution, since he was the Chief Judge of the Circuit. Judge Bell was well respected on the court for his administrative skills, and that fact may explain his selection to replace Judge Brown on the panel retaining jurisdiction of these cases. Ironically, I was interviewed by Judge Bell in an unsuccessful pursuit of a clerkship for the year 1968-69. During the interview, Judge Bell recalled the occasion when he put a Georgia school district into receivership for failing to comply with desegregation orders. He also mused about the judges in the Southern District of Mississippi, my home district, and ventured an assessment that Judge Dan Russell appeared to be a reasonable fellow.

ed modifications and conduct hearings on the desegregation plans to be implemented. Judge Russell was directed to make findings and recommendations to the Court of Appeals. No modification of a plan could be implemented without the approval of the Fifth Circuit.[26]

By order dated November 25, 1969, the Legal Defense Fund was named *amicus curiae* in the cases brought by the United States Department of Justice.[27] Thus, the school desegregation case load of our Mississippi law office was effectively quadrupled. Although we later sought full intervention in some of the Justice Department cases, the Legal Defense Fund had the right to participate as *amicus* in hearings before Judge Russell and to express its views concerning recommendations to the Fifth Circuit panel regarding plans whether we had been granted full intervention or not.[28]

Our early participation in Justice Department cases was usually provoked by a decision of either the local school district, or the United States, or both, to adopt a plan which failed to fully utilize the facilities that had been designated for blacks. These plans placed a disproportionate share of the burdens of desegregation on the shoulders of the black community and continued a pattern of unlawful discrimination. Our efforts met with mixed success. In Forrest County, the final plan utilized the formerly black school to a greater extent than originally planned. On the other hand, in Lawrence County, plaintiff-intervenors' contentions were rejected.

These problems were by no means limited to the thirty districts in the *United States v. Hinds County School Board* group. Private plaintiffs successfully resisted under-utilization of black schools in *Bell v. West Point*, a Northern District case.[29] The obvious official preference for sparing white children the burden of changing schools, however, usually ruled the day. To be sure, often the formerly white schools were better built and better kept. The surrounding areas, often substantially less poor, were also better kept. Nevertheless, race was too often the predominant factor, and the practice had the effect of eliminating one of the intended benefits of the entire desegregation effort, a more equal distribution of resources affecting the community as a whole.

The issues associated with the conversion from a dual to a unitary school district were mirrored in all of the cases handled by the Legal Defense Fund, in both the Northern and Southern Districts. In addition to under-utilization of formerly black attendance centers, we witnessed the wholesale dedication of public resources to hastily formed private academies, the summary discharge or demotion of black administrators, teachers, and coaches, the diminished opportunity for black students to participate in certain extracurricular activities, and in-school segregation by tracking and other methods. These problems had to be addressed through negotiation as well as litigation.

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26. United States v. Hinds County Sch. Bd., 423 F.2d 1264, 1269 (5th Cir. 1969).

27. United States v. Hinds County Sch. Bd., 433 F.2d 611, 612 n.1 (5th Cir. 1970).

28. For example, in United States v. Lawrence County, 799 F.2d 1031 (5th Cir. 1986), our intervention was allowed by the Fifth Circuit. *Hinds County Sch. Bd.*, 433 F.2d at 613. In the Forrest County case, Lee v. United States v. Evans, our intervention was denied, but the Legal Defense Fund nevertheless participated fully as *amicus curiae*. *Hinds County Sch. Bd.*, 433 F.2d at 607.

29. 446 F.2d 1362 (5th Cir. 1971).

Extensive litigation was required to isolate the segregationist academies and prevent their access to the public treasury. We obtained injunctions prohibiting several tuition schemes that were passed by the Mississippi legislature.[30] For example, in *Norwood v. Harrison*,[31] we successfully petitioned the court to deny free textbooks to those who would attend schools established or expanded for the purpose of avoiding desegregation.[32] Likewise, in *Green v. Kennedy*,[33] brought by the Lawyers' Committee for Civil Rights under Law, the court denied tax-exempt status to these schools.[34]

The Fifth Circuit played an essential role in guarding against the decimation of black school personnel. First, the uniform "Singleton Decree"[35] anticipated the potential effect of desegregation upon black faculty and administrators. The decree provided first for desegregation. The faculty of each school in the district was required to reflect the racial make-up of the faculty as a whole. It also provided for a mechanism for reduction in staff where required by the elimination of dual systems. The decision about which personnel were to be retained and which were to be discharged was to be made based solely upon objective, non-racial criteria. Finally, subsequent vacancies were not to be filled by a person of a different race than the person discharged or demoted, unless the person discharged, if qualified, was first offered the job.[36]

The resolve of the court regarding this provision was soon tested, and the court met the challenge. Objective criteria became certification, education, and years of service.[37] Subjective "evaluations" of performance and other factors were not admitted to the equation.[38] The court would not countenance the contention that teachers who had been deemed well qualified before desegregation became suddenly incompetent thereafter.[39] The requirement that vacancies be filled with persons dismissed or demoted was enforced despite the availability of others who were objectively more qualified.[40] While schools could decline to rehire persons who had been displaced for "just cause" during the course of the desegregation

30. Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (declaring a legislative scheme for tuition grants to pupils attending private segregationist academies violative of the equal protection clause); C.C. No. 2906, (S.D. Miss. Sept. 2, 1970) (declaring a similar scheme providing loans to children attending such academies unconstitutional).

31. 413 U.S. 455 (1973).

32. *Id.* at 471.

33. 309 F. Supp. 1127 (D.D.C. 1970).

34. *Id.* at 1140.

35. It is referred to as the "Singleton Decree" because it first appeared in final form in the order remanding several cases for the development of new plans of desegregation, of which Singleton v. Jackson Municipal Separate School District was the first numbered and, therefore, appeared first. Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211 (5th Cir. 1969). The decree expanded upon a similar provision in the *Jefferson* model decree.

36. *Singleton*, 419 F.2d at 1218.

37. *See* Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 327 (5th Cir. 1973); Ward v. Kelly, 515 F.2d 908, 911 (5th Cir. 1975).

38. *Ward*, 515 F.2d at 911.

39. McLaurin v. Columbia Mun. Separate Sch. Dist., 478 F.2d 348, 353 (5th Cir. 1973) ("It is difficult to believe that the District's level of tolerance of the plaintiffs' alleged deficiencies in the performance of their duties was coincidentally reached and exceeded during the period meaningful desegregation was being achieved.").

40. *Adams*, 485 F.2d at 326.

process, such cause was limited to "types of conduct that [were] repulsive to the minimum standards of decency—such as honesty and integrity."[41]

In the end, the elimination of dual systems of education in the South, once thought an impossibility, became a reality in the space of a very short time. The process was not without casualties. Students and parents, black and white, suffered from disruption and the uncertainties and fears of a new and different environment. Black professionals in education suffered most, with many losing their jobs despite the protections of the Singleton Decree. Nevertheless, the effort finally broke the back of apartheid in the schools of the southern United States.

II. EQUAL EMPLOYMENT OPPORTUNITY

The resolve of leading judges on the Fifth Circuit Court of Appeals to provide equal opportunity for black citizens was also manifest in employment discrimination cases. The contrast between the reaction of the district courts in the Northern and Southern Districts of Mississippi was also obvious in this area. While in cases coming from the Northern District the Fifth Circuit could sometimes adopt the opinion of the trial court as its own,[42] time and time again the Southern District had to be reversed, at least in part.[43]

In *Morrow v. Crisler*,[44] the evidence proved that the Mississippi Highway Patrol had never seen fit to hire a black person.[45] The black plaintiffs had been denied the right to even apply in 1970. The trial court was virtually compelled to find discrimination in hiring, but ordered only a cessation of discrimination and a vague increase in recruitment efforts without any goals or timetables. This order was, of course, no more than that which Title VII had commanded since 1964, let alone any more than the prescription of 42 U.S.C. 1981, adopted in 1866. By the time the case reached the Fifth Circuit en banc, only six of the ninety-one new people hired after the decree were black. It was left to the Fifth Circuit to order a remedy that actually worked. Chief Judge Brown wrote a concurring opinion relating the long history of the court's use of race-conscious remedies to combat discrimination in voting rights, school desegregation, and

41. Thompson v. Madison County Bd. of Educ., 476 F.2d 676, 679 (5th Cir. 1973). The Thompson in this case is now Congressman Bennie Thompson of the Second Congressional District of Mississippi. At the time of desegregation of the Madison County public schools, he was a teacher there as well as a political activist and a member of the board of aldermen of the Town of Bolton in Hinds County.

42. Carr v. Conoco Plastics, Inc., 423 F.2d 57, 58 (5th. Cir. 1970) (adopting the district court opinion by Judge Orma Smith, which "admirably" stated the law in the difficult area of employment discrimination, as its own).

43. One example in addition to the cases that follow in the text is Bolton v. Murray Envelope, 493 F.2d 191 (5th Cir. 1974), a case in which a panel composed of Judges Coleman and Clark of Mississippi and Judge Gee felt compelled to reverse Judge Cox in an equal employment case. Judge Coleman was a former Governor of Mississippi and Judge Clark, who later served with distinction as Chief Judge of the Fifth Circuit, had practiced law with Judge Cox's old law firm. Only months before his appointment to the Fifth Circuit, Judge Clark had been counsel for some of the school districts involved in United States v. Hinds County School Board. He had served for a period as Special Assistant Attorney General for the State of Mississippi.

44. 491 F.2d 1053 (5th Cir. 1974).

45. Morrow v. Crisler, 479 F.2d 960, 961-62 (5th Cir. 1973), *modified*, 491 F.2d 1053 (5th Cir. 1974). The Morrow in this case was the husband of a woman who worked as a file clerk in our offices. The case was handled, however, by Frank Parker and Constance Slaughter of the Lawyers' Committee for Civil Rights under Law.

jury selection as well as in prior Title VII cases which refuted the contention that such remedies broke new judicial ground.[46]

Ten years later, Judge Wisdom demonstrated a steadfast commitment to the use of race-conscious remedies to eliminate discrimination in employment in *Williams v. City of New Orleans*,[47] in the face of a full-scale effort on the part of the Reagan Administration to roll back civil rights advancements. To Judge Wisdom,

> [c]olor-blindness is not constitutional dogma. When a vice is inherent in a system, the vice can be eradicated only by restructuring the system . . . . Thus when faced with our society's systematic racial discrimination against blacks as a class, an effective remedy must be color conscious . . . . "In order to get beyond racism, we must first take account of race . . . . [a]nd in order to treat some persons equally, we must treat them differently. We cannot . . . let the Equal Protection Clause perpetrate racial supremacy."[48]

It was the Fifth Circuit which most liberally used the "ultimate finding of fact" approach to review and reverse district court findings, usually adverse to plaintiffs, in employment discrimination cases.[49] Under that approach, the ultimate finding of whether a specific set of facts proved racial discrimination was deemed not protected by the "clearly erroneous" standard of review, and could be determined de novo by the court on appeal.[50] The Fifth Circuit adopted the doctrine that "statistics often tell much,"[51] and courts should take them into account to find discrimination and order an appropriate remedy.[52] In doing so, it created an atmosphere that enabled relief for black plaintiffs even in district courts whose judges were hostile to civil rights claims. Sadly, that relief was often nonetheless halting and incomplete.

III. CRIMINAL LAW

The Fifth Circuit also played an important role in developing procedural safeguards in the criminal process. Most importantly, it was active in eradicating discrimination in the selection of juries.[53] Nevertheless, my most prominent experiences were something of a mixed bag.

In one of the few reported cases in which an appellant has attempted to meet the *Swain*[54] requirements to demonstrate the discriminatory use of peremptory

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46. *Morrow*, 491 F.2d at 1057 (Brown, C. J., concurring).

47. 729 F.2d 1554, 1570 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part).

48. *Id.* at 1573 (quoting University of California Bd. of Regents v. Bakke, 438 U.S. 265, 407 (1978)) (Blackmun, J., concurring).

49. *But see* Pullman-Standard v. Swint, 456 U.S. 273, 286 (1982) (rejecting the approach and citing the line of Fifth Circuit cases in which it had been applied).

50. East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975).

51. Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962).

52. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 231 (5th Cir. 1974); Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973).

53. *See, e.g.*, Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967), *reh. den.*, 386 U.S. 1043 (1967); *See also* Rabinowitz v. U.S., 366 F.2d 34 (5th Cir. 1966); READ AND MCGOUGH, *supra* note 3, at 344.

54. Swain v. Alabama, 380 U.S. 202, 223 (1965).

challenges, the court came close to granting relief but, in the end, backed away.[55] I represented a defendant in a case before the court in which I tried to make the *Swain* showing in two different ways. First, I examined the Assistant United States Attorney about his motives in exercising the challenges. Second, I presented other evidence that in each case involving a black defendant during the term of court, the United States Attorney had exercised peremptory challenges to remove all or virtually all black prospective jurors. The only deviation from this pattern of strikes against blacks was their strike of one particular white woman. That woman held a law degree and was removed from every jury which sat during the term.

The Fifth Circuit held that the refusal of the Justice Department to allow inquiry into the thought processes of its Assistant United States Attorney "did not improperly deny the defendants an opportunity to meet their burden under the rationale expressed . . . in *United States v. Reynolds*, . . . [that] 'it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.'"[56] The court examined the evidence that was produced, which included the prosecutor's notes as to the race of the persons against whom strikes were executed during the week in question. The prosecutor testified that he had no notes or recollection of actions in this regard beyond the week in question. There were no official records reflecting information about the use of peremptory challenges. The court, conceding our difficulty in making a better record, nevertheless concluded that "[t]he testimony and notes of the prosecutor covering a period of time of one week [were] entirely too slender to overcome the presumption that an official of the United States [had] faithfully discharged his duties in a fair, even and constitutional manner."[57] Thus, despite a record which virtually compelled a finding that a racial animus was behind the exclusion of blacks from the jury, the Fifth Circuit failed to grant any relief. In declining to do so, it missed a perfect opportu-

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55. United States v. Pearson, 448 F.2d 1207, 1218 (5th Cir. 1971). This case began as a routine Dyer Act (interstate transportation of stolen goods) case in which I was court-appointed as one of counsel on Judge Cox's list for such appointments.

56. *Id.* at 1215 (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953)). The court's rationale for its conclusion regarding inquiry into thought processes included a reference to Wigmore's statment that the "Alabama Doctrine," which forbids testimony concerning one's own intent or state of mind, is based on "supposed principles" that have been repudiated. *Id.* In the end, it concluded that such an inquiry would be inconsistent with the nature of peremptory challenges and might subject the prosecutor to criminal charges under 18 U.S.C. § 243 of the United States Code proscribing discrimination in summoning and selecting jurors and prescribing a fine for any official found to have done so. *Id.* at 1216.

57. *Id.* The court observed that it could "well understand how the present defendant's counsel were unable to produce additional evidence. In the six years which have passed since *Swain*, we have not found a single instance in which a defendant has prevailed on this issue." *Id.* at 1217-18.

nity to foreshadow the United States Supreme Court's decision in *Batson v. Kentucky*, which was to come fifteen years later.[58]

The most protracted association that I had with the Fifth Circuit in a criminal matter was a case involving the Republic of New Africa (RNA). The federal aspect of that case involved charges of assault on a federal officer, conspiracy to do so, and firearms violations. The defendants described themselves as "citizens" of the Republic of New Africa. The RNA was, in their view, a domestic dependent nation, similar to the Native American nations. It represented an alternative which its citizens argued should have been accorded to the black freed slaves at the end of the Civil War. Its stated goal was to have a plebescite in an area including five southern states in which black citizens could vote to form a nation which would claim that area as its territory. It established a base of operations in Jackson, Mississippi in 1970. In August 1971, the Federal Bureau of Investigation and Jackson Police Officers conducted an early morning raid. A shootout ensued, and a Jackson Police Officer was killed and two FBI agents were wounded. Eventually, six people who were in the house at which the raid and shootout occurred and Imari Obadele, formerly known as Richard Henry, the President of the RNA, were tried and convicted of several federal charges. They received sentences ranging up to twelve years.[59]

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58. Batson v. Kentucky, 476 U.S. 79 (1986). Another interesting aspect of *United States v. Pearson* is the site of the argument. The Fifth Circuit was the only traveling circuit court of appeals, holding sessions in each of the states that it served. The *Pearson* case was argued in Jackson, Mississippi in the fourth floor courtroom used by the United States District Court for the Southern District. Behind the bench there was a full wall mural depicting a plantation scene reminiscent of the Old South. It included blacks happily strumming banjos during the slavery era, among other things. For some time prior to 1968 until shortly before the Fifth Circuit was due to sit, the mural was covered by drapes. In UNLIKELY HEROES, Bass relates that Judge Tuttle, then Chief Judge of the Fifth Circuit, had objected to the mural the first time that he saw it while presiding over a three-judge panel, shortly after Judge Cox took the bench in 1961. BASS, *supra* note 1, at 167. He thought it inconsistent with an air of neutrality and declared that the Fifth Circuit would not sit in Jackson as long as it was there. *Id.* According to Bass, the mural was then covered by drapes and remained covered at all times while Judge Tuttle was Chief Judge. *Id.* Judge Tuttle stepped down as chief in 1967. Judge Cox ordered the drapes removed prior to the Fifth Circuit session to be held in Jackson in 1971. That set off a storm of protest from me and other members of the Civil Rights Bar scheduled to appear in that courtroom for argument during the Fifth Circuit sitting. Most vociferous among those protesting was Frank R. Parker of the Lawyers' Committee for Civil Rights under Law. The protest drew a scathing letter from Judge Cox which referred to anyone protesting the mural as "scurvy." In the end, the protest was unsuccessful in having the mural covered. Thus, Parker and I were constrained to note to the Fifth Circuit panel that we appeared under protest in arguing our respective cases before the court.

59. This was another court-appointed case, but the circumstances were unusual. In the case of the Republic of New Africa, because of the political and racial overtones involved in the cases, all of the black lawyers in Jackson who did criminal or civil rights practice were summoned to provide legal assistance to the eleven individuals initially charged with state crimes, which included treason and murder. Eventually, the coordinating roles in defense of the state murder charges were assumed by John Brittain of the Lawyers' Committee for Civil Rights under Law and me. When the federal indictments were returned months later, Brittain and I were asked to continue as counsel for all of the defendants. By the time that the federal charges were tried nineteen months later (following three state trials of individuals charged with murder), additional court-appointed counsel had been secured for each individual, including Obadele who was represented by out-of-state counsel on an appointed basis. I remained as counsel for an individual named Chuma, formerly known as Robert Stallings. In post-conviction proceedings, I, again court-appointed, represented Obadele in a collateral attack on one of the three counts for which he was convicted.

An interesting event occurred prior to the trial proceedings. Obadele was held without bond on state charges of treason and murder. Eventually, all state charges were dropped and the federal government took custody. A motion to set bail was granted, and Obadele was able to secure a bond written by a Detroit bonding company. The bond was approved. Nevertheless, Judge Cox refused to sign an order releasing Obadele when it was presented because the RNA was having a rally in Jackson that weekend. I then drove to Ackerman, Mississippi to present the matter to Judge Coleman. Although there was obviously no legal basis for keeping Obadele incarcerated, Judge Coleman deferred to the judgment of the trial court. Obadele remained in jail another three days before Judge Cox ordered his release.

Although the trial occurred in 1973, the appeal, including post-conviction proceedings, lasted until 1983. The argument before the Fifth Circuit on direct appeal consumed more than two and one-half hours, the longest that I have ever experienced in an appellate court. In the end, all convictions were affirmed, save one.[60]

After all appeals had been exhausted, I filed a collaterel post-conviction action seeking to strike one of Obadele's convictions on one count as unlawful, based upon an intervening United States Supreme Court decision. After a series of appearances before the sentencing court and the Fifth Circuit, we finally won a judgment in which the Fifth Circuit, sitting en banc, vacated the sentence as unlawful. The court further prohibited the trial court from adjusting the sentence on Obadele's other convictions to preserve the original "scheme."[61]

The court was divided seven to six. The two Mississippi judges were on opposite sides. Civil rights stalwarts, Judges Brown and Johnson split with civil rights proponents Judge Randall, Judge Rubin, and me. Perhaps only the fact that Judge Randall relied in part upon the "law of the case" doctrine prevented the case from finding its way to the United States Supreme Court.[62] The result of all of the efforts was that Obadele's sentence was reduced from twelve to seven years.[63]

The effort made by the government and the resistance encountered at both the district and appellate court level may reflect deep concern over the kind of radical politics that the RNA represented. However, this case, as well as *United States v. Pearson*,[64] also reflects the fact that the court was generally conservative on criminal matters and race issues in criminal matters, even during the era when it was at the forefront of the civil rights litigation movement.

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60. United States v. James, 528 F.2d 999 (5th Cir. 1976), cert. denied, 429 U.S. 959 (1976). The court described the litigation as "bitterly contested from the time of the return of the indictment" and described in detail the number of trial days, pre-trial days, and the voluminous record and exhibits. *Id.* at 1004 n.9. It was a controversial case that was riddled with political and civil rights issues, despite the fact that the defendants were not considered to be operating within the mainstream of civil rights activity. The federal prosecution was especially problematic because of the wide sweep of federal conspiracy law.

The one conviction overturned was that of a young woman who was shown to have been in Africa at the time that the alleged conspiracy was formed, and who arrived at the house in question only hours before the raid. Her husband, who arrived at the same time but who was a vice-president of the RNA and admitted shooting during the altercation, had his conspiracy conviction upheld along with the others. District Court Judge Brewster, writing for a panel which included Judges Wisdom and Bell, fastened some significance on the fact that the woman was not shown to have been a "citizen" of the RNA.

61. United States v. Henry, 709 F.2d 298, 303 (5th Cir. 1983). That argument provided one of my most embarrassing moments before a court. The case was scheduled to be argued second following another case which was scheduled for a routine forty-minute (twenty minutes per side) argument. After the cases were called, I went to the library for some last minute preparation, and in less than five minutes, I was summoned to begin argument. For some reason, argument of the first case was pretermitted. I walked into the courtroom with fifteen judges sitting there on the bench waiting, a rare sight. Fortunately, the court understood, and the argument went off without a hitch, after a brief apology.

62. *See id.* at 306 n.14.

63. Judge Gee, in a dissent joined by Judges Brown and Johnson, among others, expressed the view that Obadele, through counsel, had somehow inveigled the court through "procedural maneuvers" into a result "repugnant to any rational system of criminal punishment." *Id.* at 319 (Gee, J., dissenting). All Obadele did was file a motion to vacate a sentence with respect to a charge which the United States Supreme Court had determined was unavailable to the prosecutor under the circumstances. It was a five-year sentence to run consecutively with two other concurrent sentences and extended for seven years. The trial court then attempted to change the sentences on the other counts, only to be rejected by the Fifth Circuit on two occasions, finally for the simple reason that the trial court had jurisdiction to affect only the conviction and sentence with respect to the count under attack. *Id.* at 317. *See also id.* at 317-18 (concurring opinions of Judges Reavley and Jolly).

64. 448 F.2d 1207 (5th Cir. 1971).

IV. OTHER CASES

While school desegregation and related teacher discharge and demotion cases provided our most consistent contacts with the Fifth Circuit, there were other areas of civil rights being litigated by our office and the Legal Defense Fund. In *Hawkins v. Town of Shaw*,[65] the court held that a municipality may not violate the Equal Protection Clause by providing municipal services in a racially discriminatory manner.[66] The result was a decree, which in part froze all revenue-sharing funds received by the town until facilities were equalized.

Shortly after the ruling of the United States Supreme Court in *Jones v. Alfred H. Mayer Company*,[67] Johnny Ray Lee, a black citizen, came to our office with a promotional letter regarding Ocean View Estates. The letter offered to sell him a lot for $49.50 if he would visit the site and claim his lot prior to August 15. The letter specifically said that "You must be of the white race." After consultation, Lee went to the office of Southern Home Sites with fifty dollars in cash to claim his lot. He was refused a lot, and a suit was filed on his behalf. The result was *Lee v. Southern Homesites Corporation*,[68] which was the first treatment of a 42 U.S.C. § 1982[69] claim following *Jones v. Alfred H. Mayer Company*.[70] The district court ruled that Mr. Lee must be sold the lot for $49.50, but denied him all other relief save an injunction against Southern Home Sites preventing it from selling lots until it had offered the plaintiff a choice of two lots and had supplied plaintiff's counsel with a copy of the mailing list for the July 30 letter which had started the chain of events. Mr. Lee had sought actual and punitive damages as well as class relief, including the publication of a notice to every black citizen receiving such a letter of a right to purchase a lot for $49.50.

While the Fifth Circuit, through an opinion authored by Judge Coleman, affirmed the judgment of the trial court as to actual and punitive damages it remanded for further findings with regard to attorneys fees and for the entry of an order requiring publication of a notice that all black citizens who received the letter and who could show that they were deterred because of the racial restriction were entitled to purchase a lot for $49.50.[71] The court recognized that an award of attorney's fees in Section 1982 cases would facilitate the enforcement of the congressional policy against discrimination in the sale of houses through private litigation.[72]

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65. 437 F.2d 1286 (5th Cir. 1971). While the Supreme Court later specifically rejected the conclusions reached in cases like Hawkins, wherein liability was found without a finding of intentional conduct, the decree was the law of that case. Well into the 1980s, and after Shaw elected a black mayor and a majority black city counsel, the Town was required to secure a consent order signed by counsel for the class of black citizens, or to litigate the matter of the use of revenue sharing funds.

66. *Id.* at 1292.

67. 392 U.S. 409 (1968) (holding that Section 1982 applied to purely private actions).

68. 429 F.2d 290 (5th Cir. 1970).

69. 42 U.S.C. § 1982 reads as follows: "All citizens of the United States have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

70. 392 U.S. 409 (1968).

71. *Lee*, 429 F.2d at 297.

72. *Id.* at 295.

V. CONCLUSION

Time and space do not permit discussion of all of the significant cases litigated before the Fifth Circuit by our office during the period. The cases mentioned above give something of the flavor of the time. It should suffice to say that for those of us in the civil rights bar, the Fifth Circuit was, on the whole, a beacon of hope for something approaching justice. More often than not, under the leadership of John Brown, John Minor Wisdom, Richard Rives, and Elbert Parr Tuttle, it answered the call with wisdom, understanding, and determination. Never before had a court played such a vital role in managing social change in such a large region. It may never happen again.