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Brown v. Board of Education[1] was one of the most significant cases decided by the Supreme Court of the United States. Certainly it was the most important case dealing with race. *Brown* will be commemorated this year—in the highlight of its life. However, I believe that the majority of scholars who reflect on this issue will sadly conclude that *Brown* is probably dead. *Brown* significantly impacted this society; and its death does not take away from what it contributed in its life.

The road to *Brown* was paved many years before the Supreme Court even announced the decision. For example, I am the former Dean of a school that was born during the sin of segregation in the mid-1940s. The State of Texas created an entirely new law school for just one person in order to avoid the integration of the segregated University of Texas Law School. This was notwithstanding the historic 1950 decision in *Sweatt v. Painter*,[2] which held that creating a "separate but equal" law school for just one black person violated the Fourteenth Amendment of the Constitution. The school nevertheless survived, and today is one of the most racially and ethnically integrated law schools in the nation. It is certainly the most integrated law school in the State of Texas.

Brown represented the fruit of painstaking strategy, extensive scholarship, and tedious grassroots efforts. *Brown* is something of a mythic march on Washington in the great heyday of the civil rights movement. It will be canonized this year, but its elements will hardly reach the classrooms of those who need the most but receive the least. The ideas explored by the *Brown v. Board of Education* scholars will hardly reach American schoolchildren stomped down in the barrios and the ghettos of low-performing schools.

The American South remains one of the country's most integrated regions. High school graduation rates for African-

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1 347 U.S. 483 (1954).

2 339 U.S. 629 (1950).

Americans continue to climb. College admission and graduation rates for people of color continue to increase. The black middle-class is growing. Stanley O'Neal heads Wall Street's leading brokerage firm, Merrill Lynch. Dick Parsons leads AOL, and Oprah Winfrey and even P. Diddy are symbols of American success. However, social commentators such as Derek Brown view these stories as fulfilling the white image of success and believe that this leads many African-Americans who are less fortunate to assume that this is the paradigm.

The history of *Brown's* demise is rather ugly. If *Brown* is indeed dead, the Supreme Court of the United States first killed it almost twenty years after it decision in *Milliken v. Bradley*.[3] In fact, upon examination of the sixteen years that it really took to implement *Brown*—from 1954 to about 1970—the effects of *Brown* only really lasted about four or five years. The *Milliken* decision held that courts could not integrate schools by allowing non-white children from urban districts to go to schools in suburban districts unless the plaintiffs could prove that the suburban districts caused the segregation in the urban districts. Following *Milliken*, a plaintiff would have to prove that the suburban district caused the segregation in the urban district, but did not perpetuate desegregation in the suburban district. *Milliken* stripped *Brown* of its reach, and by the 1980s, the government followed suit by no longer providing federal money for integrating local education.

Racial segregation continues to persist. The South still has the most integrated schools; this is partly a result of demographics and partly a purposeful effect of desegregation orders. The citizens of the North and the Midwest, however, who once looked with disdain upon segregation, now run some of the Nation's most racially segregated public schools. Members of the civil rights struggle call this "up south segregation."

Today, society faces triple segregation in education characterized by extreme racial and ethnic isolation, high poverty concentration, and low educational achievement. First, today's schools experience extreme racial and ethnic isolation; there is more segregation of black and Latino children in public schools today than there was at the time of *Brown*. Additionally, Northeast states such as Pennsylvania, New Jersey, New York,

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[3] 418 U.S. 717 (1974).

and Connecticut have some of the nation's most segregated school districts, which is largely due to local control and compartmentalization of education in small suburban towns and communities. Second, the high concentrations of poverty is a far more significant contributing factor than race and ethnicity in contributing to unequal educational opportunities. The combination of these two factors leads to a low educational achievement rate.

On the same day the New York Court of Appeals decided *Campaign for Fiscal Equity, Inc. v. State of New York*,[4] it declined to hear the case of *Paynter v. State*.[5] *Paynter* dealt with issues stemming from the second factor of the triple segregation, specifically Rochester's high concentration of poverty. Rochester is a school district with over 80% non-white students and a 90% poverty rate. This high concentration of poverty served as a proxy for many disadvantages to both the children and the school system in delivering equal educational opportunities. Rochester is surrounded by white suburban segregated school districts, with most students achieving or exceeding the state's attainment level. The combination of this, along with the high concentration of poverty within the inner core of Rochester, created a disparity in education. These disparities, along with racial isolation in Rochester, denied these school children their fundamental right to an education under the New York Constitution. The district court threw out the case, and held that New York's Constitution did not recognize a claim for denial of the right to an education.[6] The appellate division affirmed,[7] and the case was appealed to the New York Court of Appeals. The Court of Appeals agreed with the lower courts and held, in essence, that the New York Constitution does not recognize such a claim.

Therefore, it was not an accident that civil rights lawyers in Connecticut decided to attack de facto segregation in the North during the latter part of the twentieth century, as well as to fight problems that would prevail in the twenty-first century. Northern-style segregation, often called de facto segregation, is

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[4] 100 N.Y.2d 893, 801 N.E.2d 326, 769 N.Y.S.2d 106 (2003).

[5] 100 N.Y.2d 434, 797 N.E.2d 1225, 765 N.Y.S.2d 819 (2003).

[6] Paynter v. State, 187 Misc. 2d 227, 720 N.Y.S.2d 712 (Sup. Ct. Monroe County 2000).

[7] Paynter v. State, 290 A.D.2d 95, 735 N.Y.S.2d 337 (4th Dep't 2001).

both different from and similar to the eradicated Southern version of segregation. It is characterized, not by explicitly discriminatory laws, but by practices such as housing discrimination, biased lending, exclusionary suburban zoning, and embedded economic and networking involvement passed down through generations. Segregation in Northern schools exists not within the city school districts, but between increasingly poor cities and the disproportionately and predominantly White middle-class suburbs. I contend that the district boundary line is the new Jim Crow segregation line and that the disparities today are not between African-Americans and Whites within the school districts, but instead result from the color differences and inequalities between urban and suburban school districts.

Ironically, de jure segregation is illegal and no longer exists; there are no more districts that prescribe where children go to school according to their race. However, de facto segregation is legal everywhere in this nation, except Connecticut. Some of the tangible consequences provided by integration, and denied by segregation, include better academic preparation for college, greater advantages, integrated educational environments, and social contacts that lead children to a higher status and better paying jobs.

Today, social science data shows that integration still has a very positive impact not upon the strict academic achievement of non-white children, but on those intangible factors that ease the integration of our society. These intangibles include housing and jobs with higher career pursuits and aspirations. Despite these advantages, integration is hard to sell to the non-white communities or the victims of inequalities in education. Certainly, a slight majority of Caucasian-Americans say they favor integration, but only if they will not be burdened by having to implement it. Nevertheless, the racial and ethnic equality of a community can always be determined by examining the school integration and achievement, the housing patterns, voting and election of minority officials, and community relations.

We started planning our strategy in *Sheff v. O'Neill*[8] in Hartford, Connecticut by measuring those symbols to determine

[8] 678 A.2d 1267 (Conn. 1996).

the level of equality.[9] The main challenge we faced was getting around *Milliken v. Bradley*.[10] That case had all but foreclosed the possibility of school integration through the federal courts because the plaintiffs could not show that de facto segregation was, by definition, a form of intentional segregation.[11] To solve this problem, we looked to two provisions in the Connecticut Constitution.

First, as exemplified in by the 1977 case, *Horton v. Meskill*,[12] Connecticut recognized the right that education always included "free public elementary and secondary schools in the state. The general assembly . . . implemente[d] this principle by appropriate legislation."[13] Therefore, Article VIII of the Connecticut Constitution guarantees the fundamental right to an education. The current constitution was adopted in 1965, during the height of the civil rights movement. Another untested provision of its constitution is article I, section 20. As amended, this provision states: "[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoinment of his or her civil or political rights because of . . . race or color . . . ."[14] To the extent that the Connecticut Constitution prohibits segregation and discrimination, it is redundant.[15] Connecticut's express

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[9] I took what I learned from *Bolling v. Sharpe*, 347 U.S. 497 (1954), which dealt with students in the District of Columbia. The District of Columbia is not a state; it is a municipality and is governed by the Fifth Amendment, not by the Fourteenth Amendment. Yet, the Fifth Amendment did not have an Equal Protection Clause. Therefore, the issue became how to make an argument that de jure segregation in the District of Columbia was unconstitutional on equal protection grounds if the Fifth Amendment did not have an Equal Protection Clause. The United States Supreme Court reasoned that if the Fourteenth Amendment is a child of the Fifth Amendment in terms of due process and if the child has equal protection, then the child could only have the lineage and the legacy from his parents. Therefore, the Fifth Amendment must have contained an equal protection component. The Court interpreted that component and held that the District of Columbia's segregation violated the Equal Protection Clause.

[10] 418 U.S. 717 (1974). We assembled a "Dream Team" that consisted of the NAACP Legal Defense Fund, the ACLU out of New York, the Connecticut Civil Liberties Union, the Puerto Rican Legal Defense Fund from New York, and the number one appellate lawyer in the State of Connecticut, Wesley Horton.

[11] *Id.* at 748–51.

[12] 376 A.2d 359 (Conn. 1977).

[13] *Id.* at 362 n.2; *see also* CONN. CONST. art. VIII.

[14] CONN. CONST. art. I, § 20 (amended 1974 and 1984).

[15] Only three state constitutions in the country attempt to expressly prohibit segregation and discrimination.

prohibition of segregation and discrimination on the basis of race allowed us to attack de facto segregation without proving a violation of the Connecticut Constitution's right to an education. We argued that the right to an education in one constitutional clause and the protection against discrimination and segregation in another should be read jointly to create one fundamental right—the right to an equal educational opportunity free of racial and ethnic concentration, segregation, and discrimination. In 1996, a bare 4-3 majority of the Connecticut Supreme Court agreed with us and held that the extreme racial segregation in the capital city of Hartford, Connecticut denied schoolchildren their fundamental right to an education free of racial and ethnic segregation under the Connecticut Constitution.[16]

The liability phase of the case led to a remedial phase in the last seven years. The road after *Sheff v. O'Neill* has been rough. Whenever the courts put the remedy back into the hands of the perpetrator, they commit the first basic mistake. This dilemma has existed for the last fifty years but crystallized in the 1990s and continues to change into the twenty-first century. The two basic remedial options for undeniably segregated and unequal educational opportunities are integration and non-integration. Integration has been the predominant remedial choice of the civil rights movement and of the beneficiaries of equal educational opportunities, namely black and Latino school children, for the past fifty years.

However, *Brown's* death in school desegregation meant the death not only of its promise but also of its future in terms of remedies. Today, large portions of the non-white community have converged with those who share opposite ideologies in dominant communities and have concluded that non-integration is perhaps a better remedy than integration. The view on proper remedies, however, comes from different positions. The non-white view is colored by the past twenty-five years of frustration and disappointment with the progress of integration because there is more segregation today than there was at the time of *Brown*. They have seen the hostility toward racial integration and the flight from the urban community, although those are not the primary causes of segregation. The cause of segregation is mathematically simple: more non-white people moved into the

[16] *See* Sheff v. O'Neill, 678 A.2d 1267, 1270–71 (Conn. 1996).

urban areas and went to the local schools, while more white people moved out of the urban areas or at least sent their children to private schools.[17] Thus, urban schools have become overwhelmingly comprised of non-whites. As a result, most non-whites today believe that "school improvement" is more beneficial for them than school integration. They believe that, if they could obtain more money and resources, they could achieve the same success in their SAT and LSAT scores and achieve equality.

This, however, raises the ultimate question: Can non-white children in overwhelmingly poor school districts with low achievement rates ever obtain equal educational opportunities? This question has yet to be answered; however, the potential remedies include: (1) integration or non-integration, (2) mandatory and voluntary percentage goals for racial and ethnic composition of schools or no such goals, and (3) inter-district urban and suburban schooling or schooling only within the district. The new call is for local control over education, but local control is synonymous with segregated education.

Today, fifty years after *Brown*, more segregation exists in public schools than in 1954. This is the case despite the non-existence of de jure segregation. However, segregation continues to prevail in nearly every urban school district in America and the Supreme Court has held this to be legal. Only the Connecticut Supreme Court has stated that, as a moral imperative, "[i]t is crucial for a democratic society to provide all of its schoolchildren with fair access to an unsegregated education."[18] There is also an economic necessity to achieving integration—our country's economic well-being depends on well-educated citizens. The urban poor are an intricate part of our future economic strength. It is not just that their future depends upon the state—the country's future depends upon them.

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[17] Interestingly, many middle-income and lower middle-income blacks and Latinos left urban areas as well.

[18] *Sheff*, 678 A.2d at 1289.