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Before *Brown*: Heman Marion Sweatt, Thurgood Marshall and the Long Road to Justice

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Editor's Note: The following article by Gary M. Lavergne is drawn from his book by the same name that looks at Sweatt v. Painter, *the 1950 case that sought to desegregate the University of Texas Law School. The book was written with the cooperation of former Chief Justice Joe R. Greenhill, who represented the State of Texas. As Lavergne notes, the Court's answers to Sweatt's questions about the "factually undeniable inequality of separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation" pointed the way to the end of segregation four years later in* Brown v. Board of Education.

Heman Marion Sweatt

The *Merriam-Webster Dictionary* defines "social science" as "a branch of science that deals with the institutions and functioning of human society and with the interpersonal relationships of individuals as members of society."[1] Sociology can be considered the study of human society in all its forms and, of course, this vast domain encompasses dozens of subject areas. Clashes between two of those social sciences frequently take place in courtrooms. The 1950 U.S. Supreme Court case *Sweatt v. Painter,* 339 U.S. 629, provides a wonderful example of the battle between history and sociology for preeminence in the American judiciary. History is embraced by the "Originalists," while sociology is embraced by the "Activists."

During an interview for my book *Before Brown: Heman Sweatt, Thurgood Marshall and the Long Road to Justice*, retired Texas Supreme Court Chief Justice Joe Greenhill, who represented the state as Assistant Attorney General in *Sweatt*, told me that at the time of the litigation both he and Thurgood Marshall thought they were "arguing *Brown.*"[2] To represent his client, Greenhill took the historical approach and researched the original intent of Congress as it related to school segregation and the passage of the Fourteenth Amendment of the U.S. Constitution. The product of his inquiry easily represented the best legal work presented by the Attorney General's office in the entire record of the *Sweatt* litigation.

In his briefs and oral arguments Greenhill reminded the Court that in 1862, Congress segregated schools in the District of Columbia—the only political jurisdiction in which it had complete control—and they remained segregated throughout the Civil War and Radical Reconstruction and were still segregated in 1950 as *Sweatt* was being argued. He pointed out that the civil rights guaranteed by the Fourteenth Amendment and the Civil Rights Act of 1866 never included school integration. He further showed that during the May 1866 debates over the Fourteenth Amendment, Congress donated land to segregated Negro schools, and in July of that year they addressed the method of tax support.[3]

Greenhill's brief also reported that in the late 1860s and early 1870s, when the Radical Republicans held tight control over Congress, Massachusetts Senator Charles Sumner had made repeated attempts to insert the integration of schools in legislation, but had been defeated each time. Congress was able to require the southern states to ratify the Fourteenth Amendment in order to be readmitted to the Union, but no evidence existed that school desegregation was connected with that compliance. Indeed, eleven of the northern and border states that ratified the Fourteenth Amendment maintained white and non-white school systems—as did all the former Confederate states.

To reinforce his client's history-based Originalist view, Greenhill added legal precedent. He pointed out that at least five state courts outside the south had ruled that the Fourteenth Amendment did not mandate integrated schools.[4] During oral arguments he listed precedent supporting states' rights. He noted that *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), held that "the education of the people in schools maintained by taxation is a matter belonging to the respective states." *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U.S. 388 (1900) upheld the constitutionality of racially segregated intrastate commerce. In *Berea College v. Kentucky*, 211 U.S. 45 (1908), the Supreme Court denied a challenge to a 1904 Kentucky law making it illegal to educate white and black students in the same institution. He also presented *Chiles v. Chesapeake,* 218 U.S. 71 (1910), which upheld regulations of a private carrier that segregated passengers by race.[5]

Acting as an advocate duty-bound to zealously argue his client's case, Greenhill argued that the law supported Texas' defense of segregation at the University of Texas Law School. For seventy-five years after the Civil War and Reconstruction Congress had done nothing to attach school desegregation as a condition for any service or money provided by the federal government: Greenhill showed that to be an historical fact. He went on to cite federal regulations explaining how money should be divided among the races, such as the "A&M" money provided for in the Morrill Acts, and housing units paid for by federal funds.[6]

Alexander M. Bickel, U.S. Supreme Court Justice Felix Frankfurter's law clerk, validated Joe Greenhill's research and conclusions later during the 1952 term. After months of researching the Fourteenth Amendment's legislative history, Bickel reported that it was "impossible" to establish any connection between school desegregation (and any other racial separation) and Congress' intent in enacting the Fourteenth Amendment. He added that Congress had not foreseen the abolition of school segregation.[7]

Greenhill's documentation and logic compelled Thurgood Marshall to concede that the history and intent of the Fourteenth Amendment could be used to support *either* side of the school integration argument. So, as Heman Sweatt's attorney, Thurgood Marshall limited his argument to the undeniable assertion that Congress intended the amendment to guarantee full citizenship rights to African-Americans—a fundamental civil right Texas sought to deny Sweatt and other African-Americans.[8]

History might not have been on the side of Thurgood Marshall, but sociology was. The Sociological Approach, largely the brainchild of Thurgood Marshall's assistant Robert L. Carter, argued that a comprehensive measure of educational equality should include available social and cultural capital (the accoutrements of privilege). Racial separation in schools meant that whites had access to a social network not available to African-Americans, producing a false sense of superiority in whites and an equally false sense of inferiority in African-Americans. Sociological research supported the notion that segregation thus harmed African-Americans. As a result, inequality could never be remedied by merely duplicating and separating inanimate objects like buildings, books, teacher-pay, and money. Since separation of the races was *per se* harmful to African-Americans, separation made equality impossible, so the only logical and constitutional remedy was the end of segregation and the integration of schools.[9]

Criticism of the Sociological Argument in court was not limited to segregationists such as Attorney General Price Daniel of Texas. In his memoirs, Robert Carter recalled that, "[t]he proposed use of social scientists' testimony came under fierce attack from the outset. A number of the most influential members of the NAACP's advisory committee on legal strategy scorned social science data as without substance, since it was not hard science, proved by tests in the laboratory, but merely the reactions of a group of people." Professor Thomas R. Powell of Harvard, a pre-eminent lawyer and political scientist at the time, called the idea of presenting sociological studies in court the "silliest thing he had ever heard of."

Carter and Marshall responded that if segregation was to be directly attacked, as they were doing for the first time in *Sweatt*, it had to be proven to be an unreasonable and irrational practice, and that its sole purpose was to subjugate one race to another—a harmful public policy that violated the Equal Protection clause of the Fourteenth Amendment of the Constitution.[10]

Both Price Daniel and Joe Greenhill argued that sociological evidence had been appropriately ignored by Texas courts because, if such data were to be evaluated at all, it was the job of state and local legislators and executives to do so. It was not the job of any court to formulate policy for a state. The question before the Supreme Court, as Joe Greenhill and Price Daniel presented it, was whether Texas had the right, as a state, to control its schools. They argued that Texas' defense of its position was supported by the federal and Texas constitutions, history, case law precedent, and the social order of the time.[11]

Chief Justice Fred Vinson wrote the *Sweatt v. Painter* opinion for a unanimous Supreme Court. He made clear the Court was not yet ready to address the inherent constitutionality of racial segregation with a sweeping ruling: "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? *Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court*" (emphasis added).

Chief Justice Vinson then added that "*much of the excellent research and detailed argument presented in* [*Sweatt*] *is unnecessary to* [*its*] *disposition*" (emphasis added). So, neither the NAACP's activist Sociological Argument nor Joe Greenhill's originalist historical research regarding Congressional intent was dispositive.[12] Instead, Chief Justice Vinson avoided choosing between the social sciences and implicitly overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), by emphasizing the undeniable reality of an honest comparison of the educational resources available at the University of Texas Law School in Austin and the new, separate law school the Legislature had just approved for African-Americans in Houston: "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[13]

In *Sweatt,* neither history nor sociology prevailed, nor even mattered, because the makeshift law school in Houston the State of Texas provided for Heman Sweatt was so obviously unequal in educational resources and opportunities when compared with the University of Texas School of Law in Austin. Even before *Brown,* undeniable evidence of obviously unequal treatment violated every concept of justice, even the "separate but equal" justice meted out by *Plessy*. In *Sweatt*, the U.S. Supreme Court dared ask the question earlier courts failed to address: the factually undeniable inequality of the separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation. The Court's answer to Sweatt's questions pointed the way to the Court's end to segregation four years later in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

(Endnotes)

1 *See* Merriam Webster Dictionary Online, *"social science,"* at m-w.com, **http://www.merriam-webster.com/medical/social%20science** (checked Feb. 17, 2012).

2 The author's interview with Joe Greenhill, the former First Assistant Attorney General in the *Sweatt* case, and later Chief Justice of the Texas Supreme Court, on September 9, 2005.

3 *See* the Joe Greenhill Papers, provided to the author in November of 2005, and Joe Greenhill to Bill Pugsley, November 20, 2003. Texas Wesleyan University Law School.

4 The states were Ohio (1870), New York (1872), Pennsylvania (1873), California (1874), and Indiana (1874); Joe Greenhill, an oral history interview by H. W. Brands, for the University of Texas Law School, dated February 10, 1986; Michael J. Klarman, "Why *Brown v. Board of Education* was a Hard Case," *The Judge's Journal*, vol. 43, no. 2 (Spring 2004), pgs. 6-14; ibid.

5 Joe Greenhill very kindly provided this author with a copy of his U.S. Supreme Court briefing in *Sweatt v. Painter* (1950).

6 Joe R. Greenhill, oral history interview by H. W. Brands for the University of Texas Law School, February 10, 1986, **http://www.houseofrussell.com/legalhistory/sweatt/docs/goh.html** (checked Feb. 17, 2012); Milton R. Konvitz, "The Extent and Character of Legally-Enforced Segregation, *Journal of Negro Education*, vol. 20, no. 3 (Summer 1951), pgs. 425-435.

7 Michael J. Klarman, "Why *Brown* Was a Hard Case," *Judges' Journal,* vol. 43, no. 2 (Spring 2004), pgs. 6-14.

8 John Q. Barrett, "Teacher, Student, Ticket," *Yale Law and Policy Review*, vol. 20, no. 2 (2002), pg. 316.

9 Mark V. Tushnet, *The NAACP's Legal Strategy*, Chapel Hill: University of North Carolina Press, 1987, pg. 119; For a brief discussion of human and cultural capital in the context of college admissions see my commentary, "College Admissions as Conspiracy Theory," first published in *Chronicle of Higher Education Review*, November 9, 2007, **http://www.garylavergne.com/CollegeAdmissionsConspiracyTheory-Lavergne.pdf**.

10 Robert L. Carter, *A Matter of Law*, New York: New Press, 2005, pg. 99; Thurgood Marshall, "Tribute to Charles H. Houston, *Amherst Magazine*, in Mark V. Tushnet, *Thurgood Marshall*, Chicago: Lawrence Hill, 2001, pg. 501. In this article Marshall called Thomas Powell an "old mossback."

11 Gale Leslie Barchus, *The Dynamics of Black Demands and White Responses for Negro Higher Education in the State of Texas, 1945-1950*, Master's thesis, University of Texas at Austin, 1970, pgs. 60-64.

12 *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

13 *Id.* at 633.

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