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A TRIBUTE TO JUDGE SIMON E. SOBELOFF

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Simon Sobeloff and I first met when he was Solicitor General and I was Assistant Attorney General in the Eisenhower Administration. We became, and remained, warm friends for twenty years until his death. Thus, I worked with him when we were both advocates for the United States and, after that, for a much longer period while we were both Circuit Judges. As an advocate, he was most persuasive, partly because of the engaging manner of his presentation and partly because of his candor with courts. Both of these qualities were buttressed by an unusually broad experience and undoubted learning in the law.

On the Court of Appeals for the Fourth Circuit, I have no doubt that these splendid qualities deriving from his experience, his skill as an advocate, and personal charm enhanced his influence to the extent any one appellate judge can influence his colleagues. I am sure my personal experience with him which reflected his capacity to disagree agreeably was true in his relations with his colleagues on the bench.

The essential gentleness of Simon Sobeloff’s nature and temperament in no way impaired his powers as an advocate, and I believe it made him a better judge. His willingness to listen to opposing points of view insured that, in turn, he would be heard when he expressed his position. He contributed richly to the law, and he will be sorely missed.

Warren E. Burger
I knew Simon E. Sobeloff only casually until he became Solicitor General in 1954. From that time on, I came to know him well, not only by his briefs and arguments, but also socially. His civic interests were wide and varied, and he contributed greatly as an active citizen. He had long been active in civil rights affairs: working against school segregation, working for a federal anti-lynching bill, working against censorship of the press, and working for the civil rights of all minorities. He had a wide range of experience in the law—as private practitioner, as solicitor for Baltimore City, as United States Attorney, as chairman of a Commission on Administrative Reorganization of the State of Maryland, as Chief Judge of the Maryland Court of Appeals, as Solicitor General, and as a member of the Court of Appeals for the Fourth Circuit from 1956 to the time of his death in 1973.

One of his first cases before the United States Supreme Court was *Phillips Petroleum Co. v. Wisconsin,* argued in April 1954. The Court held—to its sorrow I believe—that the Natural Gas Act extended jurisdiction of the Federal Power Commission to regulation at the well head. Simon Sobeloff had argued that Congress had designed the Act to leave that segment of regulation to the State.

The theory that the end justifies the means subtly crept into areas of our law. But Simon Sobeloff, like Brandeis before him, stood firmly against that trend. He believed in due process for everyone; he was a stickler for the proprieties of judicial procedures; he was the symbol of integrity at a time in our national life when sordid practices were accepted in high places. That is why his strong and unequivocal stand on all issues of human liberty and dignity and his pleas for the decencies of a civilized society gave the nation a moral tone sorely needed.

The examples are numerous. I mention only one. In *Peters v. United States,* the Department of Justice argued that an em-

ployee could be discharged on the basis of disloyalty or as a security measure without the right to meet his accuser and to cross-examine him. The case was argued on April 19, 1955 at which time Simon Sobeloff was Solicitor General. He had filed a memorandum in opposition to the grant of certiorari on the ground that the Executive Order on which the dismissal of Peters was based had been replaced. The brief on the merits, however, did not carry Sobeloff's name. It was most unusual to find a brief from the Department of Justice without the Solicitor General's name on it. So, after the Court had disposed of the case, I asked him if there was any reason why he did not sign the brief on the merits. He said that he could not in good conscience take the position that the right of confrontation could be denied a man "on trial," so to speak, for disloyalty and removal from office with all the "stigma" which such action gave the citizen.

Simon Sobeloff grew up in a school of thought that placed the proprieties of legal procedures high on the list. That was the path he followed, no matter how despised the litigant might be. Like Brandeis, he was meticulous in dispensing even-handed justice, no matter how offensive the accused. Simon Sobeloff believed not in "law and order" but in "constutitional law and order." Our precepts of justice were not reserved for special display only on historic occasions involving the elite. They were standards even more important at the level of a magistrate's court than at the appellate level, for it is in the magistrate's court that law has its greatest impact on the people.

He and his lovely wife, Irene, were both dedicated people—dedicated to making their community a more decent, tolerant, and healthy place. The two of them left a tradition that will always inspire those who follow.
The short of the matter is that Simon Sobeloff was a wise and perceptive human being, a warm friend, and a great judge. In moments of depression, it is sometimes tempting to say "they don't make them that way any more." But they do—and one of the reasons they do is that Simon Sobeloff worked so long and hard, in public and in private, to provide breathing space for the human soul to grow.

I first met him in 1952 when he was just short of 60 years old. I had known of him before as the Republican rival of Phil Perlman in Baltimore politics, and when a dinner was given to honor Perlman, who was about to leave the office of Solicitor General, Simon Sobeloff was the toastmaster. I was impressed. Three or four weeks later, after the elections, he called to visit, and we talked for several hours; I got to know him fast. Shortly afterwards, I (and no doubt a number of others) urged him to put himself forward for the Solicitor General's job, a post from which he would almost surely receive from Eisenhower an appointment to the Supreme Court. He agonized for a long time over the question—he had been bitten early by the bug of public service and only recently had achieved his lifetime ambition of becoming Chief Judge of the Court of Appeals of Maryland—but he finally accepted the appointment as Solicitor General.

Those were not easy times for persons of principle in government service. "Loyalty" and "security" programs were at their height and lives were daily being shattered by an astonishing collection of anonymous slander, gossip and misunderstanding, disseminated against a nationwide background of fear. The Solicitor General had occasion to argue cases that he could not have wanted to win. But Simon took on the job with the firm conviction that his primary task was "to reconcile legality with decency

1. E.g., Jay v. Boyd, 351 U.S. 345 (1956), involving a 40-year resident of the United States who was being deported because of membership in the Communist Party during the 1930's and undisclosed "confidential information." The order of deportation was upheld, 5-4, but the Solicitor General's brief suggests that the office might not have been upset by a contrary result. See Brief for Respondent, No. 503, October Term, 1955, at 4-8.
TRIBUTE TO SIMON E. SOBELOFF

and justice,\(^2\) and confidence that disagreements could be worked out by a process of reasonable accommodation.

At times that confidence was sorely tried. John Peters\(^3\) was a professor of medicine at Yale who in the early 1950's was serving as a consultant to the Public Health Service, coming to Washington from four to ten days a year at the call of the Surgeon General to give advice regarding proposed federal grants. Unspecified "derogatory information" caused several formal investigations of his "loyalty" to be made from 1949 through 1952; each time he received a clean bill of health. Then in 1953, not long before his term as consultant was to expire, the matter was reopened by yet another body, the "Loyalty Review Board." That Board, solely on the basis of information that was never disclosed to Dr. Peters and which came from "informants" whose identities were not all known even to the Board, decided that there was a "reasonable doubt" of his "loyalty" and sought to bar him from all federal service for a period of three years. Dr. Peters sued to clear his name and lost in both the district court and the court of appeals. The Supreme Court agreed to review the case, which meant that Simon, as Solicitor General, would have to defend the Government's position. The case was widely publicized as the critical test of the Government's loyalty-security programs. Simon was terribly disturbed by the treatment Dr. Peters had received. At first, however, he was confident that, as Solicitor General, he could work out a decent compromise, so that the case would be dismissed. But the officials responsible for administering the programs refused to compromise. Then Simon decided to take a dramatic and unusual step—he would refuse to sign the Government's brief or to argue its case in the Supreme Court.

I agreed with Simon that the Government's position in the Peters case was indefensible and so did some of his other friends. He knew of our strong feelings on the issue and of our intense admiration for Judge Edgerton's dissent in the case of Dorothy Bailey\(^4\) which involved similar problems of due process in determining the loyalty of government employees. Yet the consequences of his action unsettled me. He was, after all, cutting off a likely appointment to the Supreme Court. I wanted to be sure he felt no pressure from his friends to take such a serious step. I

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visited him that evening, and he listened patiently while I voiced my concerns. Then he smiled. "No, I do not take this step because I want to be able to live with my friends," he said simply. "I do it because I have to be able to live with myself."5

Simon set high standards for himself and never stopped trying to meet them, yet he had, at the same time, a refreshing humility and a capacity to understand the problems of others. He was fond of describing his position as a judge on the court of appeals as a "pebble ground between two millstones"—the district courts below and the Supreme Court above—and he rarely neglected to add that, as a district court judge once remarked to him, "the millstones may find the pebble a bit abrasive at times." Recognition of problems, however, never seemed to him an excuse for abdication. He would speak sadly of the "flood" of "utterly groundless" habeas corpus petitions from prisoners—and then add that "the discovery and correction of an occasional miscarriage of justice makes the entire labor worthwhile."6 He had no illusions that answers would be easy to find: "I don't believe in magic."7 Although he knew that "[m]any may hope in the interest of certainty that . . . all problems will be finally solved," in his view, "for the sake of justice, the quest should continue indefinately."8

Simon's hallmarks were learning and wisdom, tempered by a tremendous feeling for people. He once told me of a day that he sat, as Solicitor General, listening to the Supreme Court deliver an opinion upholding the deportation of a Mexican who had resided legally in the United States since 1918 with an American wife and four children. The man had been acted against because he had been a member of the Communist Party in California from 1944 to 1946, at a time when the Party was regularly running candidates for state office in California elections.9 Felix Frankfurter delivered the Court's opinion; he went over every point at some length, and when he was finished, Simon sat in his chair with the feeling that harsh as the result might be, there was just no way out. Then, Hugo Black leaned forward in his chair and looked out over the courtroom to deliver his dissent. "You know,"

5. He had made a similar point earlier in a speech delivered in 1954, referring to "instances . . . where confession of error is not only in order but is a moral necessity." The Law Business of the United States, supra note 2, at 149.
he began and then slowly continued with measured emphasis, "I just don’t think we mean to do people this way." Simon never forgot that, and he would have taken strong issue with Felix Frankfurter’s remarks some years later that the first, second and third requirements for a judge were disinterestedness, disinterestedness, and disinterestedness. His opinions display the highest order of legal craftsmanship (and a truly remarkable ability to clarify tangled questions) fleshed out with genuine concern for others and a hearty degree of common sense. He was sensitive to the limits of appellate courts, recognizing that review is never an adequate substitute for doing things right in the first instance, and he knew as well that denunciation and affirmance are never a substitute for undoing the wrong that has been done.

He was regularly well ahead of his times. On one matter particularly close to my heart, I can say that he early got the point of Durham v. United States. While many commentators were arguing as if the opinion were designed simply to change the standard to be given a jury asked to decide if a defendant was criminally responsible for his actions, Simon realized that its major purpose was to broaden the range of information available to jurors asked to decide the question. And we still haven’t caught up with his prescient efforts, for almost two decades, to bring fairness and rationality into the process of sentencing persons convicted of crime.

Someone once said that there are two kinds of paymasters: one kind looks through the rulebook until he finds the rule saying you don’t get the money that’s coming to you, and the other kind looks through until he finds the rule that says you can have what

you need even if you don't really deserve it. Simon Sobeloff would have been the second kind; I can't imagine a better model for a judge, or for a human being.
BIOGRAPHICAL SKETCH

ABEL J. MERRILL*

The bench, bar and citizens of the State of Maryland are wealthier today because their lives have been enriched by Simon E. Sobeloff, a giant who lived in their midst. In these turbulent times, it is fitting to reflect upon the life and career of this man whose distinguished service to the community set standards to which we might aspire. A brief sketch of the Judge's biographical background and a listing of the offices that he held furnish objective evidence of his outstanding service and record of accomplishments.

Simon E. Sobeloff was born on December 3, 1894, in east Baltimore to immigrant parents. At age twelve, he started his career in the law as an office boy, earning a salary of $1.50 per week, in the law office of William F. Broening. Two years later, upon the appointment by Representative John Kronmiller of Baltimore City, he entered the federal service as a pageboy in the House of Representatives.

Five years later, Simon Sobeloff began the formal study of law at the University of Maryland School of Law where he compiled an outstanding academic record. While attending law school, he became law clerk and secretary to Morris Ames Soper, then Chief Judge of the Supreme Bench of Baltimore City. Having received one of the highest marks on the Bar examination, he was admitted to the Bar in 1914, a year before earning his law degree, a practice which was then permissible.

After entering the practice of law, Mr. Sobeloff was appointed by Mayor Broening as an Assistant Baltimore City Solicitor. He served in that office from 1919 until 1923 when he resumed the private practice of law. Mr. Sobeloff returned to public service in 1927 when he accepted an appointment as Deputy City Solicitor.

In February, 1931, Mr. Sobeloff, upon the recommendation of Senator Phillips Lee Goldsborough, was nominated by President Herbert Hoover as United States Attorney for the District of Maryland. The nomination was confirmed with the strong support of then United States District Judge Morris Ames Soper, notwithstanding the questionable objection of another federal district judge. Mr. Sobeloff's term as United States Attorney was

* B.A., 1959, Colgate University; LL.B., 1964, University of Maryland; Law Clerk to Judge Sobeloff, 1963-64; President, Merrill & Lilly, P.A., Annapolis, Maryland.
marked by vigorous enforcement of the prohibition laws with which he was not in full sympathy. In March, 1934, he resigned from that office and returned to the private practice of law which he continued until 1943.

In that year, the Mayor of Baltimore City, Theodore R. McKeldin, appointed Mr. Sobeloff as City Solicitor. Mr. Sobeloff served in this post until 1947 when Mr. McKeldin, who had since been elected Governor of Maryland, appointed him chairman of an unpaid state commission, the "Little Hoover Commission," to review the administrative structure of the Maryland government. After nine months service as commission chairman, Mr. Sobeloff again resumed the private practice of law.

He was appointed Chief Judge of the Maryland Court of Appeals by Governor McKeldin, and upon taking office on December 16, 1952, Judge Sobeloff became the first member of his faith to sit on that court. His service as Chief Judge of the Maryland Court of Appeals continued until his resignation in 1954 when President Dwight D. Eisenhower nominated him to be the Solicitor General of the United States.

During his tenure as Solicitor General, beginning February 25, 1954, Judge Sobeloff presented the government's arguments on implementation\(^1\) of the Supreme Court's decision in *Brown v. Board of Education*,\(^2\) outlawing segregation in public schools. Also while Solicitor General, the Judge, as a matter of conscience and despite the wishes of his superiors, refused to sign or argue the government's brief in *Peters v. Hobby*\(^3\) because he believed that the government's position violated a fundamental principle of liberty.

President Eisenhower nominated Judge Sobeloff in July, 1955, to become a member of the United States Court of Appeals for the Fourth Circuit. After his confirmation by the Senate was delayed for a year by Southern Senators concerned over his possible judicial attitude towards school segregation, Judge Sobeloff was sworn in as a member of that court on July 19, 1956, and became chief judge by seniority on March 17, 1958. Judge Sobeloff served as chief judge until December, 1964, when he attained the mandatory retirement age of seventy. He relinquished the chief judgeship to become a senior circuit judge, remaining an active judge until his death on July 11, 1973.

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A simple listing of even so distinguished a record cannot, however, begin to give a full measure of the man. Judge Sobeloff was described on many occasions by Theodore R. McKeldin as a "champion of the underdog." Reference to several opinions crafted by the Judge may illustrate why the appellation was so richly deserved.

On numerous occasions, the fourth circuit was called upon to review a hearing examiner's administrative denial of a worker's claim to social security disability benefits. Many such cases originated in the economically hard-pressed areas of West Virginia and usually involved coal miners. For reasons best left to speculation, few claimants in such cases were found by the hearing examiner to be entitled to disability benefits. Generally, the stated ground for denial was that the worker had not produced legally sufficient evidence to meet the statutory requirement that he was "unable to engage in any substantial gainful activity" by reason of his disability.4

A typical case was that of Winston P. Cyrus,5 a forty-nine year old West Virginian with a fourth grade education and record of employment at manual labor. After his ruptured discs required two spinal laminectomies and fusions, with the risk that a third operation would cause paralysis, he could neither bend nor stand all day and suffered from persistent pain. Cyrus had been out of work for almost two years, unable to find a job which he could perform. The social security examiner concluded, based upon a witness' reference to an occupational manual, that Cyrus "was capable of performing functions of light or sedentary occupations prevailing in the economy," including "[keeper] in a dog kennel" and "assembler in a manufacturing industry."6 The examiner denied the claim.

In an opinion sustaining the district court's reversal of the examiner, Judge Sobeloff wrote for the fourth circuit:

The existence of jobs in a compilation running the full gamut from astronaut to zookeeper, available somewhere in the national economy, from Anchorage, Alaska, to Zapata, Texas, is of little relevance. . . . [T]here must be evidence to show

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4. The statutory definition of disability is:
   inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months . . . .
6. Id. at 195.
the reasonable availability of jobs which this particular claimant is capable of performing.\textsuperscript{7}

In a similar case, the Judge wrote:

[It] would be a wholly unrealistic application of the statutory standards to expect an illiterate person of the claimant's age whose only previous work experience was at hard manual labor in the coal mines and elsewhere and who was suffering under the cumulative proven hardship of these multiple disabilities to obtain, much less perform, any substantial employment.\textsuperscript{8}

In addition to his concern for the underdog, Judge Sobeloff, throughout his life, was vigorous in his devotion to human freedom and concern for the rights and privileges of the individual. The Judge fully recognized, however, that his unyielding application of the rule of law without regard to person, particularly with respect to the criminally accused, was not universally accepted. He, therefore, took pains to emphasize the critical importance to society as a whole of requiring all branches of government to respect the Bill of Rights. In a 1962 speech at the University of Oregon, he stated:

The constitutional protections asserted by a criminal today may become the necessary defense tomorrow of an honest and responsible man. If we tolerate usages destructive of freedom, if we put men in fear so that they dare not exercise the first prerogatives of free men, it is certain that the victims will only be tinder for the spreading fire. These sacrificial lambs may richly deserve their fate, but the circle tends to widen and include others indiscriminately.\textsuperscript{9}

Judge Sobeloff may have had these thoughts in mind during his review of a federal district court's denial of a petition for a writ of habeas corpus in \textit{Davis v. North Carolina}.\textsuperscript{10} Davis was arrested after a brutal rape-murder, held incommunicado in a small room in a city jail for sixteen days, isolated from counsel, friends and family, questioned daily, inadequately fed, and not informed of

\textsuperscript{7} Id. at 196-97.
\textsuperscript{8} Lackey v. Celebrezze, 349 F.2d 76, 79-80 (4th Cir. 1965).
\textsuperscript{10} 310 F.2d 904 (4th Cir. 1962). The court, in an opinion by Chief Judge Sobeloff, held that the denial by the district court, 196 F. Supp. 488 (E.D.N.C. 1961), without a hearing, was improper and reversed and remanded for a hearing.
his right to counsel. On the sixteenth day, after a police lieutenant led him in "prayer," Davis confessed. Following the admission of the confession into evidence, Davis was convicted and sentenced to death. The conviction had received judicial approval throughout all levels of the state court system and by the federal district court, both before and after a hearing on the petition, when the case came before the fourth circuit for the second time.\(^1\)

The issue before the court was whether the confession passed constitutional muster as being voluntary.

Dissenting from all prior adjudications and the majority of his court that the confession was voluntary, Judge Sobeloff, after an incisive and detailed analysis of the case, concluded that the overwhelming evidence showed the confession to have been the involuntary product of coercion. The Supreme Court adopted Judge Sobeloff's opinion sub silentio and reversed Davis' conviction.\(^2\) This was but one of the many instances in which Judge Sobeloff's fourth circuit dissent became the basis for a Supreme Court majority opinion.

A more personal example may further explain Judge Sobeloff's point of view. After a particular case had been argued before the court, the panel of judges had reached tentative agreement on its disposition, and the case had been assigned to Judge Sobeloff for the preparation of the court's written opinion, it was the Judge's practice to engage in vigorous discourse with his law clerks in an effort to fashion a sound and persuasive legal theory in support of the agreed result. It was not uncommon during such interchanges for a sympathetic but frustrated law clerk to suggest that, in view of the lack of an appropriate precedent, the desired result, giving redress to an individual whose rights had been denied by a new variant of illegal government action, could not be justified. After the Judge's gentle but predictable rejection of such an opinion, upon being asked by the clerk to identify the legal theory on which the Judge would bottom the result, the Judge would, without hesitation, proffer his favorite theory of "t'aint fair."

Finally, no reference to Judge Sobeloff's writings or career would be complete without recognition of his sparkling wit and his conviction that even weighty matters need not be dealt with in a droll fashion. Because exploration of the ponderous and intri-

\(^{11}\) Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964) (en banc). Denial of the petition after a hearing on remand, 221 F. Supp. 494 (E.D.N.C. 1963), was affirmed over the dissenting opinion of Chief Judge Sobeloff.

cate Internal Revenue Code was definitely not the Judge’s favorite judicial pursuit, it is significant that perhaps the finest example of this aspect of the Judge appears in “Diamond Jim,” a tax case.\textsuperscript{13}

Simmons, a sportfisherman, had received a $25,000 cash prize from a brewer in its annual Fishing Derby for catching “Diamond Jim III,” a fish with an identification tag. Simmons contended that the $25,000 was excludable from his gross income on the ground that it was a “prize . . . made primarily in recognition of . . . civic achievement.”\textsuperscript{14} Judge Sobeloff’s opinion began with the observation that: “Diamond Jim III, a rock fish, was one of the millions of his species swimming in the Chesapeake Bay, but he was a very special fish, and he occasions some nice legal questions.”\textsuperscript{15} The Judge, in his own style, then dealt with the taxpayer’s contention:

Viewing the facts most favorably to the taxpayer, we hold that he was not rewarded for a civic achievement, properly interpreted. There was nothing meritorious in a civic sense in catching this rock fish. Simmons was not even rewarded for an extraordinary display of skill, if that could be considered a civic achievement, for catching Diamond Jim III was essentially a matter of luck. The case might be different if, for example, Simmons had at considerable risk to himself captured and destroyed a killer whale terrorizing the Maryland seashore. That could have been regarded as a genuine civic achievement. But catching this fish cannot reasonably be so denominated, for the only community interest in the event was one of idle curiosity. Innumerable are the rhapsodies uttered in praise of the delights and virtues of the piscatorial pastime, but never to our knowledge has it been seriously called a civic enterprise. The character of this fortuitous event is not raised to a civic level by being linked to an advertising campaign aimed at selling beer. Far from resembling a Nobel or Pulitzer prize-winner, Mr. Simmons fits naturally in the less-favored classification the legislators reserved for beneficiaries of “giveaway programs.”\textsuperscript{16}

\textsuperscript{13} Simmons v. United States, 308 F.2d 160 (4th Cir. 1962).
\textsuperscript{14} The Internal Revenue Code provides: “Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement . . . .” INT. REV. CODE of 1954, § 74 (b).
\textsuperscript{15} 308 F.2d at 161.
\textsuperscript{16} Id. at 163-64.
In conclusion, our very special friend and mentor has left an indelible impression upon all who came in contact with him, and he is deeply missed.
An invitation to review Simon Sobeloff's public school race decisions is an invitation to review the development of public schools race relations law since the Supreme Court's first decision in *Brown v. Board of Education*.¹ His involvement with the subject actually preceded his ascension to the federal bench. While Solicitor General of the United States, appointed by President Eisenhower, Judge Sobeloff participated in the argument before the Supreme Court that led to the second decision in *Brown v. Board of Education*,² the 1955 decision on school desegregation remedy.

In *Brown I*, the Supreme Court ruled that public school segregation of blacks from whites, pursuant to the state segregation statutes that flourished in the South following the Reconstruction Period, offended the equal protection clause of the fourteenth amendment.³ More than any other single event, *Brown I* signaled

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¹In preparing this article, I have resisted the temptation to treat Judge Sobeloff's other race relations decisions. Many of these decisions were as important to the development of race relations law as were his school decisions. A few, therefore, are entitled to brief mention. His decision in Simkins v. Moses H. Cone Memorial Hosp. 322 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964), enlarged the concept of "governmental action" under the fifth and fourteenth amendments and provided the judicial underpinnings for Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1 (1970), prohibiting invidious discrimination by federal government contractors and grantees. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc), resulted from a nineteen day Baltimore police rampage through the black ghetto in search of two alleged "cop killers." For a unanimous court, Judge Sobeloff ordered that the district court enter a "decree enjoining the Police Department from conducting a search of any private house to effect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause." *Id.* at 206. Thus, Judge Sobeloff attempted to establish an alternative to the exclusionary rule for the enforcement of the fourth amendment right to be safe from unreasonable searches and seizures. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), he treated 42 U.S.C. § 1983 as a tort statute and ruled that a state police officer's gross or culpable negligence in shooting an eighteen-year-old black youth was a constitutional violation and supported a damage action under that statute.

²A.B., 1959, Cornell University; LL.B., 1962 Yale University; Law Clerk to Judge Sobeloff, 1962-63; Legal Director, Mexican American Legal Defense and Educational Fund, Inc.; Author's note: The views expressed are those of the author and are not to be attributed to the Mexican American Legal Defense and Educational Fund, Inc.

1. 347 U.S. 483 (1954) [hereinafter cited as *Brown I*].
2. 349 U.S. 294 (1955) [hereinafter cited as *Brown II*].
3. In the companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), the federal government's racial segregation within the public schools of the District of Columbia was declared to violate the due process clause of the fifth amendment.
the start of America’s race to catch up with itself and to practice what it preached. In Brown II, alas, the Supreme Court allowed the race to begin at a snail’s pace. Immediate and complete desegregation of the defendant school districts was not compelled. The five separate cases comprising Brown II were remanded to the trial courts; “school authorities” were declared to “have the primary responsibility for elucidating, assessing, and solving [the] problems” relating to desegregation; and the trial courts were directed to balance competing equities in evaluating school authorities’ actions and to require only “that the defendants make a prompt and reasonable start toward full compliance” with Brown I. Thus, the five cases were remanded to the trial courts to take such steps “consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”

Perhaps not in all of its detail, but certainly in its thrust, the Brown II opinion conformed to the position Solicitor General So- beloff had taken before the Supreme Court on behalf of the United States. Not too long after that decision, however, he relinquished his position as the nation’s chief litigator and donned judicial robes.

In becoming a member of the United States Court of Appeals for the Fourth Circuit, he joined a federal appellate court whose jurisdiction extended over three former confederate states—Virginia, North Carolina and South Carolina—and two border states—Maryland and West Virginia. The public schools of each of these states were rigidly segregated pursuant to state statute. Only the Fifth Circuit had jurisdiction over more segregationist states and was to have a heavier case load of school segregation cases.

Upon becoming a federal judge, Simon Sobeloff found himself in a critical position with respect to appellate review of the workings of the public school desegregation machinery which he, as an advocate, had helped to design. Shortly after he joined the court, his position became even more influential in the enforce-

4. 349 U.S. at 299-300.
5. Id. at 301 (emphasis added).
6. See 99 L.Ed. 1083, 1099 (1955) for a summary of the brief for the United States in Brown II.
8. See generally Bickel, The Decade of School Desegregation: Progress and Prospects, 64 COLUM. L. REV. 193 (1964) [hereinafter cited as Bickel].
ment of the Brown decisions. In 1958, he became Chief Judge of the Fourth Circuit\(^9\) and remained in that post until attaining the mandatory retirement age of seventy in 1965. Judge Sobeloff continued as an active member of the court until he accepted senior judge status in 1971. By then he had come to occupy a remarkably advanced position on public school race issues, and he had contributed significantly to the development of the law and philosophy of the subject.

Although technically only primus inter pares, Judge Sobeloff was able to accomplish a great deal as the "Chief" during this significant period in the development of race relations law. He was both a strong judge and strong chief judge. The impact that his personality, intellect and morality had on his contribution to the development of the law should not be discounted. In the role of chief judge, his natural talents found a productive outlet. It was his duty to manage the court: to administer its docket, establish hearing panels and assign the drafting of opinions when he was on the prevailing side. He embraced these duties and used them, where proper, to develop the law along the lines he thought appropriate.

Judge Sobeloff employed a firm and healthy pragmatism as well as an acutely attuned "sense of injustice."\(^{10}\) Hence, not because of any need for self-apology but because he thought at the time that Brown II was necessary, he never doubted that he and the Supreme Court had taken the right approach in that decision. I think he would not have joined, therefore, in Justice Black's statement in 1968, that the "all deliberate speed" formula "delayed the process of outlawing segregation" and that it would have been preferable to treat Brown I "as an ordinary lawsuit and enforce that judgment on the counties it affected that minute."\(^{11}\) Judge Sobeloff, however, never doubted that Brown II was only an expedient, designed to allow the country a brief period to adjust before pressing more rapidly for a complete end to segregation and racism in our public life.\(^{12}\)

Judge Sobeloff's school decisions can be divided into three stages. During the initial period, which extended through his first

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9. Upon Chief Judge John J. Parker's death on March 17, 1958, Judge Sobeloff became the chief judge.


two years as chief judge, he was familiarizing himself with the court and his new role. He was not overly assertive. His predecessor, Chief Judge John J. Parker was, after all, both a compelling force and a difficult act to follow. Also, Judge Sobeloff regarded Judge Morris A. Soper, who continued as a member of the court until 1963, as his mentor. During this initial period, the South was developing its arsenal of techniques to avoid compliance with Brown I, and the inferior federal courts were working out the meaning of "all deliberate speed" and making unrealistic distinctions between desegregation and integration.

The second period extended to the end of his tenure as chief judge in 1965. Judge Sobeloff asserted his leadership and continuously moved his court, as best he could, away from the "all deliberate speed" approach toward insistence upon immediate and complete compliance with both the letter and the spirit of Brown I. He understood that the principle of Brown I required, at the very least, the dismantling, "root and branch," of the statutory biracial or dual school systems of the South. Massive resistance in the South crumbled during this period as Congress legislated equal treatment for racial and ethnic minorities.

The third stage began shortly before Richard Nixon's election to the presidency in 1968. Judge Sobeloff, as he pressed not merely for desegregation but for full and complete integration of our public schools and for the cleansing of our society's racism, found himself isolated from a majority of his colleagues, but not from a majority of the Supreme Court. This was the period of the riots, white backlash and a loss of national spirit. Nevertheless, he never lost hope, and he continued to press, perhaps even harder, for equality of treatment.

Reluctantly, Judge Sobeloff retired to senior judge status in

15. See Bickel, supra note 8, at 203-12.
16. Mr. Justice Brennan, speaking for the Court in Green v. County School Bd. of New Kent County, 391 U.S. 430, 438 (1968), rev'd 382 F.2d 338 (4th Cir. 1967) (en banc), relied heavily on Judge Sobeloff's special concurring opinion in Bowman v. County School Bd. of Charles City County, 382 F.2d 326, 330-38 (4th Cir. 1967) (en banc). Green and Bowman were decided by the Fourth Circuit on the same day and presented questions that were "substantially the same." 382 F.2d at 339.
17. See generally Bickel, supra note 8.
1971. He continued his work as a judge, carrying as heavy a load of cases as most active members of the court. All of the court's important school cases, however, were now being heard en banc, and a senior judge could not participate unless he had been a member of the original panel that heard the case.\(^9\) Hence, Judge Sobeloff authored his last school opinion more than two years before he died.\(^{20}\)

**WITH ALL DELIBERATE SPEED**

During his first several years on the court, Judge Sobeloff participated in a number of important school cases in which per curiam opinions were issued.\(^{21}\) He signed no opinions for the court, and, indeed, few of the early Fourth Circuit school opinions were signed.\(^{22}\) This use of per curiam opinions is partially explained by the silence of the Supreme Court. The Court had made no new pronouncements about school desegregation, except to indicate in *Cooper v. Aaron*\(^{23}\) that community opposition to desegregation orders could not delay enforcement of court orders implementing the "all deliberate speed" formula.\(^{24}\) No further clarification of the *Brown* mandate was provided until the mid-1960's, and no time schedule was set for desegregation.

With this lack of direction from the Supreme Court, it is not surprising that most Fourth Circuit school opinions were


\(^{21}\) E.g., Farley v. Turner, 281 F.2d 131 (4th Cir. 1960); Jones v. School Bd. of Alexandria, 278 F.2d 72 (4th Cir. 1960); Covington v. Edwards, 264 F.2d 780 (4th Cir.), cert. denied, 361 U.S. 840 (1959); Hamm v. County School Bd. of Arlington County, 264 F.2d 945 (4th Cir. 1959); Hamm v. County School Bd. of Arlington County, 263 F.2d 226 (4th Cir. 1959); Board of Educ. of St. Mary's County v. Groves, 261 F.2d 527 (4th Cir. 1958); School Bd. of Norfolk v. Beckett, 260 F.2d 18 (4th Cir. 1958); School Bd. of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958); County School Bd. of Arlington County v. Thompson, 252 F.2d 929 (4th Cir.), cert. denied, 356 U.S. 958 (1958); School Bd. of City of Newport News v. Atkins, 246 F.2d 325 (4th Cir. 1957).


\(^{23}\) 358 U.S. 1 (1958).

\(^{24}\) Id. See School Bd. of Norfolk v. Beckett, 260 F.2d 18 (4th Cir. 1958) (per curiam).
anonymous and were characterized by caution and calls for voluntarism. For example, following Judge Parker's three-judge district court decision in *Briggs v. Elliott*, the court continued to adhere to the strained view that the fourteenth amendment does not require the mixing of the races in public schools but merely prohibits their separation on the basis of race or color. It was the Fourth Circuit's position that the Constitution requires desegregation not integration.

During this period, Judge Sobeloff joined in the Fourth Circuit's decision in *Carson v. Warlick*, sustaining state pupil placement laws as facially constitutional. These laws provided that each child applying for admission to the public schools of a given school district was individually enrolled in a school designated by the school board. Theoretically, placement was neither controlled by predetermined attendance zones nor by any other en masse enrollment system. Each child's application and enrollment were considered separately. *Carson* provided that when a child was denied placement in the school of his or her choice, a likely event when a black child selected an all white school, the state administrative and judicial remedies provided by such pupil placement laws had to be exhausted prior to the filing of a federal court desegregation lawsuit unless exhaustion could be shown to be futile. Further, dictum in *Carson*, indicating that full class relief was not available in school cases, was adopted in a subsequent holding. Thus, plaintiffs were denied prompt individual relief and were unable to secure injunctions providing for system-wide class relief.

The cases of this period primarily involved freeing school boards from the effects of state-wide massive resistance laws, such as the Virginia school closing laws which closed all public schools subject to federal court desegregation orders, and, once freed, giving the school boards an opportunity to find a solution gradually and peacefully. The other school appeals heard by the

27. 238 F.2d 724 (4th Cir. 1956).
31. E.g., Jones v. School Bd. of Alexandria, 278 F.2d 72 (4th Cir. 1960) (per curiam);
Fourth Circuit generally concerned the placement of a token handful of black pupils in formerly all-white schools. Unless stays were granted on appeal for very short periods of time, based on allegations of administrative need and upon assurance of speedy compliance thereafter,\(^3\) district court orders requiring such placement were invariably affirmed.\(^3\) For example, even though a school board's gradual plan for desegregation previously had been adjudged constitutionally acceptable, a later district court order requiring integration of an additional black child was upheld.\(^3\) In another case, a lower court order transferring four black pupils to a previously all white school was sustained on appeal despite the school authorities' claim that the children in question had failed to pass an adaptability test.\(^3\) On the other hand, the court sustained a decision by the same district judge, refusing to order the transfer of five black children to a previously all white school, on the ground that the School Board had not been shown to have unequally applied the facially valid criteria of residency and academic preparedness.\(^3\)

While we may speculate that Judge Sobeloff authored several of the per curiam opinions delivered by the panels on which he sat, especially after he became chief judge, the first school desegregation opinion actually signed by Judge Sobeloff was rendered on January 30, 1959, almost five years after Brown I. He issued this opinion, sitting alone, on a request by the School Board of Charlottesville, Virginia, for a stay of a district court order admitting twelve black plaintiffs to two formerly all white public schools.\(^3\) In September, 1958, he had refused a stay in the same case because the School Board had been unable to give assurance that the stay, if granted, would have facilitated either compliance with the district court's general desegregation decree

\(^3\) Hamm v. County School Bd. of Arlington County, 264 F.2d 945 (4th Cir. 1959) (per curiam); County School Bd. of Arlington County v. Thompson, 252 F.2d 929 (4th Cir.) (per curiam), cert. denied, 356 U.S. 958 (1958).

32. E.g., Goins v. County School Bd. of Grayson County, 282 F.2d 343 (4th Cir. 1960) (Sobeloff, C.J., sitting as an individual circuit judge); School Bd. of Charlottesville v. Allen, 263 F.2d 295 (4th Cir. 1959) (Sobeloff, C.J., sitting as an individual circuit judge).

33. E.g., School Bd. of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958) (per curiam); School Bd. of Norfolk v. Beckett, 260 F.2d 18 (4th Cir. 1958) (per curiam).

34. Board of Educ. of St. Mary's County v. Groves, 261 F.2d 527 (4th Cir. 1958) (per curiam).

35. Hamm v. County School Bd. of Arlington County, 263 F.2d 226 (4th Cir. 1959) (per curiam) (affirming district court finding of no basis for rejection other than race).


37. School Bd. of Charlottesville v. Allen, 263 F.2d 295 (4th Cir. 1959) (Sobeloff, C.J., sitting as an individual circuit judge).
or reasonably early compliance with the order admitting the
twelve black students.\textsuperscript{38} Virginia school closing laws had earlier
denuded the Charlottesville School Board of the authority to op-
erate the school system once it became subject to a federal court
desegregation order. Consequently, the schools had been closed.
Thereafter, the school closing laws were invalidated,\textsuperscript{39} and both
the Charlottesville School Board and the City Council gave the
necessary assurances of compliance. Judge Sobeloff, therefore,
granted a limited stay because of what he regarded to be the
School Board’s good faith and its stated desire to comply with the
\textit{Brown} principle at the earliest possible time consistent with pro-
per management of the schools. It is likely that he published his
reasons for granting the stay to encourage other school authorities
to be as cooperative and to engage in voluntary compliance with
the fourteenth amendment and court desegregation orders.\textsuperscript{40}

The initial period in Judge Sobeloff’s tenure ended with the
court entering a per curiam opinion validating, as consistent with
the “all deliberate speed” doctrine, the City of Norfolk’s interim
plan of “progressive desegregation of grades beginning with high
school and proceeding progressively to the lower grades.”\textsuperscript{41} Thus,
six years after \textit{Brown I}, the Fourth Circuit agreed that Norfolk
could commence desegregation pursuant to a grade-a-year plan.
But, because the court had become familiar with the realities of
pupil placement laws and tokenism, and the Norfolk School case
itself had already “been frequently before the district court and
three times in this court,”\textsuperscript{42} the Fourth Circuit was a bit chary in
its opinion. Its affirmance was premised upon “the District
Court’s finding that it is the Board’s purpose to proceed in good
faith and with reasonable speed in compliance with the direction
of the Supreme Court. . . .”\textsuperscript{43} Further, the plan was accepted as
an interim measure only, “subject to re-examination from time

\textsuperscript{38} Id. at 295. Stays were also denied in similar circumstances by panels of which
Judge Sobeloff was a member, \textit{E.g.}, School Bd. of Warren County v. Kilby, 259 F.2d 497
(4th Cir. 1958) (per curiam) (no assurances given); School Bd. of Norfolk v. Beckett, 260
F.2d 18 (4th Cir. 1958) (per curiam) (school board guilty of dilatory tactics).

\textsuperscript{39} James v. Almond, 170 F. Supp. 331 (E.D. Va.), aff’d sub nom. Duckworth v.

\textsuperscript{40} Judge Sobeloff’s second signed school opinion was issued on September 13,
1960, under similar circumstances. Goins v. County School Bd. of Grayson County, 282
F.2d 343 (4th Cir. 1960) (Sobeloff, C.J., sitting as an individual circuit judge) (application
for stay denied).

\textsuperscript{41} Hill v. School Bd. of Norfolk, 282 F.2d 473, 475 (4th Cir. 1960) (per curiam).

\textsuperscript{42} Id. at 474.

\textsuperscript{43} Id. at 475.
to time of further plans to effect compliance with the law . . . .”

As the initial period ended, it became increasingly clear that tokenism and gradualism were insufficient to comply with the Brown mandate. But neither Judge Sobeloff, the Fourth Circuit nor the Supreme Court had yet been pushed beyond the limits of endurance.

THE FALL OF MASSIVE RESISTANCE AND TOKENISM

The second period of Judge Sobeloff's tenure commenced in 1961. Both he and his court became more active as did the Supreme Court. Pupil placement laws, exhaustion of state remedies, and many limitations on the scope of class relief were no longer acceptable. Further, the "all deliberate speed" formula was found to be an unsatisfactory standard, and the more crass techniques for maintaining segregation, such as minority pupil transfer provisions and grade-a-year plans, were swept aside.

The number of school cases in the Fourth Circuit during this second period appears to have increased, and the percentage of reported per curiam decisions declined. Instead of assuming a cloak of anonymity, individual members of the court regularly acknowledged their personal responsibility for desegregation rules of law and rhetoric. Frequently, opinions for both panels and the court en banc were signed by Judge Sobeloff.

Judge Sobeloff's first signed opinion for a panel of the court again involved the City of Charlottesville.45 He sustained a district court order refusing to reassign immediately ten black pupils to previously white schools. The School Board had rejected the plaintiffs' reassignment applications allegedly because some of the plaintiffs had exhibited academic credentials substantially below the average at the white school they wished to attend and because the others resided closer to the black schools than to the white schools. The existing rule in the Fourth Circuit was "that residence and academic attainment tests may be applied in determining what schools children shall attend, provided that factors of race and color are not considered."46

Even though the school district's desegregation to date had been pathetically slight, involving the reassignment of fewer than thirty black children to previously all white schools and the trans-

44. Id.
46. Id. at 442.
fer of no white children to previously all black schools, the Fourth Circuit was satisfied that "there has been some progress towards desegregating the city's schools." The school district's plan, which "divided the city into six geographical [attendance] zones, each served by one of the city's six elementary schools" and provided for individual pupil placement in each of the city's two high schools, was held facially "not objectionable on constitutional grounds." But, "constitutional infirmities" were found "in the manner in which the plan is being administered."

Pursuant to the plan adopted by the Charlottesville School Board, each elementary school student was to be assigned to the school located in and serving the attendance zone in which he resided. At the request of the child's parent, transfer was then to be considered on the basis of ostensibly neutral criteria. In practice, however, all black children throughout the city school system were initially assigned to the black schools, and all white children were assigned to the white schools. To secure assignment to a school of the other race, a child first had to apply for a transfer. Additionally, high school applicants had to pass scholastic aptitude and intelligence tests.

Despite these blatant infirmities and Judge Sobeloff's acknowledgement that "we would normally be required to reverse" the district court, he declined to reverse and to direct that an appropriate injunction be entered. The school authorities, as before, had given assurances of intention to comply with their obligation to desegregate, and the district court had retained jurisdiction of the case to assure compliance. Hence, with confidence "that steps will be taken promptly to end the present discriminatory practices in the administration of the desegregation plan," Judge Sobeloff affirmed the lower court's decision.

47. Id. at 441.
48. Id.
49. Id. at 442.
50. Id.
51. Id. at 442-43.
52. Id.
53. Id. at 444. The Charlottesville plan came before the court again in Dillard v. School Bd. of Charlottesville, 308 F.2d 920 (4th Cir. 1962) (en banc) (per curiam), cert. denied, 374 U.S. 827 (1967). The majority of the court, including Chief Judge Sobeloff, adopted the opinion of Senior Judge Soper, who had prepared an opinion for the original panel that heard the case. The Fourth Circuit rejected the Charlottesville plan because: (1) each elementary school pupil was assigned to a school in his residence zone, but pupils in a racial minority within their assigned school could freely transfer to a school in which their race was in the majority; (2) academic tests were given to black pupils seeking to enroll in the predominantly white high school while white pupils were admitted without
The unequal administration of pupil placement programs came before Judge Sobeloff again in 1962. This time, he examined the administration of such a program in the context of the interplay between the School Board of the City of Roanoke, Virginia, and Virginia's Pupil Placement Board.\textsuperscript{54} On this occasion, the court was not as gentle.

The evidence demonstrated that the School Board operated a rigid "feeder" school system.

The city schools are divided into six sections, numbered I to VI. A pupil, when he first enters the city's school system, is assigned to an elementary school in one of the sections. When he graduates from the elementary school, he is automatically assigned to the junior high school which serves that same section. Similarly, upon graduation from junior high school, he goes to his section's senior high school.\textsuperscript{55}

The "sections" served no defined geographical areas. Theoretically, they conformed to some amorphous notion of neighborhood school zones, but there were no maps of these zones. Not surprisingly, "the 'neighborhood' served by section II schools consist[ed] of the entire Negro community in the city" regardless of actual residency.\textsuperscript{56} In order to escape from the section II schools, black students had to apply for transfer. Any transfer applications were forwarded to the state Pupil Placement Board. Ordinarily, that Board's role in the assignment of pupils was largely a formality. The city school authorities recommended to the state Board assignments for all pupils in the city schools. Unless a child's parents objected to an assignment, the Pupil Placement Board automatically ratified all assignments.\textsuperscript{57}

In 1960, thirty-nine black pupils applied to the City of Roanoke School Board for transfer to white schools. Although the applications were forwarded to the state Board, the city school authorities made no recommendations. With remarkable candor, the Pupil Placement Board requested that the city school authorities answer three questions about the applications: (1) "Are there Negro pupils who cannot be excluded from attending white schools except for race?" (2) "Would the Superintendent and School Board so certify to the Pupil Placement Board?" (3) tests; and (3) the alternative of sending white pupils to the black high school was never considered.

\textsuperscript{54} Green v. School Bd. of Roanoke, 304 F.2d 118 (4th Cir. 1962).
\textsuperscript{55} Id. at 120.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
"[W]hat would happen in the local communities if some Negro pupils were assigned to white schools?" Upon receiving the answers, the state Board denied thirty of the applications and granted nine. "These nine were the first Negroes to be admitted to white schools in Roanoke City since the Supreme Court's decisions in Brown . . . ."

The parents of twenty-eight of the pupils denied transfers filed suit in federal district court. The School Board contended that twelve pupils had been denied transfers because their test scores were below the median of the schools they wished to attend. The transfer applications of five other pupils had been denied because each had a sibling, attending the same school, whose test scores were below the median of the comparable white students. Finally, the School Board maintained that eleven of the pupils had been denied transfers because they lived closer to black schools than to the white schools they requested.

The district judge ruled that there was no need for the plaintiffs to exhaust the state administrative remedies because their transfers had been denied only a few days before the school term commenced. But, he also ruled that the plaintiffs were not entitled to an injunction barring the continued operation of a segregated school system or requiring a plan for desegregation. Upon reviewing the denials of the transfer applications, the district judge sustained twelve, reversed one and directed the school board to re-examine the remaining applications.

In his opinion for the Fourth Circuit, Judge Sobeloff reversed and remanded with directions. Unlike the situation presented in the Norfolk and Charlottesville cases, the City of Roanoke defendants "have disavowed any purpose of using their assignment system as a vehicle to desegregate the schools and have stated that there was no plan aimed at ending the present practices which we have found to be discriminatory . . . ." Further, the district court had not recognized the informities of the school authorities' existing practices and had not "made it clear that progress toward a completely non-discriminatory school system . . . ."

58. Id. at 121.
59. Id.
60. Id. at 121-22. One of the plaintiffs actually lived closer to the white school, and another lived halfway between the black and white schools.
61. Five of the fifteen applications re-examined were granted. In the following school year, two additional applicants were allowed to transfer. Thus, by the time the appeal was heard, the number of untransferred appellants was twenty. Id. at 122.
62. See text accompanying notes 37-44 supra.
63. 304 F.2d at 124.
would be insisted upon." Hence, the decision of the district court was reversed, and the case was remanded for entry of an order transferring the plaintiffs.

However, if, upon remand, the defendants desire to submit to the District Court a plan for ending the existing discriminatory practices, then, rather than the appellants and others similarly situated all being entitled to immediate admission to non-segregated schools, their admissions may be in accordance with the plan. Any such plan, before being approved by the District Court, should provide for immediate steps looking to the termination of the discriminatory practices "with all deliberate speed" in accordance with a specified time table.

Judge Sobeloff, thus, began to demonstrate his own impatience, and that of his court, with the interminable delays fashioned by various school districts.

Judge Sobeloff's impatience was even more unmistakable in a case, decided a month later, involving the derelictions of the Roanoke County School authorities. The county school authorities placed pupils in the public schools pursuant to a rigid "feeder" system similar to that of Roanoke City. This "feeder" system purposefully perpetuated a segregated school system and was "maintained in flagrant disregard of the Supreme Court's decisions in [Brown I and Brown II] . . . and of this court's unmistakable declaration that '[o]bviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated.'"

The same district judge who had heard the Roanoke City case decided in the Roanoke County case that the plaintiffs could not press their federal lawsuit for failure to exhaust their state administrative remedies. The plaintiffs had not, as required by a regulation of the state Pupil Placement Board, filed their transfer applications at least sixty days prior to the commencement of the school year.

Chastising the state Pupil Placement Board for refusing to "try to bring about the desegregation of the State of Virginia,"
Judge Sobeloff ruled that "where the discrimination relates back to the initial assignments, the sixty-day rule may not be used as a pretext to defeat the vindication of constitutional rights." 9 Carson v. Warlick, 70 requiring exhaustion of state remedies, was again limited to the proposition that although a pupil placement law is "not unconstitutional on its face, . . . administrative remedies need [not] be exhausted if they were shown to be a part of the discriminatory administration of the Act." 71 Judge Sobeloff then reversed and remanded for "a declaratory judgment that the defendants are administering the Pupil Placement Act in an unconstitutional manner . . . ." 72 Unless the defendants submitted "a plan for ending the existing discrimination . . . 'in accordance with a specified time table,'" 73 the district court was ordered to enter "an injunction against the further use of racially discriminatory criteria in the assignment of pupils to schools." 74 Judge Sobeloff further directed the district court to issue promptly an injunction "so as to control the assignment of pupils for the coming 1962-63 school year." 75 Thus, the limitations on class relief were being eliminated through injunctions requiring comprehensive pupil placement plans.

Further indication of the court's new direction was provided by the disposition of the Lynchburg, Virginia, desegregation lawsuit. The appeal had been argued on September 25, 1962, and, three days later, by a per curiam order, the district court's refusal to admit two of the four plaintiffs to previously all white schools was reversed. 76 The class issues, however, were not settled until June 29, 1963. 77 This was an unusual lapse of time. Judge Sobeloff, as chief judge, was sensitive to the court's obligation to keep its docket current. Further, he was anxious to avoid delay in school desegregation cases where a month's delay in court could defer desegregation for an entire school year. But, in this instance, the delay was explainable.

The Fourth Circuit was awaiting a determination by the

69. Id. at 98.
70. 238 F.2d 724 (4th Cir. 1956).
71. Marsh v. County School Bd. of Roanoke County, 305 F.2d 94, 99 (4th Cir. 1962).
72. Id. at 99.
73. Id. at 99-100 (quoting Green v. School Bd. of Roanoke, 304 F.2d 118, 124 (4th Cir. 1962)).
74. Id. at 99.
Supreme Court of one of the issues presented by the Lynchburg case. The Supreme Court decision was not delivered until June 3, 1963. The Court agreed with the Fourth Circuit position that a minority pupil transfer provision, allowing children who are in a minority race within the school to which they have been assigned to transfer freely to a school in which they are in the majority race, was unconstitutional. Subsequently, in deciding the class action issues in the Lynchburg case, the Fourth Circuit began by invalidating the city’s minority student transfer provision.

The Lynchburg case raised two additional class action issues which Judge Sobeloff creatively decided. First, giving a broad reading to a signal from the Supreme Court that nine years after Brown I it was becoming impatient with the “all deliberate speed” formula, Judge Sobeloff persuaded his court to join the Third, Fifth and Sixth Circuits in ruling that desegregation by a grade-a-year “time schedule is too slow and unduly protracts the process of desegregation.” The second class action point was equally important, for it significantly extended the scope of the desegregation plans that the Fourth Circuit would thereafter insist upon. The defendants’ plan had been opposed by the plaintiffs on grounds such as the failure to delineate proper zones, to spell out details with respect to assignments and deadlines, and to provide for notifying parents and children of their rights under the plan and how these rights may be vindicated. They further complain that the plan fails to provide for desegregation of faculty and staff, or the special classes for handicapped and gifted children, or adult education classes, or vocational and commercial education, or kindergarten and other pre-school as well as summer school programs. Again, giving a liberal reading to the Supreme Court’s statement that the requirement of desegregation dictated by the Constitution “would . . . [no longer] be fully satisfied by types of plans or programs for desegregation of public educational facilities

82. Id. at 233.
which eight years ago might have been deemed sufficient,” Judge Sobeloff ordered the district court promptly, for use in the imminent 1963-64 school year, “to undertake a detailed rewriting of the board’s plan [and] . . . to perform the task comprehensively to bring the plan into full conformity with the law.”

In his next school case, *Bell v. School Board of Powhatan County*, Judge Sobeloff accelerated the pace for judicial intervention in public school desegregation. The Powhatan County school system consisted of two schools, each encompassing all grades from elementary through high school. The Powhatan School was designated for white pupils and was staffed exclusively by white personnel while the Pocahontas School was designated for black pupils and staffed by black personnel. There had been absolutely no change in the racial composition of these schools since the Supreme Court’s decision in *Brown II*. After frustrating efforts to transfer to the all white school, in the summer of 1962 sixty-five black children and their parents filed a class action against the School Board, the superintendent of schools and the members of the Virginia Pupil Placement Board. Judge Sobeloff observed:

The record discloses a persistent purpose and plan on the part of the defendants to deny the plaintiffs their constitutional rights and pretextuously to invoke against them rules which in practice had no application to white pupils. This the defendants did after making it difficult, if not impossible, for the rules to be complied with, by failing to make available before the deadline sufficient official application forms and later refusing to consider applications not on official forms. They furthered their obstructive purpose by refusing to act upon applications, regardless of when made, and by interposing captious objections that applications had been presented to the Division of Superintendent instead of to the school principal, when in fact the defendants knew that the plaintiffs would quite naturally rely on the regulation of the Pupil Placement Board which specified filing with the Division Superintendent.

The district court had found the facts to be substantially as alleged by the plaintiffs and had issued an injunction against a racially discriminatory admission policy. Noting developments in

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85. 321 F.2d 494 (4th Cir. 1963) (en banc).
86. *Id.* at 497-98.
nearby Prince Edward County, the district court also had enjoined the defendants from closing their schools. The district judge had further directed the defendants to submit a plan for desegregation within ninety days. He had also invoked the doctrine of abstention because of the pendency of a state court proceeding. The state suit had been arranged between the local school board and the state Pupil Placement Board to determine whether the local school authorities were obligated to investigate the genuineness of the transfer applications. Consequently, the district court had not acted on the transfer requests of the named plaintiffs, except those of the three who had specifically moved for an interlocutory injunction. Their motions had been granted. Finally, the district court had denied counsel fees to the plaintiffs' attorneys.

Judge Sobeloff delivered the local school authorities a stinging lecture and affirmed the district court order in all but two respects. First, since the Supreme Court had recently ruled that the vindication of rights under 42 U.S.C. § 1983 in federal court desegregation suits was not to be delayed for exhaustion of state remedies, the district judge was instructed that he should not have abstained from consideration of the plaintiffs' transfer applications. According to Judge Sobeloff, all the plaintiffs were "entitled to admission at the opening of the school year in Sep-

87. For a number of years, until an appropriate court order was entered by direction of the United States Supreme Court, the public schools of Prince Edward County, Virginia, were closed. See Griffin v. Board of Supervisors of Prince Edward County, 322 F.2d 332 (4th Cir. 1963), rev'd sub nom. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Allen v. County School Bd. of Prince Edward County, 207 F. Supp. 349 (E.D. Va. 1962).

As one of Judge Sobeloff's law clerks at the time, I observed the resolution of that case within the Fourth Circuit. Judge Sobeloff had proposed that his colleagues consider the case en banc. However, as a district court judge, Judge Albert V. Bryan, then of the Fourth Circuit, had treated several aspects of the litigation. Further, the Prince Edward County case was one of the five cases consolidated before the Supreme Court for decision in Brown I, and Judge Sobeloff, participating in the argument of Brown II, had, thus, entered an appearance as an attorney in the case nine years earlier. When the court was convened for argument, Chief Judge Sobeloff disclosed the prior connections that both he and Judge Bryan had with the case and announced that if any party to the appeal objected to participation by either him or Judge Bryan, they would both recuse themselves. An objection was lodged, causing the case to be heard therefore by a panel composed of Judges Haynsworth, Boreman, and J. Spencer Bell. The Fourth Circuit's opinion was signed by Judge Haynsworth; Judge Bell filed a dissenting opinion.

88. Bell v. School Bd. of Powhatan County, 321 F.2d 494, 497 (4th Cir. 1963) (en banc).

89. Id. at 500.

tember, 1963 . . . ." The holding of Carson v. Warlick was finally laid to rest, and named plaintiffs in public school desegregation suits could anticipate speedy vindication of their individual rights.

Judge Sobeloff’s second point of disagreement with the district judge is particularly interesting because it preceded Supreme Court and congressional action on the subject. The district judge had denied the plaintiffs’ request for reasonable counsel fees. Judge Sobeloff recognized that “[t]he general rule is that the award of counsel fees lies within the sound discretion of the trial court . . . .” However, reviewing the denial “in the perspective of all the surrounding circumstances,” he reasoned that the defendants’ “long continued pattern of evasion and obstruction” made it clear that “[t]he equitable remedy . . . [would be] far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme.” This appears to be the first reported school case in which counsel fees were directed by an appellate court.

I was Judge Sobeloff’s law clerk when Bell was heard and decided and, therefore, remember the decisional process well. Immediately following the argument and the judges’ initial conference, Judge Sobeloff and I sat down to discuss the case and the preparation of the opinion. We began with a discussion of the bench memorandum that I had prepared for him prior to the argument. It was the Judge’s practice to read manuscripts with a pencil in his hand which, from a law clerk’s perspective, he sometimes employed promiscuously. Thus, as we read the memorandum and discussed the case, he nimbly rewrote and edited the manuscript, transforming it, as he always did with the drafts or memoranda prepared by his law clerks, entirely into his own product. I recall my surprise when we finished the manuscript, and he declared that I was to add a few case references, check the others, and have the manuscript retyped as the draft opinion. I was even more surprised when he informed me that he intended to propose to his colleagues that they reverse on the attorneys’ fees point. Since it was then near the end of my clerkship with the Judge and I was reasonably familiar with his court, the Judge did not consider it presumptuous when I suggested that it was

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91. Bell v. School Bd. of Powhatan County, 321 F.2d 494, 499-500 (4th Cir. 1963) (en banc).
92. Id.
93. Id.
unlikely that he could muster a majority for this position. He could count on Judge J. Spencer Bell, but I doubted that he could persuade Judge Haynsworth, Judge Boreman or Judge Bryan. Perhaps, he had received some contrary indication in the judges’ conference. On the other hand, he may simply have thought that the defendants’ actions were so outrageous as to warrant the effort, however futile, to convince his colleagues. Ultimately, Judges Bryan and Bell agreed with him on the counsel fees point. Judges Haynsworth and Boreman dissented from the direction that counsel fees be awarded, but otherwise concurred in the decision.

Thereafter, the court occasionally directed district courts to reconsider requests for counsel fees in school cases. But, counsel fees awards were not again expressly ordered by the court until Congress authorized them in school cases. Even after the district court had awarded counsel fees for work performed in the Richmond case prior to the effective date of the federal statute, a divided Fourth Circuit disallowed them.

After the Bell decision, Judge Sobeloff continued to champion the cause of counsel fees in civil rights cases. He dissenting from the court’s treatment of the counsel fees issue in one of the interminable rounds of the Richmond school litigation. The majority of the court affirmed an award of only $75.00 in attorneys’ fees. Judge Sobeloff protested the court’s conclusion that Bell was limited to the proposition: “Attorneys’ fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board’s unreasonable, obdurate obstinacy.” Anticipating both Congress and the Supreme Court, Judge Sobeloff would have

94. With unerring consistency, Judges Sobeloff and J. Spencer Bell voted together, especially in civil rights, civil liberties, labor, and criminal law cases.
95. Thereafter, Judge Bryan did not always agree with Judge Sobeloff about the propriety of counsel fees. See Buckner v. County School Bd. of Greene County, 332 F.2d 452, 456 (4th Cir. 1964) (Bryan, J., dissenting).
96. Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963) (en banc) (Haynsworth and Boreman, JJ., dissenting only from the award of counsel fees).
97. Brown v. County School Bd. of Frederick County, 327 F.2d 655 (4th Cir. 1964) (en banc) (per curiam); Buckner v. County School Bd. of Greene County, 332 F.2d 452 (4th Cir. 1964).
100. Bradley v. School Bd. of Richmond, 345 F.2d 310, 321 (4th Cir. 1965) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part).
101. Id. at 321.
awarded counsel fees "whenever children are compelled by deliberate official action or inaction to resort to lawyers and courts to vindicate their clearly established and indisputable right to a desegregated education." 102

Near the end of the second period of Judge Sobeloff's school decisions, questions of what constituted full compliance with the Brown principle began to surface. Initially, the Briggs v. Elliott 103 dictum, requiring desegregation rather than integration, was tested through procedural maneuvers. Several years later, the courts had to treat its substance.

The first notable procedural test occurred in 1963 when the School Board of Arlington County, Virginia, had the audacity to move to dissolve the desegregation injunction that had been entered in 1956. The School Board maintained that "its policy of segregation no longer existed and the injunction was unnecessary." 104 Remarkably, the district court granted the motion, dissolved the injunction and dismissed the entire case from its docket. 105 Writing for a panel which included Judges Haynsworth and Boreman, Judge Sobeloff unequivocally reversed the lower court judgment. Surveying the School Board's long history of segregation and resistance both to the Brown decisions and to an orderly resolution of the case, he was singularly unimpressed by the facts that:

the Arlington County governmental body had adopted an ordinance electing to remove the school assignment power from the state Pupil Placement Board to the local School Board and that on September 21, 1961, the Board had adopted a resolution rescinding the policy of segregation... [and that the Board had ruled] that attendance shall be in accordance with residential areas fixed by the School Board from time to time... 106

Rather, Judge Sobeloff concluded that the School Board's history


105. 204 F. Supp. 620.

106. 324 F.2d at 305.
of segregation and obstruction clearly had not been dissipated by its few recent actions. Specifically, the Board’s new pupil placement program included a minority pupil transfer provision similar to the provisions declared unlawful by the Supreme Court and the Fourth Circuit.\(^\text{107}\) Judge Sobeloff then determined: “The District Court’s finding that there is no evidence to sustain the charge that geographic boundaries were established to maintain segregation is clearly erroneous.”\(^\text{108}\) At most, the School Board’s recent conduct was found to constitute a “good faith beginning of compliance [which] might be a defense to a contempt citation for violating an injunction; it is no ground for rescission.”\(^\text{109}\)

The next round of litigation involving the Arlington County school system was even more bizarre. In 1965, writing for the court, Judge Sobeloff decided the fifth appeal to bring the public school problems of Arlington County before the court.\(^\text{110}\) “The novel feature of the present appeal is that when the Board acted, as it thought, to comply with earlier orders of this court as well as to improve the education system of the county, it was, at the instance of white parents, enjoined by the district court from putting its plans into effect.”\(^\text{111}\) Finally beginning to recognize its constitutional obligation, the School Board had divided the county into two integrated public school attendance districts for junior high school, replacing the three segregated districts that had previously existed. The racial composition of each of the new districts was approximately 75% white and 25% black. For each junior high school grade, all of the students in a district attended school in the same building. In one district, Jefferson, this meant that all seventh graders were housed in one school while all eighth and ninth graders were housed in another school. In a suit brought by white parents, the district court found the plan unlawful “on the grounds that the School Board ‘took race into consideration’ in redrawing the boundary lines, and that the plaintiffs are denied equal educational opportunities because the newly-created Jefferson District will be maintained not as a single- but as a dual-building district, separating the seventh grade pupils from the eighth and ninth grade pupils.”\(^\text{112}\)

\(^{107}\) Id. at 307.

\(^{108}\) Id. at 308.

\(^{109}\) Id. Accord, Bowditch v. Buncombe County Bd. of Educ., 345 F.2d 329, 332 (4th Cir. 1965) (en banc) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part).

\(^{110}\) Wanner v. County School Bd. of Arlington County, 357 F.2d 452 (4th Cir. 1965).

\(^{111}\) Id. at 453 (footnote omitted).

\(^{112}\) Id. at 454.
Judge Sobeloff left no doubt as to the position he was taking when dealing with a school board's good faith exercise of discretion to dismantle a formerly biracial school system. He distinguished between what a court could require a school district to do and what a school district could do voluntarily to desegregate and then declared:

It would be stultifying to hold that a board may not move to undo arrangements artifically contrived to effect or maintain segregation on the ground that this interference with the status quo would involve "consideration of race." When school authorities recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discontents.

Judge Sobeloff further ruled that the district court's finding that the School Board's plan denied the white students equal education opportunity was "clearly erroneous." More significantly, he lectured the district court on the applicable legal standard: "where a school board is attempting in good faith to eliminate or reduce segregation, courts are not commissioned to enter into a debate with school authorities as to which redistricting plan among several is preferable from an educational standpoint." Additionally, he stated that "[t]here is no legally protected vested interest in segregation." The Supreme Court, passing upon similar issues in 1971, essentially agreed.

As a corollary to the Arlington County decisions, the Fourth Circuit later ruled, with Judge Sobeloff entering a special concurrence, that white children who have been assigned to desegregated schools have standing to challenge a school system's desegregation plan on the ground that "the school to which they are assigned is not a part of a unitary school system, but has instead been singled out for arbitrary mixing to appease the Department of Health, Education, and Welfare and the federal courts."
Judge Sobeloff observed in his concurring opinion that "[w]hen the controversy is fit for judicial scrutiny and within the outer bounds of Article III, a federal court should not introduce unnecessary standing barriers, but should proceed to the merits and end further delay in the implementation of the mandate of Brown." 120

Having determined that individual plaintiffs cannot be required to exhaust state remedies prior to securing federal judicial vindication of their fourteenth amendment rights to a desegregated education, 121 that a mere "good faith beginning" toward compliance with a school board's equal education obligation is insufficient to free a school board from district court equity supervision, 122 and that white parents and children have no legally cognizable interest in opposing race-conscious desegregation plans 123 (but are entitled to challenge continued maintenance of a dual school system), 124 Judge Sobeloff then addressed several converse propositions. A class action was brought on behalf of several black children in Greene County, Virginia, requesting "admission of the named plaintiffs to a specified school" and "an injunction against the operation of a biracial school system throughout the county. . . ." 125 After the filing of the lawsuit, the Virginia Pupil Placement Board granted the transfer applications of six of the plaintiffs, one child had withdrawn his application, and the remaining two children were disqualified on ostensibly neutral grounds. "The District Court, believing the case to be moot because all of the individual infant plaintiffs were in schools chosen by their parents or legal guardians, removed the case from the active docket," refused "to consider injunctive relief and terminate[d] the suit . . . ." 126 The case was reversed and remanded for a hearing to formulate a desegregation plan and to consider an award of counsel fees. Judge Sobeloff noted: "It is too late in the day for this school board to say that merely by the admission of a few plaintiffs without taking any further action, it is satisfying the Supreme Court's mandate for 'good faith com-

120. Id. at 183 (Sobeloff, J., concurring).
121. Bell v. School Bd. of Powhatan County, 321 F.2d 494 (4th Cir. 1963) (en banc).
122. Brooks v. County School Bd. of Arlington County, 324 F.2d 303, 308 (4th Cir. 1963).
123. Wanner v. County School Bd. of Arlington County, 357 F.2d 452 (4th Cir. 1966).
125. Buckner v. County School Bd. of Greene County, 332 F.2d 452, 453 (4th Cir. 1964) (en banc).
126. Id. at 453.
pliance at the earliest practicable date.'" 127 Thus, he served notice that mootness would be no more availing than either exhaustion or abstention in foreclosing meaningful class action relief. Tokenism was now unacceptable, and comprehensive desegregation plans would hereinafter be required. Individual black plaintiffs now had broad standing to secure the constitutional interests of their class even after having vindicated their individual interests.

GIVING MEANING TO INTEGRATION

The second stage of Judge Sobeloff's school desegregation decisions had now ended. Several factors signaled the passage into the third stage. Generally, tokenism was judicially declared to be dead, and elimination of segregation was mandated by Congress. However, few appellate school decisions, including those of the Fourth Circuit and the Supreme Court, were unanimous. The issues in school cases had simultaneously become more simplified and more complex. Desegregation and integration continued to be the germinal concern, but attention also focused on equal educational opportunities that were more broadly defined to include such matters as the efficacy of school programs and philosophies. 128 Finally, the Supreme Court required that public schools had to be integrated, not desegregated. 129 This pronouncement however, did not end the debate. More subtle issues began to arise. Does integration mean racial balance? How is integration in public schools to be achieved when residential neighborhoods are segregated? 130 How is "white flight" to be dealt with? 131 What happens when white portions of biracial school districts formally secede and establish new uniracial school districts? 132 What happens when white students transfer from public schools to private schools? Does de facto segregation violate the Constitution? 133 If not, how does one prove de jure segregation in racially segregated school systems located in states in which no law mandated separ-
ration of the races?135 Can an unconstitutional denial of equal educational opportunity be proven in the absence of proof of unlawful racial or ethnic segregation?136 These questions faced the Supreme Court in the 1970’s.

Judge Sobeloff addressed many of the subtle issues of equal educational opportunity to come before the federal courts in the late 1960’s and early 1970’s. Indeed, he participated in some of the cases that ultimately presented these subtleties to the Supreme Court. Typically, he and a majority of the Fourth Circuit did not agree on approaches or answers. Tested by the standard of Supreme Court approval, Judge Sobeloff was correct more often than were his colleagues.

The transition from the second to the third stage of Judge Sobeloff’s school decisions was symbolized by certain occurrences within the Fourth Circuit itself. In December 1965, having attained the age of seventy, Judge Sobeloff relinquished his position as chief judge. Also, shortly before his retirement as chief judge, the court began hearing virtually all school desegregation cases en banc. Judge Sobeloff continued to participate in these hearings before the full court until he retired to senior judge status in 1971.

After his retirement as chief judge, Judge Sobeloff signed only one school opinion for a majority of the court.137 His authorship of numerous separate opinions indicates that he could no longer speak consistently for a majority of the court. Nevertheless he frequently chose to join the opinions prepared by his colleagues without further comment.138

Judge Sobeloff acquiesced in the views of his judicial brethren for various reasons. On some occasions, he agreed almost completely with the position expressed by his colleagues. At other times, his silence was due to a sense of judicial expediency. He always accepted, as a fundamental principle of judicial statecraft, that a judge had limited credit upon which to draw to stand separate and apart from the majority on his court. Hence, Judge Sobeloff considered preparing many more dissenting and concur-


137. Wanner v. County School Bd. of Arlington County, 357 F.2d 452 (4th Cir. 1966).

138. E.g., Wall v. Stanly County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967) (en banc).
ring opinions than he ever filed. 139 Often, circulation of a separate opinion among his colleagues was sufficient to alter the shape and thrust of the majority opinion, making it unnecessary for Judge Sobeloff to express his views separately. Even in those instances when only a modicum of compromise was achieved, Judge Sobeloff, to preserve his credibility, sometimes accepted the gain and withheld publication of a separate view.

When Judge Sobeloff chose to file a separate opinion, he did so for at least one of four reasons. He may have wanted to emphasize an important point not adequately articulated by the majority. Perhaps, he saw an opportunity to air an alternative formulation that might then be tested in subsequent cases. He sometimes felt it necessary to explain an apparent inconsistency between the court's decision and some prior result and formulation. Finally, he may have chosen to express sharp disagreement with the majority in the hope either that other inferior courts would accept his view or that the Supreme Court would note the dissent and review the decision. In such instances, Judge Sobeloff's dissenting opinions were, in effect, petitions for writs of certiorari. His rate of success in so directing cases to the Supreme Court and in having his position adopted was remarkably high and tends to confirm what political scientists have termed the "cure theory" of appellate review. 140 In 1967, I received evidence of the influence of a Sobeloff dissent. A former clerk to a Supreme Court Justice informed me that had it not been for Judge Sobeloff's separate opinion in a school case, the Supreme Court would not have reviewed the Fourth Circuit's decision. He was speaking of an early round in the Richmond school litigation. 141

In the midst of the proceedings challenging the constitutionality of Richmond's public school system, the School Board had passed several resolutions eliminating rigid school assignment. The Board then adopted an open enrollment system whereby, subject only to school capacity and timeliness of application, each student freely selected his school upon entering elementary school. The new system also permitted any student to transfer to another school of his choice. A majority of the court sustained this plan, observing "that the Fourteenth Amendment prohibition is

141. Bradley v. School Bd. of Richmond, 345 F.2d 310, 321 (4th Cir. 1965) (en banc) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part).
not against segregation as such. The proscription is against discrimination."

Joined by Judge J. Spencer Bell, Judge Sobeloff concurred in part and dissented in part. Accepting the School Board's open enrollment Resolution as only an interim measure subject to immediate re-evaluation by the district court, he concurred in the majority's approval of the plan "in the hope of encouraging the Board so to administer the Resolution as to make it a genuine and effective plan of desegregation . . . ." But, Judge Sobeloff left no doubt that he was unimpressed by the Board's efforts to date and that he questioned the adequacy of the freedom of choice plan. Disagreeing with the majority, he insisted that school authorities have an affirmative obligation to integrate and not merely to desegregate dual school systems. Judge Sobeloff, therefore, could not agree with the majority and the district court that the open enrollment plan justified dissolution of the injunction against the School Board. Further, he dissented from the majority's refusal to order an immediate inquiry into faculty desegregation. Clearly, the plaintiff students and parents had standing to raise this issue. "Indeed, as long as there is a strict separation of the races in faculties, schools will remain 'white' and 'Negro,' making student desegregation more difficult." Noting that the issue had been squarely presented to the district court, Judge Sobeloff observed: "There is no legal reason why

142. Id. at 316.
143. Id. at 321.
144. Id.
145. Id. at 323. Judge Sobeloff was not, however, prepared to propose either busing or racial balance—issues not then before the court. In another concurring opinion, filed the same day, Judge Sobeloff elaborated on his position in the Bradley case. He endorsed the neighborhood school but only insofar as zone boundaries are drawn without racial discrimination along natural geographical lines . . . . We are conscious, however that the size and location of a school building may determine the character of the neighborhood it serves. . . . [S]chool building plans may [not] be employed to perpetuate and promote segregation.


146. Bradley v. School Bd. of Richmond, 345 F.2d 310, 321 (4th Cir. 1965) (en banc) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part). See also Bowditch v. Buncombe County Bd. of Educ., 345 F.2d 329, 332 (4th Cir. 1965) (en banc) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part).

147. Bradley v. School Bd. of Richmond, 345 F.2d 310, 324 (4th Cir. 1965) (en banc) (Sobeloff and J. Spencer Bell, JJ., concurring in part and dissenting in part).
desegregation of faculties and student bodies may not proceed simultaneously."\textsuperscript{148}

The Supreme Court granted a writ of certiorari and, in a per curiam opinion, reversed and remanded. The Court accepted Judge Sobeloff's position on the issue of faculty desegregation and held that the plaintiffs were entitled to a full and immediate evidentiary hearing upon their contention that faculty allocation on an alleged racial basis rendered the defendants' plan inadequate under the principles of \textit{Brown}.\textsuperscript{149}

Judge Sobeloff continued to pursue his attack, begun in the Richmond case, on the unfortunate dictum in \textit{Briggs v. Elliott} that the Constitution requires desegregation, not integration. Consequently, in the Charles City County and New Kent County school cases, he wrote a special concurrence declaring:

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."\textsuperscript{150}

On this occasion, too, the Supreme Court accepted Judge Sobeloff's invitation to review.\textsuperscript{151} Specifically adopting Judge Sobeloff's view that although freedom of choice may be a permissible desegregation technique, it is not a complete solution,\textsuperscript{152} the Supreme Court brushed aside the \textit{Briggs v. Elliott} philosophy.

\textit{Brown II} was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multi-faceted problems would arise which would require time and flexibility for a successful resolution. School boards

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\item \textsuperscript{148} \textit{Id.} at 324.
\item \textsuperscript{149} \textit{Bradley v. School Bd. of Richmond}, 382 U.S. 103 (1965) (per curiam). Thereafter, Judge Sobeloff continued to press his court on the issue of faculty desegregation. Chambers \textit{v. Iredell County Bd. of Edu.} 423 F.2d 613, 618-20 (4th Cir. 1970) (en banc) (Sobeloff and Winter, J.J., dissenting from the court's refusal to "order a preventive injunction against discriminatory hiring. . . ."); Bowman \textit{v. County School Bd. of Charles City County}, 382 F.2d 326, 335-36 (4th Cir. 1967) (en banc) (Sobeloff and Winter, J.J., concurring).
\item \textsuperscript{150} Bowman \textit{v. County School Bd. of Charles City County}, 382 F.2d 326, 333 (4th Cir. 1967) (en banc) (Sobeloff and Winter, J.J., concurring specially) (footnote omitted). Judge Sobeloff's opinion was also a special concurrence in the court's decision in Green \textit{v. County School Bd. of New Kent County}, 382 F.2d 338 (4th Cir. 1967) (en banc).
\item \textsuperscript{151} Green \textit{v. County School Bd. of New Kent County}, 391 U.S. 430, 435 (1968).
\item \textsuperscript{152} \textit{Id.} at 439-40.
\end{itemize}
such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.\textsuperscript{153}

The Supreme Court then ruled: "The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system."\textsuperscript{154} There had been no shift of white students to formerly black schools, and the transfer of black students to formerly white schools was negligible. "In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with the responsibility which \textit{Brown II} placed squarely on the School Board."\textsuperscript{155} The Court ordered that the Board "formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."\textsuperscript{156}

Throughout the remainder of his career, Judge Sobeloff continued in step with the Supreme Court on the implementation of the "root and branch" principle. For example, his separate opinion entered in \textit{Swann v. Charlotte-Mecklenburg Board of}

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\textsuperscript{153} Id. at 437-38. Subsequently, in Walker v. County School Bd. of Brunswick County, 413 F.2d 53, 54 n.2 (4th Cir.) (per curiam) (emphasis added), \textit{cert. denied}, 396 U.S. 1061 (1969), the Fourth Circuit explicitly rejected the Briggs v. Elliott dictum.
\textsuperscript{154} 391 U.S. at 441.
\textsuperscript{155} 391 U.S. at 441-42.
\textsuperscript{156} Id. at 442. The reference to zoning was employed to flag an observation in Judge Sobeloff's opinion that:

"In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographical zoning. The conditions in this county present a classical case for this expedient."

391 U.S. at 441-42 n.6 (quoting Bowman v. County School Bd. of Charles City County, 382 F.2d 326, 332 n.3 (4th Cir. 1967) (en banc) (Sobeloff and Winter, JJ., concurring specially)).

The Supreme Court also suggested the "pairing" of formerly all white and all black schools, a remedy which Judge Sobeloff would have had the Fourth Circuit pursue in Chambers v. Iredell County Bd. of Educ., 423 F.2d 613, 618 (4th Cir. 1970) (en banc) (Sobeloff and Winter, JJ., dissenting).
dealing with the issue of school busing foreshadowed the position taken by the Supreme Court. In Charlotte-Mecklenburg, black and white housing patterns were rigidly segregated. Therefore, considerable busing was necessary to dismantle the biracial school system, "root and branch." Disagreeing with the Fourth Circuit's determination that the district court's plan for massive busing at the elementary school level "is an unreasonable burden," Judge Sobeloff would have affirmed the plan in its entirety. A unanimous Supreme Court adopted, in substance, the position taken by Judge Sobeloff.

In his final years, Judge Sobeloff did not merely treat the mechanics of integration. He also contributed to the philosophy of race relations. In this respect, his last two school decisions were his most magnificent. These opinions demonstrate that, until his death, Judge Sobeloff continued to grow intellectually and spiritually and to enlarge his understanding of race relations in the United States. Each of these opinions was a complete essay. The first opinion addressed the politics and morality of racism while the second was more concerned with continuing the evolution of legal standards for purging the "root and branch" of racism.

Judge Sobeloff wrote a concurring opinion in the Clarendon County case primarily in response to a partial dissent offered by Judges Craven, Haynsworth and Bryan. The Fourth Circuit affirmed the district court order requiring the implementation of a comprehensive desegregation plan. The dissenters, fearing "white flight," would have modified the desegregation plan. Hence, they proposed that the case be remanded to the district court with instructions to require the School Board to submit a
pupil assignment plan that would allow most of the white stu-
dents to attend one high school and one elementary school.\textsuperscript{164}

Judge Sobeloff argued that the dissenters' position was not
only morally and constitutionally untenable, but "it offers a
premium for community resistance."\textsuperscript{165} His opinion was also a
pointed essay on racism in the United States.\textsuperscript{166} Few judges or
commentators since Justice Harlan dissented in the \textit{Civil Rights Cases}\textsuperscript{167}
and \textit{Plessy v. Ferguson}\textsuperscript{168} have written as effectively on
the subject. Judge Sobeloff correctly understood that:

The linch-pin of the dissent is the notion that, ideally, the
goal of desegregation should be to achieve an "optimal mix,"
consisting of a white majority. It suggests, as did Dr. Pettigrew in his testimony in \textit{Brewer v. School Board of City of
Norfolk} (4th Cir. 1970), that desegregation should not go so
far as to put whites in minority situations. In \textit{Brewer} we gave
short shrift to the Board "principles" fashioned largely from
Dr. Pettigrew's testimony. Summary treatment is all it de-
served.\textsuperscript{169}

Understanding the dissenting opinion "to constitute a direct at-
tack on the roots of the \textit{Brown} decision."\textsuperscript{170} Judge Sobeloff at-
ttempted to correct the "profound misunderstanding of the social
and constitutional history of his nation and the Negro people,"\textsuperscript{171}
by tracing the development of the law from \textit{Dred Scott v. Sandford}\textsuperscript{172}
to the present. He then expounded on his primary
point:

The invidious nature of the Pettigrew thesis, advanced by
the dissent in the present case, thus emerges. Its central
proposition is that the value of a school depends on the char-
acteristics of a majority of its students and superiority is
related to whiteness, inferiority to blackness. Although the
theory is couched in terms of "socio-economic class" and the
necessity for the creation of a "middle-class milieu," never-
theless, at bottom, it rests on the generalization that, educa-

\textsuperscript{164} Id. at 822.
\textsuperscript{165} Id. at 827.
\textsuperscript{166} Id. at 823.
\textsuperscript{167} 109 U.S. 3, 26 (1883).
\textsuperscript{168} 163 U.S. 537, 552 (1896).
\textsuperscript{169} Brunson v. Board of Trustees of School Dist. No. 1 of Clarendon County, 429
F.2d 820, 824 (4th Cir. 1970) (en banc) (Sobeloff, J., concurring).
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} 60 U.S. (19 How.) 393 (1856).
tionally speaking, white pupils are somehow better or more desirable than black pupils. This premise leads to the next proposition, that association with white pupils helps the blacks and so long as whites predominate does not harm the white children. But once the number of whites approaches minority, then association with the inferior black children hurts the whites and, because there are not enough of the superior whites to go around, does not appreciably help the blacks.

This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*. The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. Certainly it is hoped that under integration members of each race will benefit from unfettered contact with their peers. But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.  

In his last school opinion, Judge Sobeloff treated the latest stratagem of resistance to integration: "the carving out of new school districts in order to achieve racial compositions more acceptable to the white community." Correctly anticipating the view of a majority of the Supreme Court, he concluded that this stratagem was merely another of the "evasive tactics pursued by white communities to avoid the mandate of *Brown* . . . [that] have ranged from outright nullification by means of massive re-

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istance laws and by open and occasional violent defiance, through discretionary pupil assignment laws and public tuition grants in support of private segregated schools, to token integration plans parading under the banner of 'freedom-of-choice.'”

The majority of the Fourth Circuit, however, did not agree with Judge Sobeloff that redistricting was necessarily a device for avoiding school integration.

To insulate the school authorities from constitutional mandate, Judge Sobeloff understood the Fourth Circuit to have established a test whereby “District Courts are told to intercede only if they find that racial considerations were the primary purpose in the creation of the new school units.” In dissent, he declared that purpose is not the proper standard: “if challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interests is demonstrated.” Not content to rely on the effect test alone, he went on to demonstrate that, even applying a purpose test, the defendants’ actions were unconstitutional. Implicitly applying the tort standard that a person is “responsible for the natural consequences of his actions,” Judge Sobeloff demonstrated the unlawfully discriminatory inferences to be drawn from the defendants’ action. Once again, he had anticipated the Supreme Court as it moved to treat the difference between de facto and de jure segregation.

It is fitting to conclude this essay by quoting the very last paragraph Judge Sobeloff published on the subject of public school race relations law. Surely, it best summarizes his efforts and the state of his development:

Racial peace and the good order and stability of our society may depend more than some realize on a convincing demonstration by our courts that true equality and nothing less is precisely what we mean by our proclaimed ideal of


177. Id. at 594 (footnote omitted).


“the equal protection of the laws.” The palpable evasions portrayed in this series of cases should be firmly condemned and enjoined. Such examples of racial inequities do not go unheeded by the adversely affected group. They are noted and resented. The humiliations inflicted by such cynical maneuvers feed the fires of hostility and aggravate the problem of maintaining peaceful race relations in the land. In this connection it is timely to bear in mind the admonition of the elder Mr. Justice Harlan, dissenting in Plessy v. Ferguson.

“The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.”

JUDGE SOBELOFF'S INFLUENCE UPON CRIMINAL REFORM

ARNOLD M. WEINER*

Throughout his career, Simon Sobeloff demonstrated an acute concern for improving the mechanism by which our society deals with criminal behavior. Perhaps, his leadership was most strongly felt in the matters of appellate sentencing review and criminal responsibility. His advocacy of reform in these areas demonstrated his willingness to recognize inadequacies in the criminal process, his ability to grasp and articulate the problems and his sensitivity in reaching toward solutions.

SENTENCING REVIEW

In his frequent speeches devoted to sentencing review, Judge Sobeloff exposed a critical flaw in our system of criminal justice. Although the law is “so solicitous of the defendant in safeguarding his rights at every stage of the trial,” he observed, it “leaves him almost completely without protection when he stands before the judge to be sentenced.” For the nine out of ten defendants who plead guilty, punishment is the only issue in their cases, and yet the law reposes “in a single judge the sole responsibility for this vital function.” Judge Sobeloff noted that statistics and case studies “constantly remind us of shocking abuses and irrational disparities.” Unfortunately, experience teaches that “[a]s long as virtually unrestricted discretion is vested in sentencing judges, there will be ample room for grossly-mistaken, arbitrary and emotionally-dictated judgments.” On the other side of the coin,

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2. The Sentence of the Court, supra note 1, at 13.


4. Id. at 3.

5. Id. at 6.
he added, misuse of the sentencing power sometimes results in "grossly inadequate sentences." At either extreme, Judge Sobeloff believed, "fantastic vagaries tear down the mightiest sanction of the law—respect for the courts."

The federal judiciary, the Judge observed, although acutely aware of the problem, has resorted only to inadequate steps toward solution. Periodic sentencing institutes, convened infrequently for the exchange of views on sentencing policy, and the use of sentencing panels in a handful of districts do little to remedy the overall problem. Judge Sobeloff was of the opinion that such voluntary sessions "will have but slight impact on extreme disparities caused by some judges who will respond to nothing less than directions on appeal." The "basic concept of checks and balances," he declared, "should apply to men's destinies as well as to procedural matters." The appellate courts are suited to the task, he reasoned, because they are removed from the "emotional overtones of the trial" and because of their wider perspective. As in review of other matters involving judicial discretion, the appellate court would have the benefit of the trial judge's reasons and the source materials, including presentence reports, on which the lower court had acted. Judge Sobeloff proposed that the appellate court have the authority to increase the sentence as well as to diminish it. The Judge believed that the possibility of such review would have a "sobering and moderating effect." He shrewdly observed: "The existence of the power would make its exercise unnecessary in all but a few cases." The authority to review sentences, moreover, could be expected to lessen those appeals which recite legal bases but which are only "anguished protests against excessive punishment."

In his decisions, when the issue was presented directly as in United States v. Martell, Judge Sobeloff declared that the court was without authority to review a sentence imposed within statutory limits. On occasion, however, he did reach out to provide

6. The Sentence of the Court, supra note 1, at 16.
7. Id.
8. Appellate Review of Sentences, supra note 1, at 11-12.
9. Id. at 12-13.
10. Id. at 9.
11. The Sentence of the Court, supra note 1, at 17.
12. Id.
13. Id.
14. Id.
15. Federalism and Individual Liberties, supra note 1, at 305.
16. 335 F.2d 764 (4th Cir. 1964).
relief from a particularly shocking disposition. In *United States v. Jenkins*,\(^{17}\) for example, a two year sentence had been imposed upon a defendant who had attempted forgery pursuant to a plan “so preposterous and so manifestly destined to failure that no reasonable mind should expect it to deceive anyone.”\(^{18}\) The Fourth Circuit, in an opinion by Judge Sobeloff, vacated the sentence sua sponte and remanded the case for inquiry “into the defendant’s mental condition at the time of his offense.”\(^{19}\) The district judge ordered a mental examination and thereafter suspended all but six months of the sentence.\(^{20}\) Similarly, in *United States v. Hawthorne*,\(^{21}\) a small-time gambler, who had been convicted on two gambling charges and who had irritated the trial judge, was given concurrent five year sentences. The court, although it affirmed one of the convictions, remanded the case so that “the judge may reconsider the sentence” in light of the partial reversal.\(^{22}\) The district judge, stating that he was “heeding the hint . . . or suggestion of the Court of Appeals,” reduced the sentence to two years.\(^{23}\)

The prodding of the appellate court, without a firm legal foundation, was not always so successful. In *United States v. Wilson*,\(^{24}\) a young man, with no previous record, pleaded guilty to forgery of a small check. In the two years between his arrest and the disposition of his case, he maintained a steady job and led an exemplary life. Although the probation officer, after pre-sentence investigation, recommended probation, the district judge sentenced the defendant to three years imprisonment. Judge Sobeloff expressed the court’s “sense of perplexity and concern” over the severity of the sentence, observing that “the disparity between the crime and the punishment is baffling.”\(^{25}\) Despite the rule that it is not an appellate court’s function to review sentences, he declared, the case would be remanded for

\(^{17}\) 347 F.2d 345 (4th Cir. 1965).
\(^{18}\) *Id.* at 348.
\(^{19}\) *Id.*
\(^{21}\) 356 F.2d 740 (4th Cir. 1966).
\(^{22}\) *Id.* at 742.
\(^{23}\) United States v. Hawthorne, Cr. No. 10664 (S.D. W. Va. 1966), Record at 9-10. At the resentencing, the district judge also said that he was acting in spite of “my irritation with my brethren on the Court of Appeals” and “the irritations that this man placed on the Court from time to time.” *Id.*, Record at 7-8. The reduced sentence was affirmed in a second appeal. *United States v. Hawthorne*, 370 F.2d 330 (4th Cir. 1966).
\(^{24}\) 450 F.2d 495 (4th Cir. 1971).
\(^{25}\) *Id.* at 498.
reconsideration because "the sentence here may have been the product of sheer inadvertence" and not "a deliberate exercise of judicial discretion." The district judge, refusing to relent, promptly resented the defendant to another three year term. A second appeal yielded only a per curiam affirmation.

In spite of a growing number of proponents, the federal system still remains without any mechanism for sentence review. Judge Marvin Frankel of the Southern District of New York reports that sentencing institutes are infrequent and brief and: "For the most part, the judges tend to record their differences, reassure each other of their independence and go home to do their disparate thing as before." Sentencing panels or councils have been utilized by only a handful of districts. Although the Ninth Circuit, in a 1964 sentencing institute, adopted a resolution calling for the creation of such panels, Judge Frankel reports that no district court within the circuit has followed the resolution. Opponents of sentencing review, not all of them district judges, remain vocal.

26. Id.
29. In 1968, the American Bar Association adopted standards, prepared by an advisory committee chaired by Judge Sobeloff, relating to appellate review of sentences. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968). The standards provide that sentence review be available in all cases where provision is made for review of the conviction, id. Standard 1.1 (a), at 13, and that the conviction and sentence be reviewed by the same court as part of the direct appeal, id. Standard 2.1, at 31. The record on appeal, the standards suggest, should include a full record of the sentencing procedure, copies of presentence and diagnostic reports, and such parts of the trial record as are relevant to the sentencing decision. Id. Standard 2.3, at 42. The appellate court is required to make its own examination of the record and to set forth the basis for its disposition in a written opinion. Id. Standard 3.1, at 48. Contrary to the earlier Sobeloff proposals, as the consequence of a close vote, the standards provide that the appellate court shall not be empowered to increase sentences on review. Id. Standard 3.4, at 55; see Commentary 55-66.
31. Frankel, supra note 30, at 20.
32. Id. at 21.
Criminal Responsibility

The issue of criminal responsibility drew Judge Sobeloff's early attention. In 1955, while Solicitor General, he addressed the National Conference of Bar Councils on the subject. 34 Durham v. United States 35 had just recently been decided, and the American Law Institute was considering various proposed formulations for criminal responsibility. Sensible reform, Judge Sobeloff understood, involved a careful blend of philosophical and psychological considerations. He accepted the traditional assumption of the criminal law that men act in accordance with free will; that those who exercise their will to transgress the law are to be punished; but that "there are conditions, recognized as disease or defect, which in good morals should excuse the afflicted one from criminal responsibility." 36

With remarkable foresight, Judge Sobeloff cautioned against excessive preoccupation "with the minutiae" of the differences between the new formulations, emphasizing that they "reveal a greater degree of accord than of actual disharmony." 37 The demise of the McNaghten rule, 38 and the substitution of any of the new formulations, would operate to permit a full inquiry into the question of volition as well as that of cognition. More importantly, a reformulation would permit the courts to free themselves from the stinted procedures by which expert testimony was received only in conclusory form and in the language of the legal test. The Judge observed that each of the proposed formulations "allows the jury to receive more light" and encourages testimony "cast in terms that are meaningful to the witness and that can be more amply explained." 39 The suggested changes, moreover,

34. This speech was subsequently published as an article. Sobeloff, From McNaghten to Durham, and Beyond-A Discussion of Insanity and the Criminal Law, 15 Md. L. Rev. 93 (1955) [hereinafter cited as Insanity and the Criminal Law].

35. 214 F.2d 862 (D.C. Cir. 1954).

36. Insanity and the Criminal Law, supra note 34, at 105. The free will assumption, which Judge Sobeloff accepted on moral and philosophical grounds, is challenged by those who would severely limit or abolish the insanity defense. Their arguments, proceeding from a deterministic concept of human behavior, are premised largely, if not exclusively, on psychological assumptions. See Diamond, Criminal Responsibility of the Addict: Conviction by Force of Habit, 1 Fordham Urban L.J. 395 (1973); Goldstein & Katz, Abolish the 'Insanity Defense'—Why Not?, 72 Yale L.J. 833 (1963); Kittrie, Responsibility and the Therapeutic State, 19 Wayne L. Rev. 873 (1973); Lyons, Unobvious Excuses in the Criminal Law, 19 Wayne L. Rev. 925 (1973); Monahan, Abolish the Insanity Defense?—Not Yet, 26 Rutgers L. Rev. 719 (1973); Rose, Criminal Responsibility and Competency as Influenced by Organic Disease, 35 Mo. L. Rev. 326 (1970).

37. Insanity and the Criminal Law, supra note 34, at 105.


39. Insanity and the Criminal Law, supra note 34, at 107.
are intended to provide a "means . . . to bring the legal and medical professions together."\textsuperscript{40}

In a characteristic display of pragmatism Judge Sobeloff recognized that the changes would neither "spell ruin to law enforcement" nor "bring salvation."\textsuperscript{41} To those who argued for the complete abolition of the insanity defense, with their particular complaint against the consideration of scientific evidence by untrained juries, he replied that the continued role of juries is "not an unmixed calamity."\textsuperscript{42} He reminded them that, "[j]uries often find ways, sometimes with the benign acquiescence of judges, to mitigate rigidities and absurdities in the law" and that juries "tend to reflect the community sense of justice which courts cannot wholly ignore in maintaining public order."\textsuperscript{43} It was not intended, he added, that greater sensitivity in assessing responsibility be at the expense of society's need to protect itself. Those acquitted by reason of insanity "should be put in detention and should remain there as long as necessary."\textsuperscript{44} The Judge argued that a "warden's certificate that the prisoner has served his sentence and been discharged regardless of his medical condition" offers less protection than "detention and treatment in a hospital, and ultimately a medical judgment that the person is not likely to offend again."\textsuperscript{45}

The decisions of the Fourth Circuit bear the heavy imprint of the views expressed by Judge Sobeloff. In a series of opinions, beginning in 1961 with \textit{Hall v. United States},\textsuperscript{46} Judge Sobeloff emphasized the role of the jury as arbiter of the responsibility issue, declaring that only "slight" evidence, not even "such as to generate a reasonable doubt," was sufficient to overcome the pre-

\textsuperscript{40} Id. at 109. The urgent need for further efforts in this direction is the subject of considerable scholarly concern. See, e.g., H. Fingarette, \textit{The Meaning of Criminal Insanity} (1972) [hereinafter cited as Fingarette]; S. Halleck, \textit{Psychiatry and the Dilemmas of Crime} (1967); K. Menninger, \textit{The Crime of Punishment} (1968); H. Packer, \textit{The Limits of the Criminal Sanction} (1968). Fingarette suggests, optimistically, that "psychiatric understanding" was "the mental concepts of common sense and the law"; that "the contemporary psychiatrist is also deeply concerned with questions of moral values and moral judgments"; and that "moral concepts and issues are as central to psychiatric doctrine and practice as are teleological concepts of wish and purpose." Fingarette 98.

\textsuperscript{41} \textit{Insanity and the Criminal Law}, supra note 34, at 108.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 105.

\textsuperscript{45} Id. at 109.

\textsuperscript{46} 295 F.2d 26, 28 (4th Cir. 1961); see Jacobs v. United States, 350 F.2d 571 (4th Cir. 1966); United States v. Taylor, 437 F.2d 371, 379 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part); cf. Kilbert v. Peyton, 383 F.2d 566 (4th Cir. 1967).
sumption of sanity and to send the question to the factfinder. Without direct reference to any applicable standard, he discussed, in the *Hall* opinion, the need for the jury to consider diffuse expert testimony with respect to the defendant's intellectual and emotional development and as to any condition which might impair his judgment, insight or controls.

When, in 1968, the Fourth Circuit approved the American Law Institute "substantial capacity" test in *United States v. Chandler,*\(^{47}\) the Sobeloff influence was apparent. Judge Haynsworth, in an opinion in which Judge Sobeloff joined, cautioned: "We avoided the imposition of rigid formulas in *Hall,* and we prescribe none now."\(^{48}\) Although "[w]e embrace today's advances," Judge Haynsworth added, "[w]e abjure any formalistic approach which might foreclose variation."\(^{49}\) More significant than the details of the formulation, the opinion continued, was the requirement that the insanity issue, when raised, be fully explored. Henceforth, the opinion noted, the courts must conduct "an unrestricted inquiry into the whole personality of a defendant who surmounts the threshold question of doubt of his responsibility."

Two cases decided shortly after *Chandler* illustrate the care with which Judge Sobeloff sought to implement the new doctrine. In *United States v. Wilson,*\(^{50}\) Judge Sobeloff condemned the trial in which a perfunctory psychiatric examination had been followed by a cursory presentation in court. He stressed the duty of defense counsel and experts to engage "in significant consultation prior to trial"; the "obligation" of the psychiatrist "to present the jury with the underlying data"; and the requirement that counsel conduct a searching inquiry of each expert.\(^{52}\) "The need for judicial supervision is particularly urgent in insanity cases . . . ." he continued, and the trial judge has an affirmative duty to ensure that there is adequate "exploration of the underlying, determinative facts."\(^{53}\) Judge Sobeloff concluded that the years of "intense search" for an improved standard will not have brought about a material advance if appellate courts "tolerate . . . failure to focus on the basic facts indispensable for . . . significant judgment" or

\(^{47}\) 393 F.2d 920 (4th Cir. 1968).
\(^{48}\) Id. at 927.
\(^{49}\) Id.
\(^{50}\) Id. at 926.
\(^{51}\) 399 F.2d 469, 464 (4th Cir. 1968) (Sobeloff, J., dissenting).
\(^{52}\) Id. at 464.
\(^{53}\) Id. at 465.
if "shallow and mechanical . . . performance . . . is validated." 54

In the second case, United States v. Butler, 55 the insanity issue was explored exhaustively in the testimony, but the district judge, in his instructions, departed somewhat from the American Law Institute formulation. Holding that the conviction should not be reversed, Judge Sobeloff declined to permit the court to become immersed in the nuances of insanity instructions. The "whole tenor" of the recent advances, he wrote, was "to discourage a formalistic straitjacket in the examination of the witnesses and the instructions to the juries." 56 If the trial is liberated from "the unnatural restraints" previously imposed, and if an instruction contains adequate description of the cognitive and volitional elements of legal insanity, the Judge concluded, the judgment will not be disturbed. 52

Thus, the Fourth Circuit, rather than adhere to legal formalism, has developed a workable test for criminal responsibility. 58 The new standard strongly reflects Judge Sobeloff's belief that the essence of reform is in the practice to be adopted and not in the language of the formulation.

**Conclusion**

Judge Sobeloff's work was directed toward the greater goal of improvement of our system of criminal justice. As he frequently reminded us, the entire system suffers when unfair procedures are slavishly and mindlessly perpetuated. Sensible reform benefits our entire society and not just the accused. In the best tradition of our empirical legal method, Judge Sobeloff did not

54. Id. at 466. Although the trial had taken place before Chandler, Judge Sobeloff argued that this case be reversed for the lesson which it might afford. The two-member majority of the panel voted for affirmation, noting, however, that the Sobeloff views accurately reflected the procedure to be followed under the new standard and that, had the trial occurred after Chandler, the conviction would have been reversed. Id. at 462.

55. 409 F.2d 1261 (4th Cir. 1969).

56. Id. at 1282.

57. Professor Weihofen has criticized Butler, stating that by this decision: "The Fourth Circuit . . . seems to regard the ALI test as only making a cosmetic change." Weihofen, Detruding the Experts, 1973 WASH. U.L.Q. 38, 45 n.28.

58. Other federal circuits have embraced the ALI rule with varying degrees of flexibility and alertness to the procedural dangers. See United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1979); United States v. White, 447 F.2d 796 (9th Cir. 1971); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Stewart, 443 F.2d 1129 (10th Cir. 1971); United States v. Smith, 437 F.2d 538 (6th Cir. 1970); United States v. O'Neal, 431 F.2d 695 (5th Cir. 1970); United States v. Tarrago, 398 F.2d 621 (2d Cir. 1968); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
hesitate to declare that, while correct rulings deserved to be precedents and should be followed, those rulings or procedures which, through experience, have proven unsatisfactory, must be changed.