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A Time to Lose

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A TIME TO LOSE

I wish I had thought of that title, but it was Paul Wilson who chose it for his book about representing the state of Kansas in *Brown v. Board of Education*.¹ In this installment of *From The Library*, he explains how he got that job.

It is an extraordinary story. After being a small-town lawyer, county prosecutor, and attorney for a state agency, Wilson joined the Kansas Attorney General's office. He wanted, among other things, to get some appellate experience, and he certainly did that: *Brown* was his first appeal.

The case was unusual from the start, for although the Attorney General's office had answered Linda Brown's complaint against the Topeka schools, it had not participated in the trial. The Topeka school board handled the defense and prevailed before the three-judge district court. When a post-trial election gave the anti-segregation forces a majority on the school board, however, that body decided not to defend the appeal in the Supreme Court. This prompted the Court to inquire, about two weeks before the date on which the case was set for argument, whether Kansas would file a brief and appear at the argument. The Attorney General decided only then that Kansas would do both—through Paul Wilson.

1. Paul E. Wilson, *A Time to Lose: Representing Kansas in Brown v. Board of Education* (Univ. Press of Kan. 1995).

Wilson reviewed the file and produced a spare and logical argument for his brief: The Constitution commits public education to the states; *Plessey* is the controlling precedent; the parties agree that, unlike most school districts, Topeka's provides equal facilities and resources in its separate schools; the judgment should therefore be affirmed.

Then Wilson took the train to Washington, where he bought a newspaper bearing the headline *Legal Titans to do Battle in the Supreme Court*. The article was about John W. Davis, who would be arguing for South Carolina in one of the companion cases, and Thurgood Marshall and the other members of the NAACP's legal team. Wilson himself was mentioned only at the end of the articles, as "Assistant Attorney General Paul *Williams*."

He hand delivered Kansas's brief to the other lawyers, and agreed to meet later with Davis to discuss the oral argument. As Wilson recalls it, Davis, then the country's preeminent appellate lawyer, "took me under his wing and gave me a course in appellate argument." The next day, Davis moved Wilson's admission to the bar of the Supreme Court and sat beside him, passing him helpful notes as Robert Carter argued for the plaintiffs. Wilson then "stood up and began to talk." He found himself enjoying the chance to respond to the Court's questions and, following Davis's advice, he sat down before using all his time.

We know the rest of the story. Chief Justice Vinson died, and President Eisenhower appointed Earl Warren to succeed him. The parties reargued the cases in December of 1953, Wilson appeared again for Kansas, this time as "an experienced Supreme Court advocate," and in due course he lost the case.

But that's not the end of the Paul Wilson story. After a few more years at the Attorney General's office and an unsuccessful race for the Kansas Supreme Court, he joined the law faculty at the University of Kansas. He was a pioneer in clinical education, founding what is now known as the Paul E. Wilson Defender Project, long recognized as a model for other such programs.² He edited the *American Criminal Law Quarterly* and immersed himself in law reform: He was the principal drafter of what

2. *Johnson v. Avery*, 393 U.S. 483, 495-96 (1969) (Douglas, J., concurring).

became the *Model Rules to Implement the American Bar Association Standards of Criminal Justice*; he led a rewrite of the Kansas Criminal Code; and he was the principal architect and author of the legislation creating the Kansas Court of Appeals.³

It was Wilson's supporting role in *Brown*, however, that followed him through the years. He said when he retired that among the things he would miss most was "the annual visit from the Kansas reporter who wants to do a story on *Brown v. Board of Education*."⁴ We can suppose too that he missed the opportunity to give the talk reprinted here; he gave it each spring during his last several years at the law school.

Wilson's talk reminded his students, as it now reminds us, that a lawyer's work on what turns out to be a losing appeal can nonetheless be of critical importance. He told the Supreme Court about "the merits in the position he represent[ed]" so that the Court could "decide one of the most important issues of the century" after being fully informed.

The result in *Brown* was, then, not truly a loss for Wilson. He performed a valuable service for the Court, for the state of Kansas, and for the country as a whole. As his adversary Robert Carter pointed out after the decision came down, "your purely lawyer-like examination of constitutional power, unfettered with emotions and demagoguery, helped embolden the Court to make its courageous and statesmanlike declaration of May 17."

Our own work as appellate lawyers may never have so lasting an effect. But we can at least enjoy listening to "an elderly man reminisce about his brief visit to Camelot," where, Paul Wilson's experience demonstrates, an individual defeat sometimes yields a broader triumph.

DPM
Jonesboro
May 20, 2004

3. See generally Michael J. Davis, *Dedication*, 30 Kan. L. Rev. 1, 2 (1981); Sandra Craig McKenzie, *Paul Wilson: Kansas Lawyer*, 37 Kan. L. Rev. 1, 24-51 (1988).

4. Paul E. Wilson, *Retrospective Ramblings*, 30 Kan. L. Rev. 5, 13 (1981).

