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Advancing Victims' Rights Through Strategic Litigation: Taking a Page From History*

"'[Y]ou fools go ahead and have your fun . . . we ain't begun to work yet.'"
-Thurgood Marshall, commenting during the post-*Brown v. Board of Education* celebration.[1]

Social movements seek to bring about historic social change by advancing justice. The social movement of crime victims' rights has been successful in this endeavor over the past three decades. As Joanna Tucker Davis notes in her article in this newsletter, the crime victims' rights movement began with a handful of grassroots organizations working to achieve justice for crime victims, and has gained considerable momentum, passing victims' rights constitutional amendments and/or statutes in every jurisdiction. These changes established in law that the crime victim cannot be ignored in the pursuit of justice. Despite these advances, the crime victims' rights movement must recognize that, in Thurgood Marshall's words, it "ain't begun to work yet." To bring about true change, the rights provided by law must be implemented and enforced in practice; to do that most effectively requires the movement to engage in strategic litigation.[2]

This article is the beginning of a concerted effort to look to, learn from, and import from the litigation strategies of other social movements, with an eye towards creating a strategic victims' rights litigation plan. One of the preeminent social movements, the civil rights movement, provides an example of the using litigation for social change.

The United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), is a commonly recognized moment of strategic litigation. The lesson of *Brown v. Board of Education* requires understanding that the victory of that case was the culmination of a conscious strategy to challenge racial inequality through litigation, that a part of that conscious strategy was regular evolution of the strategy itself, and that this seminal legal victory did not complete the work of the civil rights movement. This article discusses some basic lessons the victims' rights movement can take from *Brown v. Board of Education*, and in future newsletters NCVLI will detail strategies for strategic litigation to advance victims' rights.

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The Civil Rights Movement: An Evolving Strategy[3]

The National Association for the Advancement of Colored People (NAACP) was founded in 1909 by a multiracial group of activists. During its early years, the NAACP engaged in lobbying, public education, and ad hoc litigation. From 1925-30, the NAACP began to develop a plan for coordinated litigation to win social justice for African-Americans. The impetus for the plan, in part, was a belief that it was a waste of time and money to conduct isolated, ad hoc litigation, and instead, a widespread legal campaign was necessary. The strategy began in earnest with an infusion of $100,000 from the Garland Fund to launch a strategic legal attack on racial discrimination. With a portion of these funds, in 1930 the NAACP and the Garland Fund formed a joint committee and hired a staff attorney, Nathan Margold.

Margold undertook a comprehensive study of the segregation laws to determine how best to challenge racial inequality through the courts. Margold's report, issued in May 1931, concluded that segregation in public education, as practiced, did not even comply with the separate but equal principle of *Plessy v. Ferguson*, 163 U.S. 537 (1896), because the facilities provided African Americans were separate, but not equal, as evidenced by the disproportionate per-pupil and per-teacher expenditures. Margold's report recommended a direct challenge to the education system as a violation of equality through a series of suits against jurisdictions that practiced segregation.

In 1935, Charles Hamilton Houston, former Dean of Howard University's School of Law, was appointed to be the first Special Counsel of the NAACP. Houston believed that legal challenges alone would not affect sufficient change and that a direct challenge to the education system might not succeed and might, in fact, result in an unfavorable Supreme Court decision reaffirming *Plessy*. With those concerns in mind, Houston revised the NAACP's strategy to be one of incremental legal attacks through equalization lawsuits targeted at graduate and professional schools. Equalization suits demanded relief in the form of making specific facilities and educational opportunities for black students equal to those of white students rather than directly challenging the constitutionality of the education system as a whole.

Throughout the 1930s and 40s, Houston – who was joined by, and eventually succeeded by, Thurgood Marshall – successfully argued a number of cases using this strategy: *Pearson v. Murray*, 182 A. 590 (Md. 1936), (resulting in the desegregation of the University of Maryland's law school); and in *State ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (ordering admission of a black student to the University of Missouri Law School.)[4]

While there were also unsuccessful cases, by 1950 the equalization lawsuits had gradually undermined the legal foundation of *Plessy*. Believing the time was ripe for a direct attack on segregation in public education, the NAACP again revised its strategy and *Brown v. Board of Education* was born. In the Supreme Court, *Brown v. Board of Education* consisted of six separate cases in five jurisdictions: *Briggs v. Elliot* out of South Carolina; *Gebhart v. Belton* and *Gebhart v. Bulah* out of Delaware; *Davis v. County School Board* out of Virginia; and *Bolling v. Sharpe* out of the District of Columbia. Victory came in the form of the Supreme Court's unanimous decision on May 17, 1954, holding that the segregation of children in public schools solely on the basis of race

violated the Fourteenth Amendment and deprived black children, as a racial minority group, a right to equal educational opportunities.

Some histories written about the NAACP litigation strategy add a thread of consistency regarding the evolution of the civil rights legal strategy that was not necessarily recognized throughout the campaign. Other histories recount that the NAACP did not have any litigation strategy but instead constructed one *post hoc*. Both types of history represent an unsophisticated conception of strategy. What the history of the NAACP reveals is that there was an overarching legal strategy that sought to dismantle *Plessy*. The history also reveals that over the years the NAACP regularly revised and reviewed its strategic decisions, including analysis of whether and when to launch a direct or indirect attack on educational inequality; whether to use the legal tool of mandamus or injunction; whether to file in state or federal court; whether a particular case or plaintiff materially contributed to the movement; whether to target the deep south or the border states; whether any particular court was ready for a frontal assault on segregation or whether smaller, tactical assaults were better for the day; and how best to conduct a national litigation strategy that included both local counsel and a centralized national office. What the civil rights model teaches is that a successful legal strategy is one that has a goal, but also allows room for revision through analysis - on a case-by-case basis - and periodic review from a movement perspective.

A Necessary But Not Sufficient Strategy

This call to strategic litigation is not a call to abandon other avenues of advancement of crime victims' rights, nor is it a claim that litigation is the answer to all victims' woes. A singular focus on litigation, even strategic litigation, is misplaced.[5] True social change begins before and continues after even successful litigation.

This truth about social change is evident from *Brown v. Board of Education*. There are actually two *Brown v. Board of Education* decisions – *Brown I*, discussed above, and *Brown II*. *Brown II* occurred because the Supreme Court's 1954 decision in *Brown I* did not address the remedy for the constitutional violation, but instead held over the cases for re-argument of the issue of implementation and remedy in 1955. In *Brown II*, 349 U.S. 294 (1955), the Supreme Court remanded the cases to the trial courts and ordered school boards to develop plans of desegregation that would proceed with "deliberate speed" and be supervised by local federal courts. What followed *Brown II* is a well-known story of hostility, purposefully delayed implementation, mixed-results in implementation, and, more than fifty years later, a continuing struggle for educational equality.

The civil rights movement demonstrates that social change can occur only when litigation is complemented by a popular, socio-political movement. As the crime victims' rights movement advances to the next stage and includes strategic litigation, it must not abandon the many tools of change already working for it such as public education and legislative and constitutional reform. Instead, the crime victims' rights movement must wed strategic litigation to the other aspects of its movement.

The Work Ahead

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The call for lawyering for social change is not a new one. As Charles Hamilton Houston is oft-quoted as saying: "A lawyer's either a social engineer or a parasite on society." Neither is the call for lawyering for social change new to the victims' rights movement.[6]

This article calls for even more than mere lawyering to advance the victims' rights movement. It calls for a thoughtful and strategic approach to litigation that advances the movement nationwide. It asks the movement to move beyond ad hoc, isolated litigation, into strategic litigation. This has begun to happen, as evidenced by the thoughtful litigation of each of the nine clinics that are part of the State and Federal Clinics and System Demonstration Project, funded by the Office for Victims of Crime. (See article on page 2). Moving forward, articles in NCVLI News will articulate a strategic litigation plan targeting critical cases for the advancement of crime victims' rights nationwide and highlight the successes and lessons to be learned as this next phase of the crime victims' rights movement advances.

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[1] Genna Rae McNeil, "BEFORE BROWN: REFLECTIONS ON HISTORICAL CONTEXT AND VISION," 52 AM. UNIV. L. REV. 1431, 1443 (August 2003) (quoting James T. Patterson, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 71 (2001)).

[2] Strategic litigation is often called impact, public interest, structural, strategic, or social action litigation. I have chosen the word "strategic" because it implies the understanding that the purpose of the litigation is a true social movement and that such movement requires short and long term tactical analysis.

[3] The history of the NAACP and the civil rights movement provided throughout this article is taken in large part from the NAACP's own website, *Legal Affairs History* at http://www.naacp.org/departments/legal/legal_history.html, and Mark V. Tushnet, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, *passim* (1987). Additional useful sources include Leland B. Ware, "EDUCATIONAL EQUITY AND BROWN V. BOARD OF EDUCATION: FIFTY YEARS OF SCHOOL DESEGREGATION IN DELAWARE," 47 HOWARD L. J. 299, 301 (Winter 2004); McNeil, "BEFORE BROWN: REFLECTIONS ON HISTORICAL CONTEXT AND VISION," supra.

[4] While this article addresses the evolution of the education cases, it should be noted that the movement's strategy included other avenues of attack, including salary and compensation disputes.

[5] See Gerald N. Rosenberg, THE HOLLOW HOPE CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael Klarman, NEITHER HERO NOR VILLAIN: THE SUPREME COURT, RACE, AND THE CONSTITUTION IN THE TWENTIETH CENTURY: CHAPTER 2: THE PROGRESSIVE ERA (UNIVERSITY OF VIRGINIA SCHOOL OF LAW LEGAL STUDENTS WORKING PAPER NO. 99-3B, JUNE 1999), ONLINE AT HTTP://PAPERS.SSRN.COM/ABSTRACT_ID=170228, VISITED MAY 1, 2005; Kevin R. Johnson, "LAWYERING FOR SOCIAL CHANGE: WHAT'S A LAWYER TO DO?" 5 MICH. J. OF RACE AND LAW 201 (Fall 1999).

[6] See, e.g., John W. Gillis and Douglas E. Beloof, "THE NEXT STEP FOR A MATURING VICTIM RIGHTS MOVEMENT: ENFORCING CRIME VICTIM RIGHTS IN THE COURTS," 33 MCGEORGE L. REV. 689 (Summer 2002).

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