

## REVIEW: MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER

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In the middle of *The Making of a Civil Rights Lawyer*, Michael Meltsner recalls the first time he met William Kunstler. It was in late 1961, shortly after Meltsner had joined the NAACP Legal and Education Defense Fund (LDF). Kunstler had not yet, Meltsner remembers, “been overtaken by fame.”<sup>1</sup> A meeting on representing civil rights workers was about to begin when a call came in about arrests in Poplarville, Mississippi, a hard-nosed Delta town where only two years earlier a black man had been lynched for allegedly raping a white woman. Kunstler immediately demanded action. “We have to get there now,” he boomed. “This is Poplarville. I mean *Poplarville!*”<sup>2</sup>

Kunstler was already showing the impulsive traits that would make him one of the most well-known civil rights lawyers in the country. “Unfortunately,” Meltsner adds, “as time went by, he developed a habit of crisscrossing the South and filing a wild array of cases—an itinerant, a sort of legal Johnny Appleseed—that other lawyers would have to take over after he moved on.”<sup>3</sup>

Meltsner does not say whether he actually had to pick up after Kunstler, but he certainly fits the description of those who did—hard working, committed, and unlikely to be featured in newspapers or on television. As a result, Meltsner has not figured prominently in the leading histories of civil rights litigation in the 1960s, but that does not mean that his new book is a secondary account by a minor player.<sup>4</sup> He offers an insider’s view of the work of LDF (arguably the most important public interest legal organization in the country’s history); a far-ranging yet clear-headed meditation on law, social change, and the struggle for racial equality; and candid commentary on the virtues of being a public interest lawyer by a veteran practitioner. His book is, moreover, a good read.

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1. MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 115 (2006) (hereinafter cited by page number only).

2. P. 115.

3. P. 116. For an even more critical account of Kunstler’s work, see CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE: UNDER LAW* 139–40 (1998) (hereinafter MOTLEY, *EQUAL JUSTICE*).

4. For a more detailed account of the work of LDF, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) [hereinafter GREENBERG, *CRUSADERS*]. Two other significant memoirs are MOTLEY, *EQUAL JUSTICE*, *supra* note 3, and ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* (2005).

Meltsner has an eye for the telling vignette and a talent for the memorable phrase as his recounting of the Kunstler episode reveals.

### I. AN INSIDER'S VIEW OF LDF

Michael Meltsner grew up in a striving New York City Jewish family that had known hard times. Neither of his parents was devoutly religious, but both were active in liberal political circles. Meltsner's first hero was Joseph Welch, the legendary Boston attorney who took on Joseph McCarthy and Roy Cohn during the Army–McCarthy hearings in 1954. Meltsner attended Oberlin College and then went on to Yale Law School. At Yale he encountered a galaxy of renowned law professors, including Thomas Emerson and Alexander Bickel. Meltsner was, however, dissatisfied with the thrust of the legal curriculum. His critique was not yet fully developed, but he questioned the value of the high-minded, close analysis of court opinions. While at Yale in the late 1950s, he interned with a public defender and witnessed first-hand the gritty, even disturbing, reality of the American legal system. The Yale legal education at the time unfolded on a plane removed from everyday considerations. Commenting on the famed case method first employed in the 1880s by the Dean of the Harvard Law School, Christopher Langdell, Meltsner notes that “[i]t was as if Michelangelo refused to explain to an apprentice how he held his chisel, much less to model its use with the apprentice at his elbow, though he was quite willing to debate endlessly the views of the art historian Giorgio Vasari . . . .”<sup>5</sup>

Early on, Meltsner knew that he would not follow the path of most of his classmates into the established law firms so closely tied to the world of business and government. He considered working for the Justice Department, but worried that because “self-suppression wasn’t my strong suit, I ran the risk of going along and then feeling like a counterfeit.”<sup>6</sup> A friend of his family had recommended the NAACP Legal and Education Defense Fund and, after some hesitation, he consulted with Bickel who told him, “This is the job for you.”<sup>7</sup>

There was no compelling experience in his background that led him to civil rights work. He had known blacks growing up, but racial issues did not dominate his youth. He speculates that his Jewish heritage—a deeply felt antipathy toward oppression—helped to determine his path.<sup>8</sup>

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5. P. 44.

6. P. 29.

7. P. 31.

8. P. 100. For a broader analysis of the Jewish involvement in the modern civil rights

When he joined LDF in the late summer of 1961, Meltsner was only the sixth lawyer on staff. Thurgood Marshall and his team had won their great victories, including *Brown v. Board of Education* in 1954, with only a modest number of full-timers. LDF was actually separated from the National Association for the Advancement of Colored People (NAACP) in part for tax purposes, but also because Marshall wanted full control of the legal operation.<sup>9</sup>

Meltsner's real legal education began at LDF. He had to learn how to choose cases, work with clients, prepare briefs, and argue in court—all of the nuts-and-bolts stuff of lawyering that Yale had not taught him. He was surrounded by gifted colleagues who freely gave of their time and expertise.

The work was invigorating. LDF lawyers were often called to help civil rights activists in the South in legal trouble. Meltsner recounts in detail one trip to Americus, Georgia, in the fall of 1963. There Student Nonviolent Coordinating Committee (SNCC) and Congress of Racial Equality (CORE) protesters had been arrested for trying to open up the segregated downtown theater. They were charged with inciting and conspiring to incite insurrections. The death penalty was a possibility with convictions. Meltsner worked with the unflappable C. B. King, the only black lawyer in southwestern Georgia. The Department of Justice, headed by Robert Kennedy, stayed far away from the case.

Meltsner was caught unprepared by the tenacity of white segregationists, even under oath. In a cross-examination, the police chief simply denied everything. "It dawned on me that, incredibly," he notes, "I had never been schooled in cross-examination of truly hostile witnesses."<sup>10</sup> Fortunately, Morris Abram, the highly-regarded Atlanta lawyer devoted to civil rights reform, kept a level head and exposed the unconstitutionality of the charges.

"After a few years at LDF," Meltsner writes, "I had come down to earth, landing in a world I could not have imagined."<sup>11</sup> It is disappointing, then, that Meltsner does not offer more war stories about his actual work with LDF.<sup>12</sup> One effect of his relative reticence here is to remind readers that the life of a civil rights lawyer, William Kunstler notwithstanding, did

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movement, see CHERYL LYNN GREENBERG, *TROUBLING THE WATERS: BLACK-JEWISH RELATIONS IN THE AMERICAN CENTURY* (2006).

9. This story is covered in MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1930–1961* (1994).

10. P. 68.

11. P. 79.

12. Constance Baker Motley discusses her work as a lead LDF lawyer in a fuller range of cases in the southern theater during the 1960s in her autobiography. MOTLEY, *EQUAL JUSTICE* *supra* note 3, at 148–202.

not necessarily mean running from one dramatic courtroom encounter to the next. Much of the work required long hours rounding up evidence and studying legal statutes. “I had,” he recalls, “to learn in fact as well as in theory that a civil rights case required just as much attention to investigating facts, hunting precedents, and acquiring technical proficiency as any other serious lawsuit.”<sup>13</sup>

By the 1960s, LDF was praised by its admirers and feared by its opponents for its efficiency and its visionary strategy. Meltsner counters the view of LDF as masterfully following a well-devised script. The reality of decision-making at LDF was much different. “In the LDF office,” he notes, “there was a remarkable informality about taking on cases.”<sup>14</sup> And rarely were fundamental assumptions questioned. Despite its unique work, LDF operated like the typical big law firm of the era. It was, Meltsner writes, “better suited to finding lawyers to further develop areas in which it had already been working or handling cases that arrived at its door and interested a staff member” than “at developing a strategic plan crafted to gain clear resolution of explicit and detailed social goals and objectives.”<sup>15</sup>

Meltsner was not a regular headline maker at LDF, but his memoir is valuable for his incisive portraits of his more prominent colleagues. James Nabrit III, Meltsner’s original mentor, was “a civil rights diaper baby.”<sup>16</sup> His father also worked with Thurgood Marshall and LDF. Nabrit measured up to his father. He was, according to Meltsner, “the most thorough lawyer I encountered in four decades of law practice and teaching.”<sup>17</sup> When Meltsner started at LDF, he shared an office with Derrick Bell. Bell had, Meltsner writes, “an infectious laugh that could be heard an office or two away, and a sardonic wit about the foibles of the larger society.”<sup>18</sup> Bell also possessed a sharp legal acumen and would be one of the early inside critics of LDF’s strategy as the 1960s unfolded. Jack Greenberg, who would be Meltsner’s boss for most of his time with the LDF, had been the commander of a landing craft at Iwo Jima during World War II. He was a good man, yet he was not especially gregarious. Meltsner, for instance, does not recall him ever telling a joke. He was, however, a strong, calm leader, “full of iron and very much in charge.”<sup>19</sup> Thurgood Marshall was in many ways a study in contrasts with Greenberg. Marshall was, according

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13. P. 36.

14. P. 95.

15. Pp. 96–97.

16. P. 55.

17. P. 55.

18. P. 80.

19. P. 92.

to Meltsner, “a social animal, comfortable with janitors and Wall Streeters alike. He was the center of attention in every gathering and never at a loss for words.”<sup>20</sup> Marshall, moreover, had a singular style as a commander. “There was something about being in his presence,” Meltsner writes, “that was both comforting and unsettling. This must have been how he wanted you to feel. His manner left things unclear, where he stood and where you stood with him, but it also conveyed that he wanted results.” Marshall loved anecdotes. They were “a didactic tool to express his numerous opinions on just how particular cases would turn on evidence, precedent, and cunning.” Marshall, Meltsner speculates, “had learned to be careful in expressing his opinions.”<sup>21</sup>

Marshall left LDF for a federal judgeship less than a year after Meltsner started working there. The selection of a successor was more heated than was widely known at the time. Robert L. Carter, who had been with Marshall for years and was one of the principal strategists of the path to *Brown*, wanted to be the next head of LDF. Instead, Greenberg was tapped. By 1961, Marshall’s and Carter’s relationship had soured, but Carter came to believe that Marshall chose Greenberg in part to prove to important white politicians who held the keys to important posts in the federal government that he did not hold grudges against whites.<sup>22</sup> Meltsner contends that Marshall’s support for Greenberg, a Jew from the Bronx who had also been with LDF for years, “had nothing to do with brains, legal ability, or leadership skills.” Marshall still wanted to shape LDF’s legal program, and he viewed Carter as “a rival or potential rival.” Greenberg, who had been “a loyal lieutenant,” was more likely to follow Marshall’s vision than the more independent Carter.<sup>23</sup>

The selection struggle ultimately would have far-reaching consequences, one of which was a growing distance between the NAACP and LDF. Marshall had, in fact, maneuvered Carter’s earlier appointment as the NAACP counsel. It was a position initially without resources, but over time Carter trained his sights on having northern school segregation declared unconstitutional. His program put him at odds with LDF, which focused on eradicating de jure segregation from American life.<sup>24</sup> LDF concentrated on the South, and ultimately Martin Luther King, Jr., and the

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20. P. 92.

21. P. 35. For a fuller account of Marshall, see JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

22. CARTER, *supra* note 4, at 146.

23. P. 101. For Greenberg’s version of the succession, see GREENBERG, *CRUSADERS*, *supra* note 4, at 294–98.

24. CARTER, *supra* note 4, at 165–95.

Southern Christian Leadership Conference (SCLC) turned to it for legal assistance. In many ways during the 1960s, LDF's stature rose (more money, more resources, more lawyers), while the NAACP's fell (the Association seemed less relevant than other civil rights organizations, most notably CORE, SNCC, and SCLC).

But for most of the 1960s, the power struggles and disputes within the civil rights community did not detract from Meltsner's love for his work nor his respect for LDF. "LDF society," Meltsner writes, "included a mostly black but integrated population of staff lawyers and an overwhelmingly black network of cooperating lawyers advised by a group of mostly but not exclusively white academics."<sup>25</sup> Blacks and whites worked there together as colleagues and as friends. "Rarely did anyone, lawyer or secretary, complain about the hours," Meltsner recalls. "Spouses or girlfriends of the then overwhelmingly male legal staff would arrive late in the day, after their own work, to bring in meals or help collate documents. We saw each other socially with a frequency I have never experienced in any other job."<sup>26</sup>

LDF was, in many respects, a model for a new America. But even in LDF, race mattered, and how it mattered is a question that fascinates Meltsner. His boss Jack Greenberg maintained that his racial background was the "least relevant" quality about him.<sup>27</sup> Meltsner wanted to share Greenberg's perspective, but he could not. The differential treatment that he and a black colleague received in trying to hail a taxi in front of the LDF's Manhattan office proved the ever-present significance of race in America.<sup>28</sup> And LDF was not inoculated from the intensification of racial rhetoric in the late 1960s. Meltsner insists that LDF was still a remarkable place, but as it grew it was no longer the intimate organization that it once had been. Meltsner offers few details on the subtle, yet significant, changes. He lets his wife sum up the new context. "You are upset that things are different," she told him.<sup>29</sup> Soon afterward Meltsner left LDF, but he continues to affirm the importance of white participation in the fight for civil rights. As he writes at the end of his book "the white civil rights lawyer represents something of great value for a social movement that in

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25. P. 40.

26. P. 58.

27. P. 37.

28. P. 100. Meltsner notes that in her autobiography, Constance Baker Motley, a leading attorney for LDF and later a distinguished federal judge, pointed out that essentially only one white lawyer—Greenberg—had worked for LDF. "Actually, this once," Meltsner—who had worked with Motley on a few cases—writes, "I was an invisible man, given a taste of what then was for too many just the ordinary pain of blackness." P. 100.

29. P. 128.

the end must be inclusive to realize its goals.” “The presence of white advocates,” he adds, “is obviously important tactically,” but more important in a broader sense because “down the road a just society can’t only mean one group coming up to the level of another; it requires a system of respectful and equitable encounter, interaction, discourse, exchange, and growth.”<sup>30</sup>

In his last years at LDF, Meltsner was involved in arguably his most famous case. In the mid-1960s, Muhammad Ali, the heavyweight champion of the world, had become entangled in the draft. Ali, a follower of Elijah Muhammad, claimed that he could not enter the military because of his religious beliefs. In 1967, he refused to accept his induction into the armed services and was sentenced to five years in prison. At the same time, he was banned from boxing by New York State Athletic Commission and other state boxing associations. Eager to fight while appealing his conviction, Ali accepted the legal services of LDF in challenging the suspension of his boxing license.

This is where Meltsner and Ann Wagner, a new recruit to LDF, stepped in. They discovered that in the past the state of New York had licensed over two hundred fighters who had criminal records. Ali had been singled out by the New York State Athletic Commission because of his cause, his fame, his race, and his religious affiliation. The state of New York dropped its charges.<sup>31</sup>

## II. LAW, SOCIAL CHANGE, AND THE STRUGGLE FOR RACIAL JUSTICE

The Ali case highlights one of the most important qualities of this book. Meltsner does not view the struggle for racial equality in conventional terms; that is, beginning with the *Brown* decision in 1954 and ending with Martin Luther King’s assassination in 1968.<sup>32</sup> He says little about the deep origins of the modern struggle, which the historian Jacquelyn Dowd Hall calls the “long civil rights movement,” for they stretch back into the 1930s.<sup>33</sup> But he shows that even as the nonviolent

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30. P. 264. Meltsner did not seem to suffer from movement fatigue or despair, common afflictions of movements. For a description of movement fatigue, see BILL MOYER ET AL., *DOING DEMOCRACY: THE MAP MODEL FOR ORGANIZING SOCIAL MOVEMENTS* 59–64 (2001).

31. Meltsner’s work is overlooked in most biographies of Muhammad Ali. For example, DAVID REMNICK, *KING OF THE WORLD: MUHAMMAD ALI AND THE RISE OF AN AMERICAN HERO* (1998) does not discuss Meltsner’s efforts.

32. See, e.g., JOHN A. SALMOND, *MY MIND SET ON FREEDOM: A HISTORY OF THE CIVIL RIGHTS MOVEMENT, 1954–1968* (1997); ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA’S CIVIL RIGHTS MOVEMENT* (1990).

33. Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1233–63 (Mar. 2005). The article suggests the coming primacy—not just the

movement was fraying, LDF extended its work and in many ways framed the terms of civil rights debate, especially the problems of school segregation and employment discrimination, during the 1970s.<sup>34</sup>

Meltsner's exploration of the black freedom struggle focuses on the important role lawyers played. The drama of direct action and its leading exponents—King, James Farmer, James Bevel, and Diane Nash to name a few—are featured in the major accounts of the civil rights movement after the *Brown* decision.<sup>35</sup> Meltsner shows how deeply embedded were movement lawyers in the unfolding of events. He writes,

The hoped-for impact of protest demonstrations was cumulative and systemic, making the lawyer's role one, though only one, of the elements necessary for success. Without it, activists would have had trouble putting demonstrators on the line day after day, raising bail money, neutralizing white control of local justice systems, and, most important, converting concessions into concrete negotiated or court-sanctioned results.<sup>36</sup>

The work of the lawyers expanded—rather than contracted—with the victories triggered by direct action. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 (as well as numerous programs of Lyndon Johnson's Great Society agenda) presented federal government lawyers with copious opportunities to ply their trade. And there were more and more public interest lawyers following in the footsteps of LDF.<sup>37</sup>

Despite its ever-expanding initiatives, LDF, Meltsner argues, missed an opportunity to extend the achievements of the civil rights movement. Meltsner agrees with most historians that the black freedom struggle

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emergence—of a different framework and is based on a rich array of recent studies.

34. Meltsner spends far more time discussing educational issues than he does affirmative action in employment.

35. See, for example, Taylor Branch's comprehensive study of the civil rights movement from 1954 to 1968: *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63* (1988); *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–65* (1998); and *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68* (2006). The role of lawyers is more central to most studies of civil rights efforts in the run-up to the *Brown* decision. Richard Kluger's *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) is the classic example. Historians have tended to neglect the NAACP in their accounts of the civil rights movement in the 1960s. For a partial corrective, see GILBERT JONAS, *FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909–1969* (2005).

36. P. 87. For an overview of the many people who helped LDF become so influential, see GREENBERG, *CRUSADERS*, *supra* note 4, at 519–22.

37. For an important study of the effect of the civil rights movement on governmental activity, see HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* (1990).



reached a fundamental crossroads in the mid-1960s.<sup>38</sup> He writes,

Dr. King became increasingly aware that the movement had not addressed economic justice or general living conditions in the North. Frustrated by the urban riots, a distracting and costly war, and the growing appeal of Black Power rhetoric, he decided on a dramatic shift in strategy: he would open a “second phase” of the movement devoted to economic discrimination.<sup>39</sup>

King’s and SCLC’s Chicago campaign from 1965 to 1967 and then their Poor People’s Campaign in 1968 were the most notable efforts of this “second phase,” but they were, according to Meltsner, “earnest, amateurish, and ultimately embarrassing, largely because of the shortsighted planning that went into them.”<sup>40</sup>

But Meltsner does not just focus on the shortcomings of King, SCLC, and their allies. He criticizes LDF for failing to attack economic injustice. It is admittedly a sympathetic criticism as he recognizes the consequences of LDF’s lack of a grand strategy and also the limitations of the very nature of litigation. “We were lawyers first,” he notes, “and our training did not prepare us to plot a course for black economic growth . . . .”<sup>41</sup>

Meltsner also admits that LDF’s relentless pursuit of school desegregation in the 1960s and 1970s might have been too single-minded. Even in the 1960s Derrick Bell doubted whether integration should be the principal goal, and by the mid-1970s he criticized the LDF’s goals and even motivations. The focus of attack, Bell argued, should have been on acquiring equal education.<sup>42</sup> On the fiftieth anniversary of the *Brown*

38. See, e.g., AUGUST MEIER AND ELLIOTT RUDWICK, *CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942–1968*, 374–431 (1973); ROBERT J. NORRELL, *THE HOUSE I LIVE IN: RACE IN THE AMERICAN CENTURY* 231–68 (2005). Martin Luther King offered a similar assessment. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 1–22 (1967).

39. P. 97. On King’s campaign in Chicago, see JAMES R. RALPH, JR., *NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT* (1993). On King’s last years, see DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 431–626 (1986) and BRANCH, *AT CANAAN’S EDGE*, *supra* note 35.

40. Pp. 97–98. Meltsner astutely analyzes the civil rights movement of the 1950s and 1960s. I only detected one minor error in his recounting of a range of events. He writes on page 43 that President Dwight Eisenhower federalized the Arkansas National Guard in 1958 during the Little Rock Crisis. The year, in fact, was 1957. Historians have recently challenged a King-centered framework for understanding the modern civil rights movement because in part it fails to account for a long tradition of northern activism. For a fuller account, see *FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940–1980* (Jeanne F. Theoharis & Komozi Woodard eds., 2003).

41. P. 98.

42. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L. J.* 470, 471–72 (1976).

decision in 2004, Bell contended that *Brown*—with its emphasis on ending legally segregated schools—had actually taken the civil rights movement down the wrong path. Integration did little for the black poor.<sup>43</sup>

Ever reasonable, Meltsner acknowledges the merit in Bell's critique. But like other contentions made by Bell that he discusses (such as Bell's protest against Jack Greenberg co-teaching a course on civil rights law at Harvard in 1983; his suggestion that LDF's strategy was essentially controlled by its donors, who were largely white; and his sensational parable in the story "The Space Traders" that white Americans would readily give up black Americans to alien invaders in order to save the planet), Meltsner finds that Bell too often tips to the extreme.<sup>44</sup> Meltsner contends that carrying through with the promise implicit in *Brown* with schools was significant.

Even earlier, LDF had rejected a course of action plotted by Bell's good friend, Robert Carter. As the NAACP counsel, Carter sought to make the Association's legal staff more salient by extending the *Brown* principle to northern public education. Carter contended that *Brown*'s animus against segregation in education did not apply exclusively to the South and de jure segregation. It should also address the racial imbalance so prominent in school systems in many northern cities.<sup>45</sup> LDF, in contrast, believed that it was impolitic to shift its focus away from legally mandated segregation which had so long been a scourge of black Southerners. It also suspected that the Supreme Court would never fully accept the constitutional vision implicit in Carter's approach. The Court, it anticipated, was unlikely to declare in sweeping terms racial isolation—without evidence of discriminatory intent—to be unconstitutional.

In the 1970s, LDF did train its sights on northern school systems, but without the comprehensive constitutional sweep of the NAACP.<sup>46</sup> The Waterloo for many advocates of Carter's initiative came in 1974 with the *Milliken v. Bradley* decision. Here the Supreme Court ruled that suburban districts could not arbitrarily be compelled to participate in remedies for central city violations.<sup>47</sup> The Court placed stark limits on metropolitan solutions to racial imbalance.<sup>48</sup>

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43. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).

44. Pp. 120–21, 129, 132–33.

45. CARTER, *supra* note 4, at 169–77, 188–95.

46. GREENBERG, CRUSADERS, *supra* note 4, at 392–93.

47. *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974).

48. *Id.* For commentary on *Milliken*, see CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 30–33, 57–74 (2004); MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 314–16 (2006).

Meltsner views the *Milliken v. Bradley* ruling as a definite setback, but not the turning point of many commentators. His perspective is in keeping with a pragmatic cast of mind that marks his book. He is not one for dire pronouncements. From a broader angle, he questions whether a positive ruling in *Milliken* really would have undermined northern school segregation. And here Meltsner bares his own skepticism about the propulsive power of court decisions in the face of intense public opposition or contrary broader social forces. More decisive than the “unwillingness of the Court to approve an interdistrict remedy” was “the social fact that in Northern city after city white parents were moving to the suburbs or enrolling their children in parochial or private schools.”<sup>49</sup>

Meltsner’s evaluation of the work of LDF sets up one of the most interesting sections of his book: his reflections on the debate over litigation as a vehicle for social change. That debate has a long history, but it intensified in 1991 with the publication of Gerald Rosenberg’s *The Hollow Hope: Can Courts Bring About Social Change?*<sup>50</sup> Rosenberg’s thesis was stark: the courts played little role in effecting liberal reforms. A corollary of his thesis was that litigation to that end represented a waste of resources and energy.

Rosenberg developed his argument by focusing on the premier example of transformative litigation and court decisions: the *Brown* ruling. In actuality, *Brown* was not, he argued, a critical engine of social change. Southern schools did not truly begin to desegregate until the passage of the Civil Rights Act of 1964, a decade after *Brown*.<sup>51</sup> Moreover, Rosenberg found little evidence in the speeches and writings of leading civil rights figures after 1954 that *Brown* was a decisive influence.<sup>52</sup>

The debate over the significance of *Brown* has been one of the liveliest scholarly controversies over the past fifteen years or so.<sup>53</sup> It is not my

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49. P. 279 n.20. For a comprehensive assessment of school desegregation, see SCHOOL DESEGREGATION IN THE 21ST CENTURY (Christine H. Rossell, David J. Armor, & Herbert J. Walberg eds., 2002). For a powerful yet skeptical account of court-mandated busing in the face of strong public resistance, see J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985).

50. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). For an insightful commentary on Rosenberg and the debate about the efficacy of litigation, see Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L. J. 1763, 1763–86 (1993) (book review). Schuck notes three major perspectives on Rosenberg’s question—the “strong-courts,” “court skeptics,” and “court fatalists.” *Id.* at 1769. As my analysis shows, Meltsner is not easily classified.

51. ROSENBERG, *supra* note 49, at 39–71.

52. *Id.* at 107–156.

53. For more on the significance of *Brown*, see Symposium, *Twentieth-Century Constitutional History*, 80 VA. L. REV. 1 (1994) and the discussion in *Roundtable*, 91 J. AM. HIST. 1 (2004). For a critical reaction to Michael J. Klarman’s FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND

intention to summarize it here. What is significant is Meltsner's contribution to the debate. He does so characteristically from the perspective of someone on the frontlines of civil rights battles who values litigation to make the world a better place and yet who recognizes limits in a messy, uncompromising world.

As a member of LDF during the 1960s, Meltsner finds the proposition that *Brown* was unimportant is laughable. "It is passing strange," he writes, "that because *Brown* didn't do everything, it should be held up as doing nothing."<sup>54</sup> To him, *Brown*'s urgent "statement of principle" was powerful. It needed to be promoted "until a critical mass of political forces brought about an end to segregation." LDF, he writes, "attempted to squeeze *Brown* for all it was worth in subsequent cases," and while it did not transform the tough realities for many African-Americans, it accomplished a lot. "A court decision," he notes, "can go just so far under the best of circumstances. But a movement needs a name, a rallying cry, and benchmarks of progress; *Brown* supplied them for a time, as well as legal precedent."<sup>55</sup>

Meltsner finds the debate over the Rosenberg thesis perplexing, one of extremes that strike him as too disconnected from reality. He writes,

In this respect, the essential point of *The Hollow Hope*'s reception is the unwillingness of numerous reviewers and analysts to develop the territory lying between, on the one hand, the common idea that courts sometimes accomplish useful reform but sometimes inhibit it and, on the other, the conclusion that as vehicles for reform they are virtually worthless.<sup>56</sup>

Meltsner notes too that in certain political contexts, the only real option that activists might have is litigation; for him, corrective political action and legislative remedies can be impossible. In 1954, no other branch of government was ready, given the public mood, to take action to eliminate a grievous wrong in American society. That was another reason why *Brown*, contrary to the view of skeptics, was important.

Litigation, to Meltsner, is a most viable vehicle for social reform in certain contexts. In a compelling chapter, *The Complex World of Law Reform*, he traces the fortunes of two worthy legal efforts that ultimately

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THE STRUGGLE FOR RACIAL EQUALITY (2004), see Matthew D. Lassiter, *Does the Supreme Court Matter: Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1401-23 (2005) (book review).

54. P. 187.

55. Pp. 186-87.

56. P. 186.

fell short of expectations. The first was the brainchild of Philip Schrag, who as a young LDF attorney in the late 1960s sought to clamp down on unsavory commercial practices that afflicted urban consumers, especially the poor. On behalf of low-income clients, he took unscrupulous merchants, salesmen, and finance companies to court. It was a tough battle. "Schrag," Meltsner writes, "learned some grim lessons in how difficult it could be to win a test case in an area of law where racial impact is indirect and commercial interests and market habits dominate."<sup>57</sup>

A pioneering campaign for prison reform that LDF launched in the late 1960s ran into similar difficulties. William Bennett Turner, another LDF attorney, focused on the abysmal conditions for prisoners in Texas. After twenty years of effort, some progress had been made, but the federal judge in the case continued to find disturbing constitutional violations in the Texas penal system.

Schrag's and Turner's innovative work showed how LDF expanded its initiatives as the 1960s wore on, even after the high tide of the civil rights movement. But it also revealed the difficulties of replicating earlier successes against legalized segregation. Both campaigns would have improved the lot of two groups, disproportionately black, on the margins of American society. And yet neither produced dramatic successes.

The message for Meltsner is clear: "The more systematically complex and interconnected the cluster of issues confronting the courts in any particular subject area, the greater the need for judicial action to be linked closely to targeted action by other institutions and branches of government." And Meltsner accents this insight with a more prosaic saying: "Sometimes litigation works and sometimes it doesn't."<sup>58</sup>

This last point is one of the themes of his lengthy discussion of the death penalty. Meltsner began work on capital cases shortly after he joined LDF. One of his assignments was to sift through letters from prisoners to see if there were striking cases of injustice. He learned firsthand that the criminal justice system made serious mistakes, often because of racism. The question for Meltsner at the time was not whether the death penalty was a violation of civil liberties. As late as 1965, the American Civil Liberties Union decried injustices in the criminal justice system but did not view the death penalty as unconstitutional. Meltsner understood the urge for exacting punishment of perpetrators of heinous crimes, but his

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57. P. 159.

58. P. 163. Meltsner recognizes the structural basis of racial inequality in American society, though he does not draw on recent historical work that traces the role of the expanding liberal state in furthering inequality. See, for instance, THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996).

involvement with prisoners and then his work with Anthony Amsterdam on capital cases led him to doubt the capacity of states to execute only the truly deserving.

For years, LDF invested a great deal of resources on capital cases. In the mid-1970s, Jack Greenberg estimated that such cases absorbed 20% of LDF's energy.<sup>59</sup> LDF saw capital cases as a direct extension of its civil rights work as blacks were disproportionately found on death row.

LDF and its allies gained a great victory in 1972 with the *Furman v. Georgia* decision which invalidated the death penalty as it was then administered.<sup>60</sup> But four years later, the Supreme Court held in *Gregg v. Georgia* that changes states had made after *Furman* brought the death penalty within constitutional parameters.<sup>61</sup> For the past thirty years, the death penalty system has effectively been broken in this country. Meltsner continues to call for an end to capital punishment, but he is not optimistic about the immediate prospects.

And yet unlike many commentators, Meltsner avoids the emotionalism that surrounds much of the discussion of the death penalty.<sup>62</sup> Meltsner does not rail against conservative judges for their support of capital punishment. The shifting judicial stance on the death penalty, he argues, represents a divided public. Many Americans on a gut level, he believes, support the death penalty because they believe that some criminals are so malevolent in their misdeeds that they deserve the ultimate punishment.<sup>63</sup>

Once again, Meltsner demonstrates the difficulty of achieving lasting reform through litigation. But he does not call, as have some critics of LDF, for a suspension of the fight against the death penalty. He sees the value of putting into the public square evidence of the unsteadiness of the American criminal judicial system. "Capital punishment is a heavy burden to carry," he writes, "and someday, probably with the help of LDF or the groups with which it is now allied, the justices will figure out a way to put it down."<sup>64</sup>

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59. GREENBERG, CRUSADERS, *supra* note 4, at 454.

60. *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

61. *Gregg v. Georgia*, 428 U.S. 153, 157 (1976).

62. See, for example, JESSE L. JACKSON, SR. & JESSE L. JACKSON, JR., *LEGAL LYNCHING: THE DEATH PENALTY AND AMERICA'S FUTURE* (2001).

63. Meltsner is the author of an earlier book on the death penalty. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

64. P. 218.

## III. SO YOU WANT TO BE A LAWYER

In his book, Meltsner looks back on a long career, but he does so with an eye toward the future. His book is an extension of his principal work since he left LDF—educating rising generations. In the 1970s he helped to expand the curriculum at Columbia Law School with a legal aid clinic. Since joining Northeastern Law School in 1979, he has been a tireless advocate for a hands-on legal education. He has never forgotten the deficiencies of his preparation at Yale.<sup>65</sup>

Unlike when Meltsner joined LDF in 1961, public interest law is no longer a novelty, an unusual track for young lawyers. He takes pride in being among the early pioneers in this specialty, but he worries that the high price of a legal education and constricted government and foundation funding will erode the strength of the public legal sector. He knows too that it is unlikely that those with a desire to serve will find themselves practicing in the kind of heroic age that he did.

Nevertheless, Meltsner welcomes newcomers to his field. In a certain sense the title of his book does not refer to the forming of a particular individual but to a class of lawyers. Throughout his book, Meltsner dispenses nuggets of wisdom that come from seasoned experience in the trenches of civil rights litigation. During one case against a discriminatory restaurant in the 1960s, he wondered whether one of his witnesses had concocted a story to ease a winning verdict. He knew the restaurant violated the law, but he later regretted that he had not more fully vetted the witness. There were, he decided, “rules of professional responsibility” that needed to be followed in spite of the presence of moral outrages.<sup>66</sup>

Meltsner even includes a ten-page appendix, *So You Want to Be a Lawyer*, in his book that explains that the popular image of the work of a lawyer does not often line up with the reality. “The stillness surrounding much legal work and the delays encountered before one actually enters a courtroom are often shocks to the system of a high-energy, upwardly mobile, assertive young attorney,” he warns.<sup>67</sup> But the overall message is that the legal world—especially public interest law—can still offer a rewarding life.

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65. Meltsner says very little about his work in the courtroom after he left LDF. He notes that after moving to Massachusetts, he acquired a license as a marriage and family therapist and worked at a community health clinic. He saw this work as a continuation on “a smaller scale” of “the kind of client problem-solving that had given me so much satisfaction as a practicing lawyer.” P. 239.

66. P. 78. For a broader perspective on public interest law, see *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998).

67. P. 258.

Meltsner is encouraging in large measure because of his faith that litigation can make a difference. He recognizes that the political climate in recent decades has not been as conducive to liberal social change as it was when he joined LDF. But he rejects the hardened pessimism of his one-time colleague and long-time friend, Derrick Bell, who writes about the “permanence of racism.”<sup>68</sup> He would be even more troubled by the fatalism of Randall Robinson, a leading actor in the successful anti-apartheid movement in the United States, who recently left for St. Kitts. “I tried to love America, its credos, its ideals, its promise, its process,” Robinson writes. “But these things could mean no more to me than they had to those who had conceived them, written them, recited them, and, ultimately, betrayed the[m].”<sup>69</sup>

Meltsner acknowledges that the energies of the civil rights movement have subsided and complains about the lack of a “systematic pattern of action, the hallmark of the civil rights movement.”<sup>70</sup> “[R]enewal,” he declares, “is a necessity.”<sup>71</sup> And he offers more than a call to action; toward the end of his book, he outlines four steps that a new generation of civil rights litigators should take.

The first calls for civil rights lawyers to rely less on their technical skills and more on their artistic side. They need to uncover “operative social facts and relationships that people would rather not see . . .”<sup>72</sup> “The job here,” he adds, “is to make news out of stories that are ignored and to develop the hidden racial dimensions buried beneath sanitized narratives.”<sup>73</sup> The second implores civil rights lawyers not to try only to hit home runs, to focus on cases that promise massive social change. The political climate, he warns, is not congenial for such dramatic action. But that fact need not lead to paralysis. Instead, he lists a number of “smaller issues” (such as tracking the consequences of the recent decision to distribute Section 8 housing subsidies for low-income Americans in block grants) that “affect the lives of the poor and of more Americans considered middle class than is generally supposed.”<sup>74</sup> The third urges the cultivation of grassroots

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68. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) is another example of a pessimistic view of race relations in America.

69. See RANDALL ROBINSON, *QUITTING AMERICA: THE DEPARTURE OF A BLACK MAN FROM HIS NATIVE LAND* 245 (2004).

70. P. 14.

71. P. 14. Meltsner is hardly a Pollyanna. He does not embrace the rosy view of American race relations offered by some commentators like the Thernstroms. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICAN IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 530 (1997).

72. P. 244.

73. P. 244.

74. Pp. 247–48.



interracial alliances. “Our only viable course,” he writes, “is to convey the message that racial and economic reform is not a black issue but a general social issue.”<sup>75</sup>

The final step addresses improved education, a typically American solution to social ills. But Meltsner’s explication of how litigators can enhance the educational opportunity for America’s youth, especially African-Americans, surprises. He insists that the No Child Left Behind Act (NCLB), despite its flaws, presents possibilities. “NCLB,” the ever pragmatic Meltsner writes, “is the only source of significant change in national educational patterns on the horizon.” If the NCLB is consistently enforced, then it is likely that many children of color will be able to transfer to schools with higher test scores. Not only will this flow improve the education that many minority youth receive, but it will also counteract the terrible trend of resegregation in many urban school systems. LDF’s current focus on desegregation cases can only produce “marginal good,” Meltsner notes, and he urges LDF to overcome its political allegiances and direct its efforts to the one potential program that can “redress racial and economic disparities that have plagued reform efforts . . . .”<sup>76</sup>

This may not be the bold new progressive agenda to excite liberals nor a sweeping plan—such as a call for a major redistribution of resources from the wealthy to the needy—to attack endemic inequality in American society. But it is practical.<sup>77</sup> And it is Meltsner’s search for specific concrete actions and his rejection of doctrinaire thinking (as his embrace of NCLB reveals) that makes his book so refreshing. He does not issue an extended jeremiad here or scathing denunciations of conservative politicians or reactionary judges.<sup>78</sup> Even in this polarized era, he sees

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75. Pp. 248–49. Meltsner’s analysis follows William Julius Wilson’s call for universal rather than group- or race-specific remedies to problems of inequality. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 140–64 (1987).

76. Pp. 250–55. It is surprising that Meltsner does not say anything about reparations, a growing popular movement for racial reconciliation. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES BLACKS* (2000). For an evocative history of the roots of the modern movement for reparations for slavery, see MARY FRANCES BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* (2005).

77. Meltsner’s approach to reform echoes the experimentalism of Franklin Roosevelt and New Deal liberals. Alan Brinkley, *The New Deal Experiments*, in *THE ACHIEVEMENT OF AMERICAN LIBERALISM: THE NEW DEAL AND ITS LEGACIES* 1, 1–20 (William H. Chafe ed., 2003).

78. See ALAN M. DERSHOWITZ, *AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION* 35–43, 541–50 (2004) for an example of overheated rhetoric about the recent Supreme Court.

opportunities for social change; maybe not sweeping change, but real change nonetheless.<sup>79</sup>

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79. Underlying his guarded optimism is his analysis of the problem: America is not full of “malevolent bigots”; rather, he believes that most white Americans suffer from “widespread self-deception or disassociation with regard to the implications of color.” They are, therefore, educable. P. 245. Meltsner is quite aware of the structural basis of racism and inequality in America, but he is not preoccupied with the seeming intractability of these flaws. He is more chastened than postwar liberals were in their ability to bring about progressive social change, but in a fundamental way shares their general source of optimism—that the American people want to live in a just society. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (20th Anniversary ed. 1962) (1944) for a classic statement of liberal optimism and GODFREY HODGSON, *AMERICA IN OUR TIME* (1976) for an assessment of postwar liberal assumptions.