

9-1-1986

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Repository Citation

Paul R. Baier, *Forum Juridicum: Framing and Reviewing a Desegregation Decree - Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. (1986)

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FORUM JURIDICUM

FRAMING AND REVIEWING A DESEGREGATION DECREE: OF THE CHANCELLOR'S FOOT AND FIFTH CIRCUIT CONTROL

*Paul R. Baier**

Equity is a roguish thing. For law we have a measure, know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. Tis all one as if they should make the standard for the measure we call a foot, to be the chancellor's foot; what an uncertain measure this would be. One chancellor has a long foot, another a short foot, a third an indifferent foot; tis the same thing in the chancellor's conscience.¹

Selden's table talk about equity being a roguish thing sadly fits the Rapides Parish, Louisiana, school desegregation case, which resulted in the sacrifice, by federal desegregation decree, of two small rural communities' only schools and the racial mixing of their entire student bodies, kindergarteners included, in another community located ten miles midway between the closed schools.² What happened to the people of

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1. Table Talk of John Selden, "Equity," 43 (F. Pollock ed. 1927). I have modernized Selden's seventeenth century English and adjusted the punctuation slightly in the interest of twentieth century readability. Compare G. McDowell, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy* 5 (1982):

Throughout the entire history of procedural innovations in equitable adjudication it was understood that equity is a potentially dangerous source of arbitrary discretion; and when kings came to be replaced by constitutions, the procedural arrangements for the dispensation of equity had to be reconsidered in light of this potential danger.

2. *Valley v. Rapides Parish School Bd.* [*Forest Hill I*], 646 F.2d 925 (5th Cir. 1981), cert. denied, 455 U.S. 939, 102 S. Ct. 1430 (1982); *Valley v. Rapides Parish School Bd.* [*Forest Hill II*], 702 F.2d 1221 (5th Cir. 1983), cert. denied, 464 U.S. 914, 104 S. Ct. 276 (1983).

Forest Hill, especially to the mothers who wanted all along to keep their young children near home, is tragic and, ultimately, cruelly ironic. I do not mean here to petition the court for rehearing. However, having struggled to save Forest Hill Elementary School over the course of three years and two Fifth Circuit appearances, I know the details well enough. I mean only to state the case, not to reargue it. I deeply believe the plight of Forest Hill should be known to the world at large lest future schools, amidst future tears, be lost elsewhere. I will, of course, tie my requiem for Forest Hill Elementary School to current happenings in the Fifth Circuit apropos framing and reviewing desegregation decrees.³

Holmes used to say that what matters most is getting your finger pinched in the machine. In the Baton Rouge school case, the federal court closed Southdowns Elementary School, around the corner from my house. School officials and parents opposed the judge's plan, but to no avail. This is another desegregation tale that troubles the conscience. In sketching its history here, I hope to jolt the reader, and perhaps the judiciary, into thinking about "desegregation due process," as well as "desegregation *now*."

First the Forest Hill case.

I.

Forest Hill is an incorporated village located in Ward 4, a rural area of Rapides Parish, Louisiana, some twenty miles from Alexandria.⁴

3. Surprisingly little thought has gone into the thorny problem of how to frame a desegregation decree. "The reports provide little guidance on this question," says Professor Chayes, whose scholarship on institutional reform litigation is the fountainhead of reflective thinking in this area. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1298 (1976). Chayes's teaching has inspired others to write on the remediation process, *viz.*, Hinkle, *Appellate Supervision of Remedies in Public Law Adjudication*, 4 Fla. St. U.L. Rev. 411 (1976); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 Harv. C.R.-C.L. L. Rev. 1 (1978); Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv. L. Rev. 410 (1978); Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635 (1982). The desegregation tales that follow should be read against this academic outpouring. Unfortunately, the gap between theory and practice, as those familiar with these articles will recognize, is wide indeed, if not disheartening.

Case histories are nothing new to the literature of desegregation. David Kirp's, *Just Schools* (1982), recounts the experience of five communities over twenty-five years; Eleanor Wolf's, *Trial and Error: The Detroit School Segregation Case* (1981), pierces the Detroit school case; and then there is Professor Lino Graglia's, *Disaster By Decree* (1976), a book some would dismiss—wrongly I think—as the musings of an illiberal fellow. The Forest Hill case sketched here is one lawyer's supplement to this trying field.

4. Rapides Parish is 1,316 square miles in total area, roughly 40 miles wide and 35 miles long. State of Louisiana, Geological Survey, *Water Resources Bull. No. 8* (April

Forest Hill Elementary School is the only school in School District 16 serving all students, blacks and whites, in the surrounding area. It is a modern facility consisting of sixteen classrooms, a library, a cafeteria, and a gymnasium, all of which are air-conditioned.⁵ The citizens of Forest Hill built their first school in 1901. They have maintained a school in Forest Hill ever since by virtue of a separate bonding district and at the expense of the Community's taxpayers. Over the years, a total of \$430,000 in assessed millage has been expended by the citizens of Forest Hill in support of their public school.⁶

The idea to close Forest Hill Elementary School was the district court's alone, conceived *ex parte* in chambers and announced to the parties in a plan handed down on July 3, 1980. Neither the private plaintiffs nor the United States Government as intervenor had ever proposed closing Forest Hill Elementary School as a possible remedy in the Rapides Parish school desegregation case.

In fashioning its own plan involving wards and schools outside the scope of the evidence adduced by the parties, the district court not only rejected the plan of the Government's expert, but also announced that he would draw up the plan himself, saying: "I also feel I am the best expert I know and I intend to draw this plan myself."⁷

The district court ordered Lincoln Williams School in Cheneyville closed because: "[T]here is no concentration of white students available in the Cheneyville area to integrate Lincoln Williams Elementary (92.9% black). Consequently Lincoln Williams (K-8) must be closed and its

1966), at 4. This desegregation case thus involves an area larger than the state of Rhode Island and two and a half times the size of the area in the *Swann* case, which the Chief Justice described as "large." *Swann v. Board of Educ.*, 402 U.S. 1, 6, 91 S. Ct. 1267, 1271 (1971).

5. Response of Rapides Parish School Board to Court's Preliminary Opinion of June 6, 1980, and Order of July 3, 1980, suggesting a Proposed Plan of Desegregation for Rapides Parish, July 28, 1980 [hereinafter referred to as Board Response], Exhibit E, at 1.

6. Forest Hill School started out as a small wooden frame building. In 1911 the Community built a completely new two-story red brick building. In 1952 the present structure was built, and it was completely renovated in 1966, with the addition of a carpeted library and air conditioning throughout the buildings.

7. *Valley v. Rapides Parish School Bd.*, Civ. A. No. 10946 (W.D. La.), Preliminary Opinion, June 6, 1980, Exhibit A, at 1. The district court also told the Shreveport Bossier City Times: "Anybody can predict what I'm going to do if they're smart enough to know what's best for the school system." The Times (Shreveport—Bossier City—The Ark-La-Tex), Sunday Feb. 15, 1981, at 18-A, col. 2, a front-page interview with the district judge captioned: "Scott: 'I'd like to explain.'" The interview was set forth in full as Appendix D to the Brief For Forest Hill Intervenors-Appellants, *Forest Hill II*, filed in the Fifth Circuit the second time up. There are other statements of record from the district court that are equally eyeopening, e.g., "I am going to do this since I am a big cheese." Transcript Jan. 15, 1981, Chambers Proceedings 20.

student body must be assigned to other schools in the Lecompte area."⁸ Next, in order to increase the number of whites attending schools in Lecompte, the district court proceeded to close Forest Hill Elementary School and ordered the entire K-8 student population at Forest Hill to be bused to Lecompte, some ten miles distant from Forest Hill School.⁹

At an emergency meeting, the Rapides Parish School Board adopted member Jo Ann Kellogg's motion urging the district court to reconsider its plan. Mrs. Kellogg urged the reopening of Forest Hill School as a K-3 school serving both the Forest Hill and the Lecompte area. She also suggested that Lecompte Elementary School be closed because of its age and condition and that its student population be bused to Forest Hill for grades K-3.¹⁰

Through their attorney the people of Forest Hill filed a petition for intervention on August 1, 1980. This petition prayed for an opportunity to adduce record evidence showing the factual assumptions underlying the district court's plan regarding the location of Forest Hill students and the distances they would have to be bused to be in error. The district court, without holding an evidentiary hearing on the question of intervention, denied the petition the same day it was filed. The district court also cancelled the formal hearing scheduled for August 1, 1980, because, according to the district court, "no new evidence existed."¹¹

On August 6, 1980, the district court entered a final order closing both Lincoln Williams and Forest Hill Elementary Schools. In its opinion, the district court stated: "This plan achieves our sole purpose, the greatest amount of integration with a reasonably assured prospect of success."¹²

One academic year later, on May 18, 1981, the Fifth Circuit unanimously reversed the district court's decision closing Lincoln Williams and Forest Hill Elementary Schools. The Fifth Circuit found no adequate justification supported in the record on which to approve the closing of Forest Hill and Lincoln Williams Schools. Said the court:

The closing of a facility built and maintained at the expense of local taxpayers is a harsh remedy, which should only be

8. *Valley v. Rapides Parish School Bd.*, 499 F. Supp. 490, 492 (W.D. La. 1980).

9. The panel majority in *Forest Hill II* put the distance between Forest Hill and Lecompte as "approximately nine miles," 702 F.2d at 1227, whereas the district court found the distance to be 9.7 miles. *Valley v. Rapides Parish School Bd.*, Civ. A. No. 10946 (W.D. La.), Opinion on Remand (unpublished), July 22, 1981, at 3. There was uncontested record testimony showing that the young K-3 children were bused 2.2 miles and twenty-five minutes within the city limits of Lecompte before starting the return trip home.

10. Board Response, Exhibit G, at 2.

11. Order, August 11, 1980, at 3.

12. 499 F. Supp. at 493.

employed if absolutely necessary to achieve the goal of a unitary system after all other reasonable alternatives have been explored. Where a district court adopts such a measure, the inquiry before us is whether the order was an abuse of discretion. The district court must explicitly state its justification for ordering a school closed, in order that we may properly make this determination.¹³

Applying these principles, the court concluded:

We cannot lend our sanction so easily, however, to those portions of the plan involving pupils and facilities in Wards 3 and 4. Here, as we have described, the district court elected to close a predominantly white rural school, Forest Hill, and a predominantly black school, Lincoln Williams, equidistant in different directions from the town of Lecompte, and to transfer their pupils to Lecompte schools. As far as we can determine, the only justification for closing Lincoln Williams was its predominance of black pupils. The court admitted that Forest Hill is more modern than Lecompte Elementary, but described the latter as having "much the better location for purposes of integration," in terms of distance for busing of reassigned pupils. Alternatives are only sparingly mentioned.

These findings are an insufficient factual basis on which to approve the closing of Forest Hill and Lincoln Williams. Equally effective alternatives may exist which would avoid the closing of a modern facility and the intercommunity transfer of kindergarten pupils. These should be explored on remand and, if the district court adheres to its present plan, specific reasons for their rejection should be given. We cannot ignore the district court's disregard of neighborhood considerations for rural schools in this context, particularly where K-2 students in Alexandria were spared transfer to the point that three schools remain virtually all-black. Specific desegregation measures in southeastern Rapides Parish should be re-examined in light of the full range of mitigating equitable considerations.¹⁴

The judgment of the district court was reversed and the matter was remanded to the trial court.¹⁵

13. 646 F.2d at 940 (citation omitted).

14. *Id.*

15. The Fifth Circuit affirmed the district court's denial of Forest Hill intervention under the rule of *Hines v. Rapides Parish School Bd.*, 479 F.2d 762 (5th Cir. 1973), that where the school board advances the position which the intervenors seek to promote, intervention may be properly denied. Paradoxically, the very ground of appellate reversal in *Forest Hill I*, viz., the failure of the record to show a sufficient factual basis for

On remand, the district court *sua sponte* reversed its earlier decision denying Forest Hill's intervention and allowed the people of Forest Hill to participate in the ordered re-examination of specific desegregation measures. A hearing was held on June 30, 1981 to consider alternative plans. The School Board proposed closing one of the Lecompte schools.¹⁶ The private plaintiffs submitted a plan that reopened Forest Hill as a K-5 school and Lincoln Williams as a sixth grade center.¹⁷ Other less drastic alternatives were submitted on remand, including a proposal supported by private plaintiffs, the School Board, and Forest Hill intervenors to allow both Cheneyville and Forest Hill to keep their young children in grades K-3 at home in their own community. The last witness for Forest Hill was Dr. Jack Wright, Jr., a rural sociologist with a Ph.D. in sociology from Louisiana State University. Dr. Wright testified regarding the importance of Forest Hill School to the community:

[I]t is organized around that school. It is the one thing which they have in common, and there is the *raison d'être* to the community, without which nothing, or it is how they come together to affirm their oneness as a community. . . . And that

closing Forest Hill and Lincoln Williams Schools, see 646 F.2d at 940, was urged not by the School Board but by the Forest Hill intervenors. At any rate, strange as it may seem to the legal mind, Forest Hill made it back into the case on remand, by the grace of the district court, the *Hines* doctrine notwithstanding.

The whole matter of intervention in desegregation cases in the Fifth Circuit is a perplexing subject, and the reader is invited to contrast the Fifth Circuit's curt denial of intervention to the parents of Forest Hill with the welcome accorded West Odessa Parents for Quality Neighborhood Schools in *United States v. CRUCIAL*, 722 F.2d 1182 (5th Cir. 1983), to wit:

West Odessa PQNS is an organization of parents. "When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations."

In the instant case, the district court's order denying intervention rested on no findings at all, nor did the court conduct an evidentiary hearing. The court's failure to make findings constitutes error and mandates that the matter of the proposed intervention be remanded for such findings.

Id. at 1190, 1191 (citation omitted). In the Forest Hill case, the district court's peremptory denial of intervention rested on no findings, nor did the district court conduct an evidentiary hearing. These procedural errors were urged as grounds for reversal on appeal, yet the Fifth Circuit held Forest Hill was properly kept out of the suit. Perhaps the reader can figure out these cases better than the writer. Surely due process of law is colorblind.

16. According to data worked up by the School Board officials, under this alternative Forest Hill would be forty percent black, Lecompte would be fifty-four percent black, and Lincoln Williams would be forty-eight percent black. Transcript June 30, 1981, Proceedings 20.

17. *Id.* at 8.

is why they are so cohesive in their desire to keep it, because it represents their way of life.¹⁸

No other parties put on any evidence at the hearing, nor did the other litigants question Forest Hill's evidence in any way. The district court, however, was unpersuaded by any of the evidence adduced at the hearing, nor was it satisfied with any of the alternative plans. In an unpublished opinion handed down on July 22, 1981, the district court adhered to its earlier decision closing Lincoln Williams and Forest Hill Schools.

Once again, Forest Hill took its case to the Fifth Circuit.

Meanwhile the mothers of Forest Hill continued to conduct school for Forest Hill's children, both black and white, in the Baptist Church directly across the highway from what used to be their public school; and community volunteers began construction of Forest Hill Neighborhood School on the same location.

For twenty agonizing months the people of Forest Hill awaited word from the Fifth Circuit on the legal fate of their public school.

On Forest Hill's second appeal, the Fifth Circuit divided 2 to 1, affirming the decision to close Lincoln Williams and Forest Hill Schools.¹⁹ Citing language from *Swann*, the majority reasoned that even "bizarre" desegregation plans are constitutional, and that there is no exception that would allow a court to save a rural community's only school.²⁰

All grades must be bused, said the *Forest Hill II* majority, citing the Supreme Court's denial of certiorari in the Nashville school case.²¹

18. *Id.* at 75-76. Compare the plea of the Cheneyville Concerned Citizens Group: "It is our prayer that the Lincoln Williams Elementary and the Forest Hill Elementary schools be reopened. The school is the only source of recreation and is the community center for our community. What is a community without a church and a school?" Record on Appeal [*Forest Hill II*], Vol. I, at 3.

19. *Valley v. Rapides Parish School Bd.* [*Forest Hill II*], 702 F.2d 1221 (5th Cir. 1983), cert. denied, 464 U.S. 914, 104 S. Ct. 276 (1983).

20. *Id.* at 1226. It has been said that the effect of *Brown II* "was to present the lower federal courts with a virtual blank check." G. McDowell, *supra* note 1, at 9. And despite the Supreme Court's stated intention to offer guidelines for framing desegregation decrees, "the Court in *Swann* only further weakened whatever significance precedent and principle still retained in such cases." *Id.* at 119. Another commentator adds: "In combination, *Green* and *Swann* indicate that district court judges can insulate themselves from reversal by giving little attention to interests other than the rights plaintiffs seek to vindicate in the lawsuit." Hinkle, *supra* note 3, at 434. Nothing in the Fifth Circuit majority's review of the decree in *Forest Hill II* contradicts these observations.

21. *Kelley v. Nashville Metropolitan County Bd. of Educ.*, 687 F.2d 814 (6th Cir. 1982), cert. denied, 459 U.S. 1183, 103 S. Ct. 834 (1983). In *Kelley*, the Sixth Circuit rightly objected to a district court's plan that would have left 47 of 75 elementary schools more than ninety percent one-race, with fourteen schools projected as more than three-fourths black. See 687 F.2d at 820. But that is a far cry from the situation in Rapides Parish viewed as a whole. The panel majority, it is submitted, read far too much into the denial of certiorari in *Kelley*. A much better window to the Supreme Court's thinking

The majority did not mention that the trial court had allowed three all-black K-2 neighborhood schools to remain intact in Alexandria. This exception was deleted from the majority's recitation of facts by the use of an ellipsis.²² The majority conceded that the trial court's plan did involve excessive busing for some of Forest Hill's children.²³ Nevertheless, the majority affirmed.

on the matter of busing elementary-age children is the following excerpt from the oral argument in *Estes v. Metropolitan Branches, Dallas NAACP*, 444 U.S. 437, 100 S. Ct. 716 (1980), which was argued in the Supreme Court on October 29, 1979:

THE COURT: Well, doesn't the district court have some discretion when it comes to very young children in saying there shall be less busing with respect to them than with respect to older children?

MR. WALLACE [Deputy Solicitor General]: Some discretion based on adequate factual inquiry and findings.

THE COURT: Didn't *Swann* say precisely that, Mr. Wallace?

MR. WALLACE: *Swann* did say that, and I answered consistently with that answer.

Transcript of Oral Argument 39-40 (Hoover Reporting Co., Inc.), reproduced in *The Complete Oral Arguments of the Supreme Court Of The United States 1979 Term* (Fiche #12) (University Publications of America Inc.; microfiche). Prior to the Forest Hill case, the Fifth Circuit never required the busing of five-year-olds: "We have uniformly held that kindergarten children need not be included in desegregation plans . . ." *Pitts v. Cherry*, 598 F.2d 1005, 1006 (5th Cir. 1979) (citations omitted). Four months after the Forest Hill case, the Fifth Circuit affirmed a plan exempting children in grades K-3 from bus rides longer than 30 minutes. See *Tasby v. Wright*, 520 F. Supp. 683, 714-33 (N.D. Tex. 1981), *aff'd*, 713 F.2d 90 (5th Cir.) (per Randall, J.; Garza and Garwood, JJ., concurring). Other district courts, after meticulously detailing the times and distances involved, have reached similar results, with circuit court approval. See, e.g., *Thompson v. Newport News School Bd.*, 363 F. Supp. 458, 462-64 (E.D. Va. 1973), *aff'd*, 498 F.2d 195 (4th Cir. 1974) (en banc) (grades K-2 exempt from busing plan); *Smiley v. Blevins*, 514 F. Supp. 1248 (S.D. Tex. 1981) (grades K-1 exempt from busing).

22. The prior panel unanimously emphasized that "K-2 students in Alexandria were spared transfer to the point that three schools remain virtually all-black." 646 F.2d at 941. This exemption for K-2 children, based on neighborhood considerations in Alexandria, was deleted from the subsequent panel's recitation of the law of the case. See 702 F.2d at 1224.

23. 702 F.2d at 1230 n.10:

The intervenors attack the court's inclusion in its decree of the estimated 50 students who live in the Mill Creek, Bennett Bay and Blue Lake Road areas, to the west and south of Forest Hill. The government concedes that "the time and distance of busing these students would be considerable." As intervenors point out, no findings were made by the district court on the transportation burden, if any, sustained by these children.

The panel majority, nevertheless, pegged affirmance on the footnote hope (*id.*) of some future modification of a desegregation plan already three years old. But see *Swann*, 402 U.S. at 30-31, 91 S. Ct. at 1283; *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142, 153 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 922, 93 S. Ct. 3052 (1973); *Kelley v. Nashville Metropolitan County Bd. of Educ.*, 687 F.2d at 822—all of which hold that before a federal court can decree extensive busing it must first determine by

Chief Judge Clark, in dissent, did not think equity so draconian:

When the district court reordered the closing of the Forest Hill and Lincoln Williams schools, these two communities lost their only schools. Children from both communities must now be bused many miles from their homes. Expert evidence placed in this record on remand established that closing a town's only school, especially one located in a small settlement, traumatizes the whole town. The greatest costs are to the families that include school-aged children, but hurtful repercussions extend throughout the community.

Parents in both "burdened" communities, one predominantly white, the other predominantly black, asked the court to leave their schools open, at least for their youngest children. Their petitions were ignored. These children, ranging in age from kindergarten through early elementary grades, must rise early, board buses, drive past their community school houses and go into a distant town and then reverse the journey in the evenings. Their names are not recorded. Their family situations are not detailed. Their needs, their hopes, their rights are dashed without discussion. If a five-year-old gets sick or forgets her coat or lunch and wants to contact her parents she must make a long distance telephone call to reach her home. It seems small solace for the majority to suggest that some such children may have high school-aged siblings who will be on the bus with them part of the way. Much more remarkable, I think, is the fact that the children, parents, and communities who are so damaged did not cause or contribute in any way to the conceived constitutional wrong the court sought to remedy. Indeed, the district court and the majority both state that the people of Forest Hill have been altogether law-abiding and free of guilt.

Why then have they been put to this grief? For integration, the district court said. It saw no other reasonable prospect to

findings that are capable of appellate review what the facts are regarding the length and time of travel for students affected by such a plan.

The bus driver route sheets introduced as Forest Hill Exhibit 14 show that 181 former Forest Hill Elementary School students must be bused past Forest Hill School en route to Lecompte. These students, including five-year-old kindergarteners, already travel as much as 25 miles to reach Forest Hill School. The route sheets further show that students are picked up as early as 6:45 a.m. and they are on the bus about an hour en route to Lecompte. Contrast the Chief Justice's explicit recital of the busing distance and time in *Swann*, 402 U.S. at 30, 91 S. Ct. at 1283: "The trips for elementary school pupils average about seven miles and the District Court found that they would take 'not over 35 minutes at the most.'"

integrate Lincoln Williams because its prior order pairing Lincoln Williams had been defeated by white flight. But the Cheneyville students and parents who now plead to keep their school did not leave it. Why must their plea to keep their school open go unheeded? At the opposite base of this triangle, the pleas of the Forest Hill students and parents who also want to keep their school were equally ignored. Why? Why must the "harsh remedy" be imposed on them without weighing the "full range of mitigating equitable circumstances" they brought forward? "[T]o effect an equitable distribution of the burden" the majority says. I can see that the punishment inflicted on the citizens of Forest Hill is comparable to the punishment inflicted on Cheneyville, but I cannot detect a spark of equity in heaping the coals of sorrow on the heads of either community.²⁴

Forest Hill's petition for rehearing en banc was denied by the Fifth Circuit on April 29, 1983.²⁵ One day later, the citizens of Forest Hill voted to treble their tax assessment to a total of six mills, producing an annual revenue of \$60,000, for continued maintenance of Forest Hill Elementary School, notwithstanding the fact that the School had been closed for three years.

Certiorari was denied by the Supreme Court on October 17, 1983.²⁶ Forest Hill Elementary School was legally dead.

The reader, I hope, senses the tragedy but may wonder what is the irony?

The irony is that the chancellor lifted his foot on May 24, 1984, giving Forest Hill Elementary School back to the Community. As reported in the Alexandria, Louisiana, *Daily Town Talk*: "Ironically, the latest plan is almost exactly the one presented by School Board member Jo Ann Kellogg to the School Board in 1980."²⁷

24. 702 F.2d at 1232. Chief Judge Clark added that:

The record shows without contradiction that the Forest Hill area became predominantly white because of a change in the community's economic-industrial conditions which had nothing to do with schools. Neither the Lincoln Williams nor the Forest Hill school was constructed or maintained to evade desegregation. The school board has never used either school for racial purposes. The punishment of these innocents fits no crime of their or the district's making.

Id. (citation omitted).

25. 702 F.2d 1221 (5th Cir. 1983). No member of the panel, including Chief Judge Clark, nor judge in active service requested a poll on rehearing en banc. Presumably, the Fifth Circuit had had enough of this case; whether Forest Hill School was to be saved was a matter for the Supreme Court of the United States, not for an intermediate appellate court.

26. 464 U.S. 914, 104 S. Ct. 276 (1983).

27. "Victory for Forest Hill Parents, But Jolt for Lecompte Residents," Alexandria

At long last Forest Hill Elementary School reopened its doors for grades K to 4; Lecompte Primary was closed. "One of the reasons I did it," explained the district court to the reporters, "was I'm trying to get people back in the public schools . . . I'm interested in the public school system . . . anything to help the public school system."²⁸

The district judge also said he hated to see parents paying double, both taxes and tuition, to send their children to private school.²⁹ Judge Scott "gambled the private school would fold if he ignored it. 'More than one private school has bitten the dust by ignoring them,' Scott said."³⁰

The cruel irony, as the reader might guess, is that Forest Hill Neighborhood School also reopened its doors, including a new ninth grade, not losing one local student to Forest Hill Elementary School and drawing ninth graders from Rapides High School. "He (Scott) thought we'd just fade away. He waited too long and let our roots grow deeper. There's a lot of sweat and blood in that school," said Clyde Holloway.³¹

My reaction? I will say no more than what appears on the last page of the 24th of Howard, in the language of Mr. Justice Grier, the Latin from Cicero: "*Haud equidem invideo, miror magis*"—it is not so much that I am angry, but rather that I marvel at it.

"This is truly a story that will scare small children," a sensitive judge has said in a parallel context.³² "Even worse, this is a story that will scare grown-up judges, lawyers, and citizens concerned with due process of law."³³ Yet the fervent hope lingers that "it will be far off

Daily Town Talk, May 26, 1984, at A-2, col. 3. The district court's new plan was announced by Rapides Parish School Superintendent Allen Nichols and School Board member Charles Holloway at a hastily called press conference on the afternoon of May 24, 1984. "The two had just finished meeting with U.S. District Judge Nauman Scott." Forest Hill's School To Reopen; Lecompte Primary Will Close, Alexandria Daily Town Talk, May 25, 1984, at A-1, col. 1. The district court's plan was legally adopted by Order, Ruling, and Judgment of 18 June and 19 July, 1984, respectively, with the court explaining in part that "the August 1980 plan, as amended, like all other plans, is not perfect and . . . unforeseen developments have occurred which have adversely affected the plan of integration." Order June 18, 1984, at 1-2.

28. Alexandria Daily Town Talk, May 25, 1984, at A-2, col. 2.

29. *Id.*

30. Alexandria Daily Town Talk, May 26, 1984, at A-2, col. 2.

31. *Id.* at col. 1.

32. *Jones v. Caddo Parish School Bd.*, 704 F.2d 206, 232 (5th Cir. 1983) (Goldberg, J., dissenting), *aff'd* on reh'g en banc, 735 F.2d 923 (5th Cir. 1984). The panel majority affirmed the denial, without a hearing, of a petition for intervention filed by black parents who sought to challenge the legality of a desegregation consent decree entered into between the United States Department of Justice and the Caddo Parish School Board. For further details as to the facts and law, see note 98 *infra*.

33. 704 F.2d at 232 (Goldberg, J., dissenting).

in the future on a dark, stormy night before I read another tale of the macabre as disturbing at this one."³⁴

II

In the Baton Rouge school case the district court closed Southdowns Elementary School, a small school in a devoted neighborhood. I have elsewhere detailed the efforts of Southdowns parents, both black and white, to find out whose idea it was to close their school and the justification, if any, for doing so.³⁵ To their amazement parents were told by their elected representatives that the federal court had forever barred members of the East Baton Rouge Parish School Board from disclosing to their constituents what was said or proposed during the unsuccessful settlement negotiations that had been held at the federal courthouse. Although their representatives wanted to talk, their lips were sealed.³⁶

The district court in the Baton Rouge case ordered all proposals offered during the negotiations placed under perpetual judicial seal; then the court framed its own desegregation decree without indicating where it got its remedial ideas or whether anyone privy to the settlement negotiations had ever suggested closing Southdowns Elementary School. The district court's opinion, which was all that was available to concerned parents, leaves the matter in doubt.³⁷

With respect, it is submitted that desegregating Baton Rouge in the dark was not only unwise procedurally, but inconsistent with the primary purpose of the first amendment, *viz.*: "[T]hat all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."³⁸ The district court's confidentiality orders kept parents wondering about the origin of the idea to close Southdowns Elementary School and the factual basis for doing so. This is not the way to promote community acceptance of a court-imposed desegregation plan. "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness."³⁹ The School Board itself objected to the district court's confidentiality orders, arguing they abridged the first amendment right

34. *Id.*

35. Baier, *Constitutional Law [Fifth Circuit Symposium]*, 29 *Loy. L. Rev.* 647 (1983).

36. *Id.* at 650.

37. See *Davis v. East Baton Rouge Parish School Bd.*, 514 F. Supp. 869 (M.D. La. 1981), wherein no explanation is offered regarding the origin of the idea to close Southdowns Elementary School.

38. A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 88-89 (1948).

39. *Anti-Facist Comm. v. McGrath*, 341 U.S. 123, 171, 71 S. Ct. 624, 649 (1951)(per Frankfurter, J., concurring).

of Board members to speak out on the soundness of the district court's plan by reference to the sealed negotiations and the corollary "right to hear" of concerned parents throughout the Parish.⁴⁰ All the district court said in denying the School Board's motion to lift the confidentiality orders was: "What conceivable interest other than idle curiosity, can you possibly have in those discussions?"⁴¹

Fortunately, the district court lifted the challenged gag orders eighteen months after they were imposed and while three appeals contesting their constitutionality were pending in the Fifth Circuit. This meant, of course, that the constitutional challenge was moot, and it was so held in *Davis v. East Baton Rouge Parish School Board*, wherein the first amendment question was quietly laid to rest, deep in a footnote, without facing the merits.⁴²

The *Davis* panel affirmed the district court's remedial plan, including the closing of Southdowns Elementary School, saying that the district court "carefully explained its decision each time it ordered a school closed."⁴³ True enough, but at no time did the district court offer the parties an opportunity on the record to test the facts on which some fifteen schools were closed throughout the Parish. The Fifth Circuit itself cryptically acknowledges as much when it says: "The procedure followed in the district court produced the court's plan full-grown, however, and the parties had little opportunity to test the facts on which certain of the court's discretionary decisions were based."⁴⁴

The remarkable thing about the Baton Rouge school case—indeed the frightening thing—is that no evidentiary hearing was ever held affording the parties a record opportunity to test the remedial effectiveness of the district court's plan, which, as the appellate court says, was decreed "full grown." The reason the record "is far from adequate to

40. See Motion of Defendant, East Baton Rouge Parish School Board, Requesting the Court to Recall and Set Aside All Orders Prohibiting the Parties From Discussing, Openly and Publicly, the Private Negotiations Conducted Under Order of the Court, published as an appendix to *Baier v. Parker*, 523 F. Supp. 288, 296-300 (M.D. La. 1981)("[T]he permanency of the Court's orders continues to prevent the citizens of this parish and state from finding out or knowing what their elected representatives, or the representatives of the other parties to this litigation, did or said during the attempted negotiation of this most important public issue." *Id.* at 299.).

41. Transcript July 31, 1981, Proceedings 4. The district court added: "I am totally confounded by the interest, apparent interest in these settlement discussions which led to nothing. They led nowhere. They are over. They didn't work. It was apparently a bad idea on the part of the Court." *Id.* at 141. A complete copy of the transcript of argument on the School Board's motion to vacate the district court's confidentiality orders was attached as Appendix C to Appellants' Opening Brief in *Baier v. Parker*, No. 81-3622 (5th Cir. 1982)(Brown, Reavley, and Jolly, JJ.)(unreported).

42. 721 F.2d 1425, 1441 n.15 (5th Cir. 1983).

43. *Id.* at 1439.

44. *Id.*

base a determination that the lower court abused its broad equity powers"⁴⁵ is simply that no such record was ever made below! The nature and comparative effectiveness of the district court's plan was never explored on the record, whereas "[t]rial on the nature and potential effectiveness of the Board's plan," the *Davis* panel tells us, "took five days."⁴⁶ Without such a remedial hearing, all the appellate court can possibly do, save reversing for procedural irregularity, is to throw up its hands and say "we cannot on this record find the abuse of discretion necessary to reverse."⁴⁷ Of course not. For without the required evidentiary hear-

45. *Id.*

46. *Id.* at 1432.

47. *Id.* at 1439. But see *Little Rock School Dist. v. Pulaski County Special School Dist.*, 778 F.2d 404 (8th Cir. 1985) (en banc), where the Eighth Circuit gave microscopic consideration to claims of denial of procedural due process in the adoption of a school desegregation plan. See 778 F.2d at 429 n.17. The Eighth Circuit found no violation of due process because the affected parties had been given an opportunity on the record to cross-examine opposing experts. Nevertheless, the district court's plan was disapproved on appeal because it exceeded the scope of the violations proved and lesser intrusive remedies were available. See 778 F.2d at 434. The Eighth Circuit's approach is thus in marked contrast to the "hands-off" attitude of the Fifth Circuit in these school cases.

The usual hands-off approach to appellate review of desegregation decrees is well exemplified in the Fifth Circuit's recent pronouncement (per Williams, J., joined by Gee and Politz, JJ.) in *Tasby v. Black Coalition to Maximize Education*, 771 F.2d 849 (5th Cir. 1985), which affirmed the return of 2,300 minority students to neighborhood remedial centers that were virtually all-black:

In an area as sensitive as school desegregation, the district courts are allowed considerable flexibility in fashioning appropriate equitable remedies. See *Swann* In reviewing desegregation orders, therefore, great deference is given to the district courts. Recognizing that the district courts are best situated to understand the particular problems and needs of the districts in which they sit, the Supreme Court stated in *Brown v. Board of Education*, (*Brown II*) . . . that "[b]ecause of their proximity to local conditions . . . the [federal district] courts which originally heard these cases can best perform this judicial appraisal".

Id. at 855 (citations omitted).

The test of "abuse of discretion" as the measure of appellate review of desegregation decrees has been sharply criticized as being far too narrow considering the grave interests that are at stake. "If an appellate court confines itself to a conventional appellate role, most of the critical actions of the trial court in framing and implementing a decree in an institutional suit will go unreviewed," says Professor Fletcher, who espouses much more aggressive appellate review in public law cases, including desegregation cases. See Fletcher, *supra* note 3, at 661. Professor Fletcher's efforts to domesticate judicial remedial discretion through stiffer appellate review stem from his conviction, shared by others, that "discretion is a dangerous form of power." *Id.* at 648.

Another commentator who has made a strong showing of the desirability of extensive appellate review in public law adjudication sums up his work by saying: "[T]here is no reason to suppose that appellate courts are not fully competent extensively to review remedial choices In view of the great importance of public law remedial choices, the factors underlying the traditional allocation of roles point toward allocating ultimate

ing, appellate judges simply cannot evaluate the soundness of the chancellor's decree, and appellate review becomes a deadly game of blindman's buff.

Again, the Fifth Circuit itself recognized precisely this point two weeks to the day after *Davis* was handed down, in the Ector County, Texas, school case, which offers a troubling comparison to the East Baton Rouge Parish appeal.

It should be noted, before proceeding further, that in the Forest Hill case the district court also decreed its plan full blown without holding an evidentiary hearing on its potential for success, or for disaster, until the Fifth Circuit mandated such a hearing after the first appeal.

III

Here are the procedural happenings in the Ector County, Texas, school case as recited in Judge Carolyn Randall's opinion for the court in *United States v. CRUCIAL*,⁴⁸ decided fourteen days after the *Davis* affirmance. Incidentally, Judge Randall was on the *Davis* panel.

At this point, the case took an unexpected turn. . . . [T]he district court adopted a desegregation plan, stipulated to by Ector County ISD and by the United States but forcefully objected to by plaintiff-intervenor CRUCIAL (Committee for Redress, Unity, Concern and Integrity at All Levels), without holding an evidentiary hearing to consider that plan and without making any findings of fact or conclusions of law addressed to that plan or any alternative.⁴⁹

Here is the issue as stated by the *CRUCIAL* court:

In the present case, the issue before us is whether the district court fulfilled its responsibility under *Green* in approving the

responsibility for those choices to the appellate courts." Hinkle, *supra* note 3, at 442.

Chief Judge Frank M. Coffin, of the United States Court of Appeals for the First Circuit, has also expressed the radical but reasoned view that appellate judges should be viewed as active partners, not affirming automatons, in the task of framing an equitable decree:

It is no longer obvious that the appellate court should be viewed as solely a safety valve of last resort rather than as an active partner in the enterprise of arriving at a sensible remedial program More importantly, there would seem to be little reason to defer to the judgments of the trial court on remedial matters; the task of fitting together a broad remedial package calls not so much for judgment as to credibility as for experience, wisdom, sense, and intuition—attributes that are not monopolized by the trier of fact.

Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 Cal. L. Rev. 983, 991 (1979).

48. 722 F.2d 1182 (5th Cir. 1983).

49. *Id.* at 1185.

plan stipulated to by the United States and Ector County ISD, without a remedial hearing and over CRUCIAL's objection.⁵⁰

Here is the *CRUCIAL* law:

Whether the plan adopted by the court "promises realistically to work, and promises realistically to work *now*," and is the most effective vehicle for the realization of this standard are questions that, in this case and on this record, we cannot adequately evaluate. Nor are we able to evaluate CRUCIAL's substantive challenges to the stipulated plan. . . . CRUCIAL specifically challenges the closure of the only high school and junior high school in south Odessa.

Although the district court's factual findings with regard to liability are explicit, it made no findings at all with regard to the efficacy of the plan it adopted; nor did it make any comparative findings. What testimony the court did hear with regard to the proposed closure of schools and the effectiveness of magnet programs as a desegregation device was negative as to both proposals. Without explicit findings, therefore, we have no basis for evaluating the degree to which the plan adopted was "reasonably related to the ultimate objective" of desegregation. *Valley v. Rapides Parish School Board* [*Forest Hill I*]. The provisions of the plan adopted make the need for explicit findings particularly pressing. Both school closures and magnet programs as desegregation techniques require careful scrutiny by the district court.⁵¹

The judgment of the district court was reversed and the case was remanded "with instructions to hold a hearing on the stipulated plan and on all alternatives that have been or may be proposed."⁵²

IV

Although one can understand the Fifth Circuit's reluctance to suspend operation of court-ordered desegregation in Baton Rouge and "turn back the clock over two years,"⁵³ the gross procedural irregularity patent on the face of the docket sheet in *Davis* is inexcusable. However worthy the goal of desegregation, it must not be achieved by means that fall short of minimum procedural due process requirements.

50. *Id.* at 1187, citing *Green v. County School Bd.*, 391 U.S. 430, 439, 88 S. Ct. 1689, 1693-95 (1968).

51. 722 F.2d at 1188-89.

52. *Id.* at 1191.

53. *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d at 1441.

The *Davis* docket sheet (page 7) shows:⁵⁴

- 5/1/81 DESEGREGATION PLAN. . . JVP [John V. Parker].
- 5/12/81 M.E. . . status conference held to clarify court desegregation plan. . . .
- 5/13/81 JUDGMENT. . . JVP. . . in favor of pltf-intervenors and in favor of USA as intervenor and against deft. EBR Parish School Board and plan contained in Court's Opinion of 5/1/81 made final judgment of Court deft. Ordered and directed to immediately take all actions necessary to implement plan. . . .
- 5/26/81 MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS & FOR REHEARING & NEW TRIAL filed by EBR Parish School Board et al. . . .

Thus within two weeks of the district court's entering a final judgment adopting its own plan, the School Board requested an opportunity to adduce record testimony bearing on the effectiveness of the district court's plan. Paragraph 1 of the Board's motion recited:

1. As defendants had no way to present evidence with regard to the Court's plan until it knew what that plan was after issuance by the Court, after trial, defendants now have new and additional evidence to present to the Court with respect to improving the educational and administrative feasibility of various components of the Court's plan.⁵⁵

The affidavit of Dr. Raymond Arveson, Superintendent of Schools, was attached. Dr. Arveson avouched that:

Of course, we could not respond to the Court's plan . . . until it was issued. Having only now had an opportunity to study the Court's plan, the School Board and staff need to present new, additional and supplementary evidence as to the educational and administrative effect of various components of such plan⁵⁶

Exhibit "B" of the Board's motion for new trial contained a specific request to reopen two schools that the district court had ordered closed, one of which was Southdowns Elementary School. The School Board

54. Civil No. 1662A (M.D. La.).

55. Defendants' Motion to Amend or Make Additional Findings and for Rehearing and New Trial Under Fed. R. Civ. P. 52(b), 59 and 60, at 1.

56. Affidavit of Raymond G. Arveson, Superintendent of Schools, May 26, 1981, at 2.

wanted Southdowns reopened to house an elementary magnet academy and in order "to respond to an identified community interest."⁵⁷

On June 5th, the Board filed a supplemental motion praying for an opportunity on the record to present the testimony of the Superintendent of Schools, Dr. Raymond G. Arveson. The Board's supporting memorandum urged that:

Dr. Arveson, as the chief administrative officer of the School System, has the ultimate responsibility for successfully implementing in this community whatever plan the Court might finally order. Consequently, defendants believe that his testimony as to the various modifications, changes, requests for clarification, etc. filed by the various parties would be of benefit to the court in arriving at its decision as to such matters.

We would further respectfully submit that Dr. Arveson's testimony would be appropriate due to the fact that defendants have had no opportunity to present testimony or evidence with respect to the Court's plan as set forth in its findings and conclusions of May 1, 1981 and its judgment of May 13, 1981. The only plans before the Court during trial on which testimony could be presented were the Government's plan and the School

57. Exhibit B (May 20, 1981), at 5. The School Board added:

We further recommend that *Southdowns* and *Hollywood* be reopened and designated because of their accessibility, central location, facility condition, and proximity to existing middle magnets. This proposal would benefit this community in the following ways:

- 1) Give parents yet another opportunity for choice.
- 2) Complete the feeder system for Glasgow Middle, Istrouma Middle and Baton Rouge High School Magnet (expanded continuity).
- 3) Give some of the children an education opportunity that parents have requested for their children.
- 4) Insure the creation of two additional racially balanced schools.

Id. at 7 (emphasis in original). The School Board's view of Southdowns Elementary School's educational potential is thus in sharp contrast to the district court's opinion, which said Southdowns "is too small and ranks number thirteen on the Board's 'worst' list." *Davis v. East Baton Rouge Parish School Bd.*, 514 F. Supp. at 877. According to the Building Analysis attached as an exhibit to the School Board's Desegregation Plan of January 9, 1981, Goodwood Elementary, which was spared by the district court, was smaller than Southdowns Elementary School (450 capacity vs. 540; 160 enrollment vs. 270); was less utilized than Southdowns (35% used vs. 50%); had greater enrollment decline (42% over the last five years for Goodwood vs. 25% for Southdowns); had greater energy cost per capita (25.77 vs. 18.58); was ranked higher on the School Board's "worst" list than was Southdowns (11th vs. 13th place); and was almost all-white (only 1% black), whereas Southdowns Elementary School was 20.4% black. Building Analysis, East Baton Rouge Parish Schools, November 1980, Appendix, A Proposal for Further Desegregation of the East Baton Rouge Parish Schools, January 9, 1981, at 180 [Goodwood], 183 [Southdowns].

Board's plan. The Court's plan differs from those plans in several significant respects.⁵⁸

The hearing before the district court on the School Board's and the Government's desegregation plans spanned five days and filled five volumes of testimony totalling 981 pages. At no time during the entire hearing did any witness, including the Government's expert, suggest closing Southdowns Elementary School. Nor was Southdowns on the list of schools recommended for closing by the School Board's staff or its consultants.⁵⁹ The Board's supporting memorandum concluded: "[D]efendants respectfully suggest that under all of the appellate court decisions relating to school desegregation, the testimony of Dr. Arveson . . . would be pertinent, desirable and necessary, of substantial benefit to the Court in reaching a proper decision, and in the interest of justice and this community."⁶⁰

One week later, on June 12th, the district court denied the Board's request "[i]n all respects,"⁶¹ explaining in open court:

The difficulties caused by motions such as this are numerous, but I will mention only two. First, such a motion consumes—and this one has—an enormous amount of the court's time, because each of these proposals had to be examined, analyzed, and personally evaluated by the court. Considering the size of this court's docket, that is not an insignificant factor. Equally as important, some of the Board's proposals are probably worthy of meritorious consideration, but those with merit are so overwhelmed by those that are flagrantly non-meritorious that they are apt to be overlooked.⁶²

With respect to the Board's request to re-open two schools that had been ordered closed, the district court declared:

As was stated in the court's opinion of May 1, these schools were ordered closed for desegregation purposes, and the court's

58. Memorandum in Support of Defendants' Supplemental Motion 1-2 (June 5, 1981).

59. Dr. William Gordon, the School Board's consultant, recommended that only four schools be closed. Southdowns was not among them. See Vol. III, March 6, 1981, at 35-36, 45. Yet Southdowns Elementary School was closed by the district court. On the other hand, two of the schools recommended for closing by the School Board's consultants, i.e., South Greenville and Goodwood, were not closed by the district court.

60. Memorandum, *supra* note 58, at 3.

61. Minute Entry, June 13, 1981, at 3.

62. Transcript June 12, 1981, Proceedings 18-19. Ironically, a month earlier, in its opinion of May 1, 1981, the district court had invited the Board "to consider installing magnet schools in some of those [closed] buildings," which is precisely what the Board proposed with respect to reopening Southdowns as an elementary magnet academy. See *supra* note 57.

reasons for closing those specific schools are detailed in the opinion. There is no inference in that opinion that someone else could not have come up with a different list of schools to be closed. Obviously, many different lists, many different combinations are available.

Somewhere, sometime, however, someone has to make a decision. This court, by the default of the Board, made that decision. The Board, by its default, having forced the court to make a decision, will not now be permitted to second-guess the court.⁶³

And the district court cautioned: "There comes a time in any litigation when it is necessary to get on with the business of compliance with the judgment of the court. That time in this case is now."⁶⁴

V

With all due respect to the district court in the first instance and the Fifth Circuit on review, desegregation "*now*" should not be mandated by means that ignore the need for democracy in the remedial process, viz: "The central issue in public law litigation should be whether the members of the affected public were given adequate notice and a fair opportunity to participate in the decision-making process."⁶⁵ Even the most enthusiastic supporters of the changes wrought in the forms of adjudication by institutional reform litigation stick to a modicum of due process. Thus Professor Abram Chayes, extolling "The Triumph of Equity" in public law litigation,⁶⁶ cautions that: "The decree is also an order of the court, signed by the judge and issued under his responsibility. . . . But it cannot be supposed that the judge, at least in

63. Transcript June 12, 1981, Proceedings 23-24. *Contra*, *Morgan v. McDonough*, 689 F.2d 265 (1st Cir. 1982)(district court reversed itself and ordered Conley Elementary School reopened after Boston school officials objected); *Haney v. Sevier County School Bd.*, 429 F.2d 364, 372 (8th Cir. 1970)("The matter of utilization of available facilities is within the province and discretion of the school board."). The Fourth Circuit has also rejected the dangerous notion "that it is ordinarily for the district courts to determine which schools shall be closed rather than for the school board." *Allen v. Ashville City Bd. of Educ.*, 434 F.2d 902, 907 (4th Cir. 1970).

64. Transcript June 12, 1981, Proceedings 24.

65. Parker & Stone, *Standing and Public Law Remedies*, 78 Colum. L. Rev. 771, 778 (1978). I owe this reference to Henry P. Monaghan, Thomas M. Macioce Professor of Law, Columbia University School of Law. Accord, *United States v. CRUCIAL*, 722 F.2d at 1190: "West Odessa PQNS is an organization of parents. 'When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations.' *Adams v. Baldwin County Board of Education of Baldwin County, Georgia*, 628 F.2d 895, 897 (5th Cir. 1980)."

66. Chayes, *supra* note 3, at 1292.

a case of any complexity, composes it out of his own head. How then is the relief formulated?" asks Professor Chayes.⁶⁷ His answer: "Even if the court itself should prepare the initial draft of the order, some form of negotiation will almost inevitably ensue upon submission of the draft to the parties for comment."⁶⁸

Another structural reformist, Professor Owen Fiss, emphasizes "the dialogic quality" of the remedial phase, in his radiant essay *The Forms of Justice*.⁶⁹ "The right of the judge to speak, and the obligation of others to listen," says Fiss, "depends not on the judge's personal attributes, nor even on the content of his message, but on the quality of his process."⁷⁰ A judge must be willing to listen, to hear. He is under an obligation "to confront grievances he would otherwise prefer to ignore, to listen to the broadest possible range of persons and interests."⁷¹ Admittedly, the capacity of judges to engage in this communicative process "is far from secure. Like an art, it always seems in peril."⁷² And what are the threats to this capacity? Professor Fiss names three: impatience, self-righteousness, judicial burnout.⁷³

Another commentator anticipates other difficulties with court-drawn decrees: "The court's tremendously intense, sometimes almost personal, involvement may lead to a mind-set which makes objective and sensitive consideration of new evidence and alternatives virtually impossible. The district court may lose its sense of perspective."⁷⁴

A decade ago the Institute of Judicial Administration conducted a study of the role of courts in school desegregation cases. The study lasted some eighteen months—a year and a half of input from judges, lawyers, professors, and educators. One conclusion drawn from this massive effort was that "we have a dilemma too little recognized and entirely unresolved,"⁷⁵ viz: the proper constitutional balance between the need for unprecedented adjudicative procedures in school desegregation cases and "the entitlement of the parties to a full and open hearing."⁷⁶ The published results of the IJA's study, *Limits of Justice: The Courts' Role in School Desegregation*, included a warning—sadly unheeded—that due process is at risk in desegregation cases:

67. Id. at 1298.

68. Id. at 1299.

69. Supra note 3.

70. Id. at 16.

71. Id. at 45.

72. Id.

73. Id.

74. Hinkle, supra note 3, at 442.

75. H. Kalodner, Introduction to *Limits Of Justice: The Courts' Role in School Desegregation* 12 (1978).

76. Id. at 11.

Still another problem created by the expert-court relationship has been found in the tendency for decisions to be made prior to a reasonable opportunity for the parties to be heard. Nowhere is this more a danger than when the expert-court consultation develops remedial ideas that are beyond the recommendations of the parties and which have, therefore, not received the benefit of examination and advocacy afforded by traditional adjudicative procedures.⁷⁷

Unless those who are forced to bear the brunt of a judge's decision have been heard, the moral force of the decree is in doubt and due process has been thrown to the wind. These are old ideas, quietly laid down by a great figure in the law, Professor Lon Fuller of the Harvard Law School, in his *The Forms and Limits of Adjudication*.⁷⁸ Central to Fuller's adjudicative norms is "one simple proposition: namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."⁷⁹ In other words: "The adjudicator should *attend* to what the parties have to say."⁸⁰ This may be obvious, but Lon Fuller's profundity flowed from his teaching the obvious.⁸¹ Fuller's student, later his colleague, Melvin Eisenberg, has elaborated Fuller's work, testing it against the adjudicative reforms of public law litigation. In an article entitled *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, Eisenberg, like his teacher, stresses the right to be heard: "Where a decision will have a serious impact on a discrete set of persons, preservation of individual dignity points to the desirability of an ordering process in which those persons will be able to express their view of the matter to the decision-maker before the decision is made."⁸² This too is obvious, but the lesson is unlearned. And what of the moral force of the decree?

77. *Id.* at 20.

78. 92 Harv. L. Rev. 353 (1978).

79. *Id.* at 364.

80. Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv. L. Rev. 410, 411 (1978).

81. The writer had the good fortune to sit at the feet of Professor Fuller in first-year Contracts at the Harvard Law School in 1966-67. Enrollment in Professor Fuller's Jurisprudence course followed the next year, and we lucky students heard many of the ideas of Fuller's *Forms and Limits* from his own lips. Lon Fuller's sweetness of manner and his unaffected ways linger in memory still. "In substance and in style his work fused in an often breathtaking way three elements that are usually incommensurate—profundity, elegance, and a sure touch for the colloquial and the everyday." Eisenberg, *supra* note 80, at 410.

82. *Id.* at 417.

The underlying message of *Forms and Limits* cannot be lightly disregarded: adjudication has a moral force, and this force is in major part a function of those elements that distinguish adjudication from all other forms of ordering. In the long run, the cost of departing from those elements may be a forfeiture of the moral force of the judicial role.⁸³

VI

This cry for desegregation due process has been voiced in very high places, not only by scholars posing hypotheticals in the *Harvard Law Review*, but also by lawyers litigating real cases in courts of law.

In Birdie Mae Davis's case, *Davis v. School Commissioners of Mobile County*,⁸⁴ an unheralded companion of *Swann v. Board of Education*,⁸⁵ Chief Justice Burger asked a question about the district court's plan. "I want to get a little bit clearer picture of what is the explanation for it," inquired the Chief Justice.⁸⁶ Jack Greenberg, lawyer for the plaintiffs, responded: "I don't know, Mr. Chief Justice, we have been unable to get a hearing."⁸⁷ This from a superb lawyer who has labored a lifetime in court vindicating civil rights and the Constitution. One senses the Chief Justice's surprise, even from the cold record of the oral argument:

CHIEF JUSTICE BURGER: Judge Thomas has not given you a hearing, any hearing at all at any time?

MR. GREENBERG: There have been hearings at various times. The plan that is in effect was put in following a pre-trial conference, but a trial was never held. It was just put right in by Judge Thomas without a hearing.

At an earlier stage we made a motion to the Court that, had this thing not occurred several times, saying that we would like a procedure set down for filing objections and papers and having a hearing, and it was denied.

And that is all set forth in our brief and it is in the record.⁸⁸

83. *Id.* at 430.

84. 402 U.S. 33, 91 S. Ct. 1289 (1971).

85. 402 U.S. 1, 91 S. Ct. 1267 (1971).

86. Transcript of Oral Argument 81 (Hoover Reporting Co., Inc.), reproduced in *The Complete Oral Arguments of the Supreme Court of the United States 1970 Term, Davis v. School Comm'rs*, 402 U.S. 33, 91 S. Ct. 1289 (1971) (Fiche #102) (University Publications of America, Inc.; microfiche).

87. *Id.* at 82.

88. *Id.*

In their petition for certiorari, Messrs. Greenberg and James M. Nabrit, III, another seasoned litigator, urged the Supreme Court to review the Fifth Circuit's decision in *Davis* because:

*This Court Should Grant Certiorari in Order to Insure Petitioners' Due Process Right to an Evidentiary Hearing in the District Court.*⁸⁹

And in their brief following issuance of the writ, petitioners urged that:

*Final School Desegregation Plans Should Not Be Approved Without Evidentiary Hearings. Petitioners Were Denied Due Process by the District Court's Ex Parte Procedures in Deciding the Case.*⁹⁰

The Supreme Court reversed and remanded in *Davis*, without reaching petitioners' due process plea and without a whisper of procedural guidance to the courts below.

Unfortunately, the Supreme Court's silence on procedure is all too common, and a big part of the problem: "[T]he Court has been generally

89. Motion to Advance and Petition for a Writ of Certiorari at i, *Davis v. School Comm'rs*, 402 U.S. 33, 91 S. Ct. 1289 (1971), reproduced in United States Supreme Court Records & Briefs (Card 10 of 17; microfiche).

90. Brief for Petitioners at 80, *Davis v. School Comm'rs*, 402 U.S. 33, 91 S. Ct. 1289 (1971), reproduced in United States Supreme Court Records & Briefs (Card 13 of 17; microfiche). Compare Appellants' Supplemental and Reply Brief at i, *Valley v. Rapides Parish School Bd.* [*Forest Hill I*], 646 F.2d 925 (5th Cir. 1981) ("Minimum procedural due process required Judge Scott to afford the intervenors an opportunity to present sworn testimony challenging Judge Scott's decision to close Forest Hill School."); and Brief for Forest Hill Intervenors-Appellants at iii, *Valley v. Rapides Parish School Bd.* [*Forest Hill II*], 702 F.2d 1221 (5th Cir. 1983):

Minimum procedural due process requires that before a federal judge can close a school in a desegregation case, there must be record evidence supporting such drastic action Minimum procedural due process required Judge Scott to afford the intervenors an opportunity to present sworn testimony challenging Judge Scott's decision to close Forest Hill School.

Due process pleas were also raised by the suburban school districts in the Detroit desegregation case, viz.: "Petitioners' School Districts have a fundamental right to participate in this litigation with respect to *all* issues, *violation and remedy*, to the extent that determination of such issues might have an effect on their interests." Reply Brief of Petitioners, Milliken, et al., Allen Park Public Schools, et al., and the Grosse Pointe Public School System at 23, *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112 (1974), reproduced in 80 P. Kurland & G. Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 1086 (1975). See also Brief for Petitioners at iii, *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112 (1974), reproduced in *Landmark Briefs and Arguments* at 678 ("The lower courts denied fundamental due process to the affected schools other than Detroit"). The Supreme Court, in reversing the Sixth Circuit in *Milliken*, did not reach these procedural claims but relied instead on "[t]he controlling principle consistently expounded in our holdings . . . that the scope of the remedy is determined by the nature and extent of the constitutional violation." 418 U.S. at 744, 94 S. Ct. at 3127.

uninterested in procedural and tactical details in school cases," says Professor Fletcher,⁹¹ and the record certainly bears him out. Two other scholars, Professors Frank Read and Lucy McGough, in their painstaking history of desegregation cases in the Fifth Circuit, *Let Them Be Judged: The Judicial Integregation of the Deep South*, also shake their finger at the Supreme Court: "Even in its decisions in *Green*, *Alexander*, and *Carter*, the Supreme Court issued terse 'do it now' commands[;] it did not provide 'how to do it' instructions."⁹² It is remarkable, and yet quite true, that in the thirty years since *Brown v. Board of Education*, only one Supreme Court justice has ever said a word about what process is due in fashioning desegregation decrees; and the word was a short one: In his concurring opinion in *Carter v. West Feliciana Parish School Board*,⁹³ Mr. Justice Harlan made it clear that courts should determine the workability of specific remedial proposals only "after a hearing."⁹⁴

Due process has not been completely ignored in the reports. In the Atlanta school case, interested parties were denied a fair opportunity to adduce record evidence bearing on a proposed desegregation plan's operation. On appeal the court remanded for "hearings at which the presentation of testimony and the right of cross-examination can be afforded."⁹⁵ Here is what the Fifth Circuit said a decade ago apropos framing and reviewing a desegregation decree in accordance with due process:

With no lack of sensitivity to the burdens imposed upon judges who are attempting to expediently conduct the business of a heavily burdened district court, such procedures cannot form the basis for adjudication of the merits of the complete issues in this litigation. . . . [M]inimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views.⁹⁶

And in the latest desegregation due process case to confront the Fifth Circuit, *Jones v. Caddo Parish School Board*,⁹⁷ one of the current judges repeats the warning that "[d]ifficult legal questions, particularly in school cases, are magnified by failure to adhere strictly to procedure.

91. Fletcher, *supra* note 3, at 682.

92. F. Read & L. McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* 523 (1978).

93. 396 U.S. 290, 90 S. Ct. 608 (1970).

94. *Id.* at 292, 90 S. Ct. at 609 (emphasis added).

95. *Calhoun v. Cook*, 487 F.2d 680, 681 (5th Cir. 1973) (per Clark, J.; Wisdom and Thornberry, JJ., concurring).

96. *Id.* at 683.

97. 735 F.2d 923 (1984) (en banc).

With these public law cases we are learning that the fastest path between two points is not a straight line,"⁹⁸ said Judge Higginbotham, whose special concurring opinion glistens with dictum. "It is, instead, the sometimes tedious and seemingly tortuous path of procedural due process."⁹⁹

Yet to this day, courts, including the Fifth Circuit, are capable of reviewing desegregation decrees blindly—"acting more like a child whistling in the dark than a court of justice, afraid to look out the window and see if the mournful cries actually emanate from somebody or are just the products of a frightened imagination."¹⁰⁰ This from the Fifth Circuit itself, from one of its ablest judges.

VII

And what would an evidentiary hearing on the merits of the district court's desegregation plan for Baton Rouge have accomplished? For one thing, adequate time-and-distance studies of the amount of busing re-

98. *Id.* at 938 (Higginbotham, J., specially concurring).

99. *Id.* In this latest Louisiana school case the full Fifth Circuit split hard, 8 to 6, over the question whether June Phillips, who sought to represent a class of black parents and children, could intervene in a long-pending school desegregation case to challenge the adequacy of a consent decree agreed to by the Department of Justice and the Caddo Parish School Board. Judge Garwood's majority opinion, joined by Brown, Gee, Reavley, Williams, Jolly, and David, JJ., held that the petition for intervention was filed late, that the consent decree did not bind Phillips or the class she sought to represent, and that, at any rate, Phillips could file her own lawsuit. Judge Rubin's dissent, joined by Chief Judge Clark, Goldberg, Randall, Tate, and Johnson, JJ., was pitched on due process: "When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations," quoting *Adams v. Baldwin County Bd. of Educ.*, 628 F.2d 895, 897 (5th Cir. 1980). "Denial of a plea in intervention, therefore, often will deprive those parties of their only opportunity to be heard." *Id.* According to the dissenting judges: "Due process requires that Phillips be afforded a hearing at which she may offer evidence in support of her claims." *Jones v. Caddo Parish School Bd.*, 735 F.2d 923, 947 (5th Cir. 1984) (*en banc*) (Rubin, J., dissenting). Judge Higginbotham specially concurred on the ground that Phillips' counsel indicated during oral argument and on the briefs that Phillips desired no hearing on the petition for intervention: "I would not find that the trial court abused its discretion in denying what Phillips characterizes as a 'total waste of time.'" 725 F.2d at 938 n.1 (Higginbotham, J., specially concurring).

But surely, to waive due process as a "waste of time" is strange strategy. Other lawyers might have been less confident on appeal: "Like many lawyers, Phillips' counsel sought more than we now allow: he urged us simply to permit intervention. He did not thereby waive Phillips' right to a hearing if we did not grant her a whole-loaf of relief," responded Judge Rubin's dissent. "[U]nlike my brother Higginbotham, I cannot view counsel's pressing for complete victory as a waiver of Phillips' constitutional right to be heard." 735 F.2d at 947 (Rubin, J., dissenting).

100. *Jones v. Caddo Parish School Bd.*, 704 F.2d 206, 224 (5th Cir. 1983) (Goldberg, J., dissenting).

quired under the district court's plan could have appeared in the record, facilitating appellate review and possibly avoiding the curious spectacle of a federal judge and a United States Senator debating on the front page of the *Morning Advocate* the amount of the time six-year-olds are bused in Baton Rouge.¹⁰¹ And who knows, perhaps a hearing would have saved Southdowns Elementary School. It almost did in the Forest Hill case, where the Community got four appellate votes out of six and lost. Surely procedural regularity is a small price to pay to protect our public schools.

CONCLUSION

These desegregation tales have not been easily told. Criticism of the judges who labor in the Fifth Circuit comes hard to one who daily holds judges up to law students as worthy of respect. "[O]ne may criticise even what one reveres,"¹⁰² I tell my students.

101. The front page of the *Morning Advocate* for Wednesday, February 10, 1982, featured two stories on busing in Baton Rouge, the first captioned "Sen. Johnston wins busing debate limit," which noted (at 7-A, col. 1):

The media had gathered to seek Johnston's reaction to the order of federal Judge John V. Parker who has asked the East Baton Rouge School Board to give him the names and addresses and bus routes of any child in its system taking a court-ordered, one-way bus ride of 90 minutes.

Johnston said in Senate floor debate last week, and again Tuesday, that under Parker's order some East Baton Rouge children are riding buses for an hour and a half one way to achieve desegregation.

Johnston said Tuesday the figure he used was supplied to him by Superintendent of Schools Raymond Arveson, and that Arveson told him that he stood by the claim.

The companion article, "Arveson, surprised at bus route query," opened this way (at 1-A, col. 3):

Superintendent of Schools Raymond Arveson said Tuesday it's encouraging that federal Judge John V. Parker is concerned that some public school children are riding a bus for up to 90 minutes one way because of the court's elementary school desegregation plan.

But Arveson and other school officials said they are at a loss to explain why Parker wasn't already aware that court-ordered desegregation of elementary schools, which took effect last August at the judge's insistence, included some long bus trips.

102. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 473 (1897).

See also the remarks of Justice Harlan Fiske Stone (as he then was) to Professor Thomas Reed Powell, of the Harvard Law School, on the importance of hard-hitting academic criticism of court decisions:

"I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it. I feel this more strongly now that I have had some years' observation of the judicial process behind the scenes."

To be sure, framing a desegregation decree is a trying task: "[W]e must all agree that the problems of remedy are at least as difficult and important as the great Constitutional principle of *Brown*."¹⁰³ I realize too that federal judges have broad discretion in school desegregation cases. But the size of the chancellor's foot is not the measure of judgment. As Solicitor General Erwin Griswold reminded the Supreme Court in the *Richmond School Desegregation Case*:¹⁰⁴

We of course agree that the federal courts have wide discretion to bring about unitary school systems. But as Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."¹⁰⁵

One of those principles, I have tried to show, is the constraint of procedural due process.

Doubtless the judges have tried to do their best in these school cases.¹⁰⁶ Yet at times judges, like the rest of us, make mis-

of the judicial process behind the scenes."

Harlan Fiske Stone to Thomas Reed Powell, Nov. 15, 1935, quoted in A. Mason, *Harlan Fiske Stone: Pillar of the Law* 398 (1956). "'No amount of criticism,'" Stone noted; "'will affect the courts today, but it is likely to have a profound effect on the courts of the next generation.'" *Id.*

103. Chief Justice Warren E. Burger, Memorandum to the Conference, December 8, 1970, *re Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267 (1971), quoted in B. Schwartz, *Swann's Way: The School Busing Case and the Supreme Court* 113 (1986).

104. *Richmond School Bd. v. Board of Educ.*, 412 U.S. 92, 93 S. Ct. 1952 (1973).

105. Memorandum for the United States as Amicus Curiae, *Richmond School Bd. v. Board of Educ.*, 412 U.S. 92, 93 S. Ct. 1952 (1973), quoted in 80 P. Kurland & G. Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 1119 (1975).

Solicitor General Griswold's argument echoes the thinking of Justice Frankfurter, who in a letter to his "Dear Brethren" on the last day of reargument in *Brown II* warned that, "how we do what we do in the *Segregation* cases may be as important as what we do." Felix Frankfurter to "Dear Brethren," April 14, 1955, Felix Frankfurter Papers, Library of Congress, quoted in B. Schwartz, *Super Chief: Earl Warren and His Supreme Court* 116 (1983). Frankfurter urged his colleagues to lay down "some kind of standards" for formulating desegregation decrees that would give the lower courts "guides to which they are entitled . . . and yet not serve as the mere imposition of a distant will." *Id.*

106. For a glowing account of the work product, see Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 *Mercer L. Rev.* 1149 (1981). Professor Read rightly points out that:

Through the process of everyday combat in federal courtrooms throughout the Deep South, the Fifth Circuit emerged as the nation's premier civil rights tribunal. In the history of our nation, no group of men have had a more important impact on the translation of constitutional guarantees into reality than have

takes.¹⁰⁷ If it be thought that my purpose here is to harm the cause of civil rights, the thought is wrong. My aim is colorblind: "The right to search for truth also implies a duty. One must not conceal any part of what one has recognized to be true."¹⁰⁸

The truth is that in these school cases, in this trying field of discretionary justice, there has been too much discretion and too little justice.¹⁰⁹ In truth, the law itself failed the people of Forest Hill, not the judges. Insisting upon desegregation due process in the future, let us hope, will brighten other childrens' lives.

those on the Fifth Circuit who have worn the black robes since 1954.

Id. at 1152. The writer has no quarrel with this encomium. But there comes a point at which the drive to desegregate simply goes too far. The words of Holmes—two flashes of insight from his opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S. Ct. 529, 531 (1908)—are a telling reply to the absolutism of judges who would kill a school in order to desegregate it:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

107. The words of Learned Hand come to mind, his 1933 radio address "How Far Is a Judge Free in Rendering a Decision," delivered over fifty years ago and ever timely: And so, while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.

L. Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* 110 (I. Dilliard 3d ed. 1974).

108. The words are those of Albert Einstein, quoted in E. Wolf, *Trial and Error: The Detroit School Segregation Case* 9 (1981).

109. Chief Justice Warren Burger's comments in *Swann*, defining the powers of the chancellor for a unanimous Court, ironically come to mind:

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

402 U.S. at 15, 91 S. Ct. at 1276, quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S. Ct. 587, 592 (1944), cited in *Brown v. Board of Educ.* [*Brown II*], 349 U.S. 294, 300, 75 S. Ct. 753, 756 (1955).

