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Brown v. Board of Education: 60 Years Later

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May 17 marked the 60th anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954). By a 9-0 vote, the U.S. Supreme Court ordered school districts to desegregate with "all deliberate speed." Legal scholars, pundits and ordinary citizens have debated *Brown*'s impact. Some have hailed the case as a watershed moment in the history of the American legal system—a decision that launched the civil rights movement of the ’50s and ’60s. Subsequent critics have claimed that the practical impact of the case has been largely overstated.

Given the crisis state of our nation's education system, it is worthwhile to reflect upon what *Brown* did and did not accomplish. First, it ended court-sanctioned racial segregation by overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had infamously endorsed the "separate but equal" doctrine. For a nation that had constitutionally promised racial equality for about 150 years, *Brown* reversed over half-a-century worth of court-endorsed Jim Crow laws. Second, by ordering school districts to begin taking steps to integrate schools, *Brown* initiated the process of school desegregation across the nation. Evidence suggests that African-American children who attended integrated schools received a better education than those children relegated to segregated facilities with inferior resources. Finally, *Brown* transformed the model for civil rights lawyering; it became an exemplar for using legal initiatives to secure important political outcomes. In fact, following the successes of the NAACP Legal Defense Fund, which litigated *Brown*, hundreds of nonprofit legal organizations arose to litigate on behalf of various special interests, including the Mexican American Legal Defense and Educational Fund, the NOW Legal Defense Fund, the Asian American Legal Defense Fund, the Native American Rights Fund, the Children's Defense Fund and the Lawyers' Committee for Civil Rights Under the Law.

But, much more was hoped for from *Brown*. In addition to ending state-mandated segregation, many believed that *Brown* would lead to both racial integration and educational equality. Yet, today, schools remain largely segregated. Approximately 80 percent of Latino and about 75 percent of black students attend schools predominantly composed of minority students. Further, approximately 45 percent of Latino and 40 percent of black students respectively attend racially uniform schools. Unsurprisingly, on average, black and Latino students suffer poorer educational outcomes than white students. So, why did *Brown* fall short in achieving the hopes that advocates had pinned on it? There are a number of factors that have limited its impact.

First, white flight and immigration patterns undermined desegregation orders by creating de facto segregation. Consequently, Philadelphia schools, like other Western and Northern metropolitan areas, remain highly segregated.

Second, courts are not public policy institutions. They neither have the expertise to craft solutions to many of the problems plaguing our schools, nor do they have the capacity to implement significant changes in public policy. Additionally, courts are ill-suited to address extra-judicial hardships that have a real impact upon educational outcomes. A web of these realities exerts a drag on education, including poverty rates, neighborhood crime, unequal housing opportunities, inadequate health care and a criminal justice system that disproportionately incarcerates minority youths. Courts do not have the power to fix these socioeconomic problems.

Finally, as many political scientists and even jurists have sometimes reflected, courts are political institutions whose adjudications are constrained by public sentiment. In the debate leading up to *Brown*, noted African-American political scientist Ralph Bunche offered the following pessimism about the judiciary's ability to safeguard black interests. "The Constitution is a very flexible instrument and cannot be anything more than our legislatures and our courts, wish it to be [which] can never be more than what American public opinion wishes it to be. Unfortunately American public opinion is seldom enlightened, sympathetic, tolerant or humanitarian. Too often it resembles mob violence. It follows that the policy of civil libertarianism is circumscribed by the dominant mores of the society." Even the *Brown* court appeared concerned by a potential public backlash. Rather than order explicit deadlines, it sanctioned school district footdragging for decades by paradoxically mandating that desegregation take place with "all deliberate speed." When efforts taken by districts to achieve integration became unpopular, the courts also placed constitutional limits on what school districts could do to facilitate integration, including inter-district bussing. (See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).)

Several years ago, I had the opportunity to interview three members of the NAACP Legal Defense Fund's original *Brown* legal team—attorney Jack Greenberg, U.S. District Judge Jack Weinstein of the Eastern District of New York and former U.S. District Judge Louis Pollak of the Eastern District of Pennsylvania, before he passed. All three of these men recognized the built-in but frequently unstated limitations of courts in political movements. When describing the mood of the *Brown* legal team, Pollak stated, "We had some expansive thoughts and notions during the [Chief Justice Earl] Warren years that I think were shortsighted. [But] even with courts staffed with clones of Thurgood Marshall results are modest." In reflecting upon the legacy of *Brown*, Weinstein opined that *Brown* failed in its central purpose to "equalize educational opportunities" for African-Americans. As a result, he stated he believed that *Brown*'s ultimate legacy was disappointing to the litigation team. Both Pollak and Weinstein cited two factors that severely constrain what the best-intentioned courts can accomplish: (1) they lack the "power of the purse" and (2) they are circumscribed by public sentiment. Noted constitutional historian Michael Klarman has also argued that *Brown* had less impact than conventional wisdom suggests. According to Klarman, *Brown* did not usher in the civil rights movement, but rather it was part of a larger preexisting movement.

Klarman, Greenberg, Weinstein and Pollak highlight one of the most important lessons of *Brown* for the legal community. *Brown* serves as a reminder about what litigation can and cannot accomplish. While courts can certainly influence social issues, they cannot work independently or serve as substitutes for larger political movements. The civil rights movement that led to *Brown* and other important legislation dimmed about 40 years ago. Today, there is no comparable cohesive movement mobilized around education or our children. Without such a contemporary social movement, it is unlikely that the promise of *Brown* will be realized any time soon.

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