The Nation's Teacher: The Role of the United States Supreme Court During Times of Crisis

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Therapeutic jurisprudence (TJ) identifies how parties in cases before courts may be helped or hurt in their recovery by the legal process itself.[1] Procedures crafted to take problems faced by parties into consideration may actually aid the process of recovery.[2] Most TJ research has focused on trial courts, attempting to measure the impact on actual parties to particular pieces of litigation. Professor Nathalie Des Rosiers has recently shifted the focus to appellate courts, arguing that how an appellate court frames its decision may significantly impact persons who are not parties to the case at bar.[3] Her analysis is both creative and original.

This Article will suggest that TJ has occasionally been part of the United States Supreme Court's jurisprudence. The Court sometimes finds itself at the center of deeply-divisive national controversies. On those occasions, the opinion of the Court can, and ought to, play a role in healing the nation's controversy-inflicted wounds. The Court should consciously craft an opinion that speaks to the American people as a whole and that calls on every citizen, regardless of the fervency of his or her beliefs, to accept the resolution of the controversy offered by the Court. During such crises, citizens are unlikely to accept solutions crafted by elected officials, whom they rightly judge to be partisan politicians. The Court's removal from the political process allows it an opportunity to have a therapeutic role in healing the nation's wounds. I shall focus on two decisions: (1) *Brown v. Board of Education of Topeka*,[4] the Supreme Court's seminal decision holding that state segregation of students by race in public schools violates the

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1. *See* BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED 3-4 (1997).

2. *See id.* at 491-92.

3. *See* Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, CT. REV., Spring 2000, at 54.

4. 347 U.S. 483 (1954).

Fourteenth Amendment's equal protection clause; and (2) *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] the Court's important decision reaffirming a woman's right to choose.

In 1896, in *Plessy v. Ferguson*,[6] the Supreme Court created the separate-but-equal doctrine, which allowed segregated facilities to exist as long as they were equal.[7] This doctrine was subsequently used to uphold segregated schools.[8] The separate-but-equal doctrine controlled until the 1940s, when the NAACP Legal and Educational Defense Fund began an attack upon segregation in public institutions.[9] Between 1938 and 1952, the edifice of separate-but-equal began to crumble as the Court, in a series of rulings, struck down aspects of racial segregation.[10] Nonetheless, the doctrine remained strong in the public school system.[11] Dismantling this system of racial separation was not something that could be done easily or quickly by federal judges sitting in Washington, D.C.[12] It would take deliberate decisions by local officials making nuanced, fact-specific choices in thousands of school districts around the country.[13]

In May 1954, Chief Justice Earl Warren issued the Court's unanimous opinion in *Brown v. Board of Education of Topeka*.[14] For such a momentous decision, the opinion is rather commonplace. Warren began by suggesting that the history of racial segregation was inconclusive in terms of the intent of the framers of the Fourteenth Amendment's Equal Protection Clause.[15] Relying on "modern authority," he then noted the changing status of public education in American life, observing that education plays an incredibly important role.[16] Finally, Warren concluded that "[s]eparate educational facilities are inherently unequal."[17] The Court did not hold that *all* racial lines are impermissible, but rather that there is "no place" in public

5. 505 U.S. 833 (1992).

6. 163 U.S. 537 (1896).

7. Brown v. Board of Educ. of Topeka, 347 U.S. 483, 488 (1955).

8. *See id.* at 491-92.

9. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 116 (1994).

10. *See id.* For a discussion of the NAACP's efforts to desegregate education, see MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950 (1987).

11. *See generally* RICHARD KLUGER, SIMPLE JUSTICE 508-40 (1975) (describing school segregation cases leading up to *Brown v. Board of Educ. of Topeka*).

12. *See Brown*, 349 U.S. at 491-92.

13. *See id.*

14. 347 U.S. 483.

15. *Id.* at 489-90.

16. *Id.* at 492-94.

17. *Id.* at 495.

education for separate educational facilities.[18] The Court ordered further argument on what remedy should be forthcoming.[19]

Academics have soundly criticized the *Brown* opinion on a number of grounds, including its monumental ambiguity.[20] In my opinion, the *Brown* opinion is subject to at least four different interpretations. First, it might stand for the proposition that the state must integrate its public facilities, especially schools. Second, *Brown* can be read as endorsing the proposition that the state has to provide an equal education, which cannot happen in a segregated setting. Third, *Brown* might stand for the proposition that the Constitution prohibits state sponsored segregation. Finally, *Brown* might prohibit state actions that stigmatize African Americans.

In the aftermath of *Brown*, a veritable cottage industry of academic critics, in law as well as in other disciplines, dissected the opinion and found it wanting on a number of grounds. First, the Court's reliance upon "modern authority" embraced social science studies that were quite rudimentary.[21] Placing a constitutional ruling on such a base leaves open the possibility that the ruling could be reversed if new sociological studies reveal different psychological consequences of segregation.[22] Other critics have lambasted *Brown*'s understanding of the original intent of the framers of the Fourteenth Amendment.[23] Given the segregationist attitudes of the 1860s, these critics have attacked *Brown* as inconsistent with the original intent of the framers.[24] Still other critics have suggested that there is a problem with claiming that separate-but-equal is inherently unequal.[25] If schools are truly equal in terms of their resources, why is the education unequal? Does *Brown* imply that African Americans need the presence of whites to learn at a high level? Along these lines, perhaps the most severe critic has been Professor Herbert Wechsler of Columbia Law School who, in a famous essay, called for the Court to use "neutral principles" of constitutional law, ones that would transcend the result in the case at

18. *Id.*

19. *Id.* at 495-96.

20. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 525-30 (3d ed. 1996).

21. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

22. *See id.* at 167.

23. *See, e.g.*, John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421.

24. *See id.* at 426.

25. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

bar.[26] To him, if the schools were indeed equal in resources and facilities, then the Constitution's concept of equality was not violated.[27]

There is much force to these academic criticisms. *Brown* is not a particularly strong legal opinion. Chief Justice Warren could have made a more powerful argument for ending racial segregation in public schools. First, he might have begun by chronicling the history of the Reconstruction Amendments with their promise of providing full citizenship to all persons born in the United States. He also could have considered the extensive list of Supreme Court decisions that struck down various aspects of race discrimination or segregation. Instead, the opinion is rather casual and cursory in this regard. An extensive explanation of these decisions would have demonstrated that *Brown* was simply the natural consequence of following these earlier rulings. Third, Chief Justice Warren might have examined the history of the actual administration of the separate-but-equal doctrine by local governments. That history would have demonstrated that while the schools were always separate, they were never equal.[28] Also, he might have reasoned that it would be futile to adhere to a doctrine that had never been realistically enforced. As a consequence, only an absolute ban on separate-but-equal would be an adequate response. Finally, he might have gone back to *Plessy v. Ferguson*, the root of the separate-but-equal doctrine, and critiqued the Court's rationale in that case. *Plessy* was a rather feeble ruling, and I shall not belabor this essay by deconstructing it.[29] I will let it suffice to say, dismantling it would be an easy task.

Chief Justice Warren did none of these things. If he had, it would have produced a more powerful, persuasively reasoned legal document. It might have succeeded in quieting academic criticism. But Warren intentionally and consciously rejected this approach. When Warren circulated his initial draft of the opinion for the Court, he appended to it a memorandum in which he explained to his fellow Justices that the drafts "were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."[30] This quotation offers a remarkable commentary on who Chief Justice Warren considered to be the audience for his opinion and on how he hoped that the opinion would be received. He aspired not to generate the acclaim of legal aca-

26. *Id.* at 19.

27. *See id.* at 34.

28. *See* RICHARD KLUGER, SIMPLE JUSTICE 88 (1975).

29. For a critique of *Plessy*, see Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553, 589-90 (1973).

30. KLUGER, *supra* note 28, at 879.

demics, but to produce an opinion that would be accepted by the nation as a whole and that would pave the way for dismantling state-sponsored segregation of public schools.

Warren could easily have written an opinion full of righteous indignation at the hypocrisy and mean spiritedness of a separate-but-equal division of people based solely on the color of their skin. But such an opinion might have alienated his three southern colleagues and led them to withhold approval or even to dissent. A splintered Supreme Court might have had less legitimacy in the eyes of the South which, after all, would be required ultimately to implement the Court's ruling. Equally as important, such an opinion might have stirred up the passions of the white South and led to even greater resistance than that which ultimately developed. Rather than casting stones at the immorality or oppression of segregation, Warren chose to emphasize the critical role of education in a democratic society. "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."[31]

Recent decades have witnessed a significant change in the nature of the people appointed to the Supreme Court; this change may make it more difficult for the current Court, on that rare occasion, to reach out to the nation as a whole. The Court that decided *Brown* included Earl Warren, former Governor of California, Robert Jackson, former Attorney General of the United States, William O. Douglas, former Chair of the Securities and Exchange Commission, and Hugo Black, former United States Senator from Alabama. These men had experience in public affairs and a great sensitivity to the nation's pulse. Recently, almost no one has been appointed to the Court who was not sitting as a lower federal court judge at the time of appointment. Some of them, like Antonin Scalia and Ruth Bader Ginsburg, were formerly law professors. Law professors and judges are two groups not exactly known for having their fingers on the pulse of the people. Reclusive, arrogant, and detached are more common descriptions of professors and judges. Over the last several decades, Supreme Court decisions have become increasingly splintered, with larger numbers of concurrences and pluralities. In some cases, it takes a score card to understand whether there are four or five Justices providing a majority for sections of particular opinions. There has been an equally disturbing decline in civility, leading to sharp barbs and occasional *ad hominem* attacks on fellow Justices, such as when Justice Scalia wrote that a par-

31. *Brown*, 347 U.S. at 493.

ticular opinion of Justice O'Connor "[could not] be taken seriously."[32] Many recent Supreme Court decisions have been framed much as a college debater might structure an argument: full of rhetorical points aimed at winning an argument. As in *Brown*, what these opinions lack is a sense that the Supreme Court's audience is not simply the professional bench and bar. The audience includes not only policy makers and office holders, but also citizens of the entire country.

Even with these changes, the Supreme Court, on occasion, speaks with a voice that aims at a national audience. An example is the remarkable decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[33] Faced with the question of whether to overrule its seminal right to choose decision, *Roe v. Wade*,[34] the Court instead reaffirmed "the essential holding" of *Roe*.[35] This came as quite a surprise to many observers. After all, the Republican Party had controlled the White House for all but four years since the initial decision in *Roe* in 1973. Each presidential campaign had made the Court a political issue and Republican presidents had appointed eight of the nine then-current Justices. Yet, in a remarkable display of judicial statesmanship, Justices O'Connor, Kennedy, and Souter combined to author a joint opinion—only the second time in the history of the Court that the Court's opinion was written by more than a single individual.[36] From the opinion's opening sentence, "Liberty finds no refuge in a jurisprudence of doubt,"[37] one knew this was no ordinary judicial opinion. The Court emphasized the historic development of liberty and placed special emphasis on the unique situation in which a pregnant woman finds herself.[38] A woman who carries a child to full term faces anxieties, physical constraints, and pain that only she must bear.[39] The *Casey* joint opinion limited the state from displacing the woman's choice over such a personal decision.[40]

The *Casey* joint opinion made a bridge with *Brown* in considering the circumstances under which the Court ought to overrule earlier precedent. The joint opinion reasoned that when the Court decides a

32. Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., dissenting).

33. 505 U.S. 833 (1992).

34. 410 U.S. 113 (1973).

35. *Casey*, 505 U.S. at 846.

36. The other case written by more than one justice is *Cooper v. Aaron*, 358 U.S. 1 (1958), the Little Rock school desegregation case in which all nine Justices signed the opinion of the Court.

37. *Casey*, 505 U.S. at 844.

38. *See id.* at 852.

39. *Id.*

40. *See id.* at 833-901.

provide a remarkable forum for educating the public about the structure and processes of government and about rights and responsibilities. If appellate judges do not consider the lay public as they craft their opinions, they squander an opportunity to deepen citizens' knowledge of democratic institutions and the rule of law.