

The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death

I. *Introduction*

Military jargon sneaks imperceptibly into the vocabulary of the law when the topic is litigation for social change. The litigation itself is styled a "campaign," its theoretical framework a series of "attacks." The planners of these campaigns, to whom many refer as "fighting the good fight," have been likened by Michael Meltsner to "those highly trained, specially assembled raider groups which are occasionally deployed in wartime"¹ to chart "legal strategy under battlefield conditions."² Jack Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF or "Fund") from 1961 through 1984, warns that

[t]he term "campaign" conjures up an image of military precision. But we will see, time and again, cases take on lives of their own and mature along unexpected lines. . . . Too much that occurs is not subject to control. . . .³

Still, a quick glance at the literature on many of the Fund's projects—campaigns against segregated educational facilities, racially restrictive covenants, money bail, and others—indicates that issues of control, of risk, and of costs and benefits have been central to the decision-making process which has controlled the Fund's campaign strategies.

During the 1960s and early 1970s the LDF undertook yet another campaign. The Fund mounted a two-stage attack on the death penalty: first on its imposition for the crime of rape, then on its imposition for any crime at all. This campaign, however, was not marked by a decision-making process similar to that which engendered other LDF projects.

If it is true that "the life of the law has not been logic: it has been experience,"⁴ the LDF's death penalty campaign set logic against

1. M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 9 (1973).

2. *Id.*

3. J. GREENBERG, *LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS, AND ROLE IN DEMOCRACY* 10 (1973).

4. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

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experience in a way that no other LDF activity had ever done. The logic of first attacking the most extreme manifestation of racism in the criminal justice system, and then of extending that attack to the death penalty itself, propelled the Fund through its exhausting decade-long effort. Yet this logic also involved the LDF in a costly campaign for a small group of defendants, many of whom were not only whites, but whites culled from the most racist segment of society. This logic therefore placed the Fund at seeming loggerheads with its own goals, charter, and history; in short, with its own experience. An equally forceful tension also arose between two different kinds of experience—legal experience as Fund attorneys and moral experience as human beings—and blinded the Fund to the institutional and policy problems which the capital punishment campaign had created.

Any lawyer who has observed the process by which the state chooses those it wishes to kill should see a familiar hand at work here. That hand is the perverting hand of death which twists out of shape the adjudicative element of our justice system. It should come as little surprise, then, that death also distorts the decision-making process of the law firm that handles so many death row clients. This Comment will examine that organization, its decision-making structure, and the host of problems which the capital punishment campaign posed for it, yet which seem neither to have controlled, nor greatly influenced, nor possibly even occurred to the law firm which made the decision to attack.

II. *Legal Defense Fund: History, Principles, and Decisions*

A. *Historical Roots*

The NAACP Legal Defense and Educational Fund, Inc., has its roots in the civil rights organization whose name it still bears. For years, the NAACP—which included lobbying as one of its principal activities—maintained its own internal legal department. In 1939, however, new laws granting tax-exempt status to non-profit organizations that did no lobbying prompted the NAACP to create a separate organization which could handle its legal matters and enjoy the tax break.⁵ The separateness of this new organization allowed it “to obtain new sources of income which could be devoted exclusively to the legal program.”⁶ Furthermore, donations to the new organiza-

5. See M. MELTSNER, *supra* note 1, at 6.

6. L. HUGHES, *FIGHT FOR FREEDOM* 129 (1962).

tion under the tax laws were tax-deductible. Thus on October 11, 1939, the LDF was formed as a membership corporation under the laws of New York. A second and more definitive split between the LDF and the NAACP came in the mid-1960s. A group of southern senators obtained a ruling from the Internal Revenue Service that the two organizations could not have any common directors if the Fund were to maintain its tax-exempt status. As a consequence, the LDF's litigation activities acquired a completely independent status and the two organizations divorced entirely. It is therefore important not to be misled by LDF's name: the Fund is an organization entirely distinct and independent from the NAACP, with its own Board, staff, offices, budget, and agenda.

When the Legal Defense Fund was created, it consisted of one man, Thurgood Marshall, and a budget no larger than his salary and expenses. The LDF's budget in those early years barely topped \$10,000. By the early 1960s, the Fund had expanded to a corps of five full-time lawyers and a budget exceeding \$500,000. Marshall's tenure as Director-Counsel lasted until his appointment to the Second Circuit Court of Appeals in 1961, at which time Jack Greenberg stepped in. The Legal Defense Fund has now blossomed into a New York office, a Washington, D.C. office, field offices in four southern states, and a full-time legal staff of twenty-three attorneys. This full-time staff, however, does not fully describe the real reach of the Fund: some four hundred cooperating attorneys, many of them intimately involved in LDF affairs, are located nationwide. In addition, associated with the Fund are

social scientists, educators, commercial lawyers, law professors, foundation executives, corporation and government administrators, community workers, a Mexican-American legal defense fund, a law reform unit that specializes in cases involving discrimination against the poor, and a scholarship program.⁷

It was the civil rights explosion of the 1960s that stimulated the Fund's phenomenal growth. The expansion was supported financially by grants from the Ford Foundation and other private contributors; the LDF has never received aid from the government. Private funding sources have therefore become increasingly indispensable as the Fund has grown in size and scope. Indeed, by the late 1960s, the Fund was establishing itself as one of America's giants in the civil rights field—all on the goodwill of private contributors.

The sheer fiscal weight of LDF's broad litigation activities in the

7. M. MELTSNER, *supra* note 1, at 6.

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civil rights fight indicates that the decision to attack capital punishment ought to have caused LDF planners to worry about the ability of their organization to withstand the added pressure. Michael Meltsner, a staff attorney at the LDF during the planning stages of the campaign, was aware of such concerns:

In the mid-1960s the LDF was ill-prepared to mount a systematic challenge to the procedures employed by the States to impose the death penalty. Its New York staff was still small, spread dangerously thin, and plagued by almost daily civil rights movement crises that required immediate action.⁸

Whether such concerns actually played a substantial role in the decision-making process remains to be seen.

B. *Principles and Goals*

During the forty-six years of LDF's history, a set of overarching principles and goals has given shape to the Fund's litigation efforts. Prior to the creation of the LDF, the NAACP's legal department asked itself two questions before taking on any case:

- 1) Does the case involve a color discrimination?
- 2) Is some fundamental right of citizenship involved?⁹

The NAACP would only consider involvement in litigation which provided affirmative answers to both questions. As noted by the Supreme Court, "[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country."¹⁰

The corporate charter of the Legal Defense Fund echoes the NAACP's goals of achieving democracy for the black American, but sounds also in the special needs of the indigent. The document is explicit in its purpose "to render legal aid gratuitously for such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and are unable to employ and engage legal aid and assistance on account of poverty."¹¹ Arthur B. Spingarn, one of the Fund's founders, stated in his affidavit in sup-

8. Interview with Michael Meltsner, Professor of Law at Northeastern University School of Law, in Boston, Massachusetts (Mar. 25, 1985).

9. L. HUGHES, *supra* note 6, at 123 (quoting M.W. OVINGTON, *THE WALLS COME TUMBLING DOWN*)

10. NAACP v. Button, 371 U.S. 415, 429 (1962).

11. Certificate of Incorporation of NAACP Legal Defense and Educational Fund (Oct. 11, 1939) (Available at the offices of the Legal Defense Fund, 99 Hudson Street, New York, New York).

port of the application for incorporation that "the proposed corporation does not intend to act as a general legal aid society," but will handle only such cases which involve the rights of indigent blacks, "and only in such instances where they are deprived of said rights solely by reason of the fact that they are Negroes."¹² Although the LDF has never felt inflexibly bound by these pronouncements,¹³ the Fund may well have been troubled by its broad attack on capital punishment per se, insofar as the campaign pushed the Fund very near to being a "general legal aid society" for all death row inmates.

The Legal Defense Fund, nevertheless, did broaden its reach considerably beyond the specific provisions of its charter. In litigating cases concerning race, the Fund occasionally became involved in cases attacking discrimination based on gender, and in defending the rights of the indigent, the Fund occasionally represented indigent whites as well as indigent blacks. LDF lawyers, discovering "that justice was a chain inescapably linking black and white,"¹⁴ also found that "by helping black people, you helped white people too."¹⁵ Still, Jack Greenberg is adamant about the element which has held together and given meaning to all LDF activities: "Race was always the factor. There had to be a racial factor."¹⁶

C. *Decisions and Strategies*

Overarching principles such as those described above only acquire meaning when they manifest themselves in the planning of campaign strategy. The Legal Defense Fund's decision-making apparatus works on two distinct and ostensibly separate, but in fact intimately connected, planes. The formal, institutional dimension includes the Board of Directors and the Executive Committee. The Board, the LDF's formal governing body, is a seventy member group, of whom roughly half are black. A majority are lawyers. The principal function of this group's annual meetings is to ratify proposals originating from the legal staff. The Board thus plays a comparatively minor role in charting the Fund's legal course. Still on the formal plane but exercising greater planning authority is the six-

12. Affidavit of Arthur B. Spingarn in the matter of the application for the approval of the certificate of incorporation of NAACP Legal Defense and Educational Fund, Inc. (Nov. 2, 1939) (Available at the offices of the Legal Defense Fund, 99 Hudson Street, New York, New York).

13. Interview with Jack Greenberg, Vice Dean of Columbia University Law School, in New York City (Mar. 18, 1985).

14. M. MELTSNER, *supra* note 1, at 5.

15. Interview with Jack Greenberg, *supra* note 13.

16. *Id.*

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teen-member Executive Committee. This sub-group of the Board meets monthly, and according to LDF Associate Counsel James Nabrit, III, "is the formal organ which has substantial policy and administrative control."¹⁷

The truly crucial decision-making, however, occurs more informally, involving both the legal staff and the cooperating attorneys. Although policy guidance is formally vested in the Board of Directors and the Executive Committee, operational decisions on policies and priorities are made by the legal staff. In practice, the decisions of the legal staff must be informal and decentralized, since the Director-Counsel convenes no more than five meetings of the entire staff per year. The staff, in turn, keeps an attentive eye on the litigation needs of the black community through close contact with the cooperating attorney network.¹⁸ LDF decisions, then, are the product of spontaneous and informal communication between the Director-Counsel, members of the legal staff, and the cooperating attorneys. The organization is truly marked "by an informal flow of information and points of view, up, down, and horizontally."¹⁹

What emerges from this organizational structure is a sense of friendly cooperation at a personal, rather than institutional, level. The Board of Directors and Executive Committee are never too far removed from staff brainstorming sessions because "the members of the Board are close friends and associates."²⁰ Many of them are also among the most active of the Fund's cooperating attorneys. This personal emphasis in decision-making allows Jack Greenberg to view the evolution of LDF strategy as "really the evolution of the lives of the people who are in it. If the people who were the leaders, and indeed the staff, had the sense that a certain course ought to be pursued, and it looked workable, we did it."²¹ No elaborate conferences were needed to make a decision, because "we were always talking about one thing or another, including capital punishment. It was a very personal process; more like a family than a law office."²²

17. Telephone interview with James M. Nabrit, III, Associate Counsel of the Legal Defense Fund (Mar. 27, 1985).

18. The influence of these field attorneys cannot be underestimated: "The success of the Fund's legal program was in large measure related to its ability to connect these isolated attorneys to the lawyers and institutions which serviced the New York and Washington liberal leadership." M. MELTSNER, *supra* note 1, at 8.

19. Interview with Michael Meltsner, *supra* note 8.

20. Interview with Jack Greenberg, *supra* note 13.

21. *Id.*

22. *Id.*

III. *The Campaign*

The LDF's emphasis on a personal rather than an institutional approach to decision-making manifests itself vividly in the most accessible account of its capital punishment campaign: Michael Meltsner's *Cruel and Unusual: The Supreme Court and Capital Punishment*. Meltsner's recollections suggest that he and two LDF colleagues went to a delicatessen on their lunch hour, bought sandwiches, and, between bites, decided to attack the imposition of the death penalty for rape. The three young lawyers, prompted by a recent dissent from denial of certiorari by Justice Goldberg which invited the exploration of the constitutionality of the death penalty for rape,²³ spent their lunch hour wrangling both over Goldberg's failure to mention possible racial discrimination in the imposition of death sentences for rape, and over the difficulty of proving such discrimination. One of the lawyers pointed out that the Fund received a number of requests each month to represent black death row inmates. If the Fund could not turn these cases away, the lawyer remarked, it seemed reasonable "to focus on the real issue—capital punishment."²⁴ Meltsner concludes his account of this momentous lunchtime meeting:

Perhaps life was simpler in those days, or perhaps we were blinded by the long string of civil rights victories the Fund had accumulated, but [that] remark set our course. A week later we persuaded Greenberg that a staff attorney should be assigned to investigate the possibility of racial sentencing in rape cases, . . .²⁵

This was more than the result of a decentralized and personal planning process; this was the makings of institutional chaos.

This was also, in the words of Jack Greenberg, "total nonsense."²⁶ In fact, the Legal Defense Fund had a history of representing death row inmates which began at least fifteen years before Meltsner's lunch meeting. Throughout that time period, LDF attorneys frequently debated the possibility of attacking the constitutionality of the death penalty on racial grounds.²⁷ From 1950 through 1954, the LDF staff spent a large part of its time on the Groveland Case, which involved a long string of appeals and collateral attacks on the convictions and death sentences of two young black men for

23. *Rudolph v. Alabama*, 375 U.S. 889 (1963).

24. M. MELTSNER, *supra* note 1, at 31.

25. *Id.*

26. Interview with Jack Greenberg, *supra* note 13.

27. *Id.*

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the rape of a white woman.²⁸ Although the constitutionality of the death penalty in rape cases was never argued in the Groveland Case, the racially charged nature of the trial court proceedings precipitated LDF involvement. Another early LDF capital punishment case was *Jones v. State*,²⁹ in which the black defendant's death sentence for the rape of a white woman was allowed to stand even though the defendant's lawyer was unaware of the victim's race until the moment she walked into the courtroom.

The Fund handled an even more shocking pre-campaign death case, *Hampton v. Commonwealth*,³⁰ the case of the Martinsville Seven. Here the death sentences of seven black defendants for the rape of one white woman were upheld in the Virginia Supreme Court. Significantly, this case was the first in which lawyers assigned error on appeal explicitly for racist elements in the state's imposition of the death penalty for rape.³¹ The Virginia Supreme Court stated that "there is not a scintilla of evidence in the records to support [this claim of racism],"³² and therefore rejected the argument with the simple platitude that in Virginia, "the law applies to all alike, regardless of race or creed."³³

Finally, in another pre-campaign death case, the Fund was prepared to advance an argument like the one advanced in *Hampton v. Commonwealth*. In *Hamilton v. Alabama*,³⁴ LDF lawyers succeeded in obtaining a reversal of the defendant's conviction for breaking and entering with intent to ravish, on the grounds that Alabama's failure to accord him counsel at his arraignment violated his constitutional rights. Jack Greenberg explains that "[at his] new trial we felt [it] would be . . . appropriate . . . to raise two issues—(1) racial discrimination in the imposition of the death penalty, and (2) cruel and unusual punishment, because capital punishment was grossly un-

28. *Shepherd v. State*, 46 So.2d 880 (Fla. 1950), *rev'd*, *Shepherd v. Florida*, 341 U.S. 50 (1951); *Irvin v. State*, 66 So.2d 288 (Fla. 1953), *cert. denied*, 346 U.S. 927 (1954), *habeas denied sub nom.*, *Irvin v. Chapman*, 75 So.2d 591 (Fla. 1954), *cert. denied*, 348 U.S. 915 (1955).

29. 209 Ga. 685, 75 S.E.2d 429 (1953).

30. 190 Va. 531, 58 S.E.2d 288 (1950).

31. One of the errors assigned was the state's "sentencing petitioners, on account of their race and color, to death, pursuant to the policy, practice, and custom of the Commonwealth of Virginia, to inflict the death penalty upon Negroes, because of their race and color, convicted of rape upon white women, while failing and refusing to inflict the death penalty upon white or any other persons convicted of rape of Negro women." 58 S.E.2d at 292.

32. *Id.* at 298.

33. *Id.* at 299.

34. 270 Ala. 184, 116 So.2d 906 (1960), *cert. denied*, 363 U.S. 852 (1960), 368 U.S. 52 (1961).

fair when imposed in a case where no life had been taken and no bodily harm had been inflicted."³⁵ The opportunity to present these issues never arose, because the defendant received a life term at his second trial. Significantly, though, Jack Greenberg and Jack Himmelstein, two of the LDF attorneys who would later plot the Fund's course in the broad attack on capital punishment per se, single out this case as "the case which triggered our campaign."³⁶

Combined with LDF's long-standing opposition to racism in capital rape cases were several other factors which converged to precipitate the initial "rape stage" of the campaign. Perhaps the most concrete of these was Justice Goldberg's 1963 dissent from denial of certiorari in *Rudolph v. Alabama*,³⁷ a rape case involving a black rapist and a white victim, in which the defendant neither took nor endangered human life. Justices Brennan and Douglas joined Goldberg in the dissent, which invited consideration of the constitutionality of the death penalty for rape in light of the constitutional proscription of cruelly excessive punishment, the decreasing use of the death penalty in the United States and in foreign countries, and the possible excessiveness of a punishment of death for a crime which did not endanger life. The *Rudolph* dissent thus indicated to Greenberg and his staff that the arguments which they would have advanced on retrial in *Hamilton v. Alabama* were arguments worth making.

Conspicuously absent from Goldberg's dissent was any mention of a possible racial influence in the imposition of the death penalty. Yet this influence was what the LDF, still viewing the issue at this early stage from its traditional racial standpoint, wished to highlight. Thus *Rudolph* also alerted the Fund to a second matter: the LDF would carry a heavy burden of proving a racial bias in the imposition of the death penalty for rape. At roughly the same time, Marvin Wolfgang, Chairman of the Department of Sociology at the University of Pennsylvania, expressed his willingness to plan and assemble the research necessary to show racism at work in rape sentencing. Thus Wolfgang's commitment merged with the message of *Rudolph* and the depth of the Fund's prior commitment to black death row rapists to convince the Fund that the time for attack was ripe. Furthermore, in considering whether and how to pursue the capital punishment campaign, the Fund viewed each of the above factors

35. Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME AND DELINQUENCY 112, 114 (1969).

36. *Id.* at 114.

37. 375 U.S. 889 (1963).

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against the sanguine backdrop of nearly two decades of civil rights successes in the Supreme Court.

Each of these factors was an important element in the decision to attack, but even Meltsner admits that “you can’t pinpoint with precision when the decision happened.”³⁸ The decision flowed from a long history of Fund involvement in cases where racial discrimination worked most invidiously. No group of staff lawyers reached the decision over sandwiches; nor did Jack Greenberg write a memorandum announcing that the LDF would attack the death penalty.³⁹ Rather, the analogy which most accurately describes the decisional process for the capital campaign is one in which weighty factors accreted until a “critical mass” was finally reached.⁴⁰ The process of accretion, however, began years before that mass finally obtained.

Having reached this critical mass, the Fund jumped into its battle against the death penalty for rape with considerable alacrity and few institutional concerns. Indeed, Greenberg and his staff had little to be concerned about, for this first stage of the campaign did not lead them far away from familiar Fund turf. “For a civil rights organization like the Fund, elimination of racial discrimination was the first priority.”⁴¹ A campaign to abolish a penalty for rape which had, since 1930, chosen blacks as ninety percent of its victims turned so unmistakably on racial issues that the Fund could justifiably consider itself uniquely suited to handle the matter. In the words of Associate Counsel James M. Nabrit, III, this part of the campaign was “undeniably mainstream LDF.”⁴²

As Wolfgang collected and assembled the data which were expected to reveal conclusive evidence of racism in sentencing patterns for rape, LDF attorneys sought postponements for all rape cases on appeal. Eventually, as data which clearly showed racism at work became available, these attorneys used the statistics to bolster their alternative demands for outright abolition of the death penalty for rape or for new procedural safeguards to cleanse racism from sentencing. The only perceived obstacle to the LDF’s efforts during this early stage was a vague recognition by some Fund attorneys that the pursuit of the goal of abolition may not have been appropriate at that time, given the High Court’s somewhat tenuous position in the

38. Interview with Michael Meltsner, *supra* note 8.

39. *Id.*

40. *Id.*

41. M. MELTSNER, *supra* note 1, at 73.

42. Telephone interview with James M. Nabrit, III, *supra* note 17.

public eye after over a decade of activism.⁴³ The Court had acted bravely before, though, and the decline in executions through the 1940s and 1950s indicated that the death penalty might be falling into public disfavor. The Legal Defense Fund pushed forward.

Before the LDF realized its goal of abolition of the death penalty for rape,⁴⁴ however, the force of abolitionist logic had pushed the campaign far beyond its original scope. With two related cases of broader impact before the courts,⁴⁵

the Fund's war council of capital case lawyers made a decision which was to determine the path of their efforts for the next six years: henceforth they would attempt to block all executions. They would defend murderers as well as rapists, whites as well as blacks, northerners as well as southerners.⁴⁶

Michael Meltsner asserts that "[i]t is not easy to trace the evolution of this change in policy,"⁴⁷ but both the literature and interviews with staff attorneys actually reveal unanimous agreement as to how the change came about. The decision flowed from two very simple matters of legal logic and professional ethics. As noted above, the argument which most attracted the Fund to the issue of capital punishment for rape was the evidence of racism in southern rape sentencing. Thus the Fund formulated arguments for a number of procedural safeguards designed to eliminate racial influence in sentencing. Once the Fund had taken on the fates of southern black rapists, however, it was only logical to argue for these procedural safeguards wherever such argument would fend off executions. The very nature of these legal arguments called out for their broadened application, even if courts chose to ignore or reject the racial claims in granting the right to the procedural safeguards. Similarly, once the Fund formulated a viable argument which attacked the imposition of death on Eighth Amendment grounds and which seemed to

43. Meltsner observes that "there were still plenty of good reasons to postpone a campaign against the death penalty. The Court was in hot water because of its role in the civil rights revolution. . . . 'Impeach Earl Warren' billboards covered Dixie like the dew. . . . Even a Justice sympathetic to Goldberg's views [that the death penalty was deserving of Supreme Court scrutiny] might have thought them too bold and adventurous to act upon." M. MELTSNER, *supra* note 1, at 34.

44. The death penalty was declared grossly disproportionate and excessive punishment for rape in violation of the Eighth Amendment in *Coker v. Georgia*, 433 U.S. 584 (1977).

45. *Maxwell v. Bishop*, 398 U.S. 262 (1970) (a rape case, in which the LDF unsuccessfully sought greater procedural safeguards in capital cases to control untrammelled jury discretion); *Boykin v. Alabama*, 395 U.S. 238 (1969) (a robbery case, in which the LDF unsuccessfully advanced for the first time an Eighth Amendment attack on capital punishment per se).

46. M. MELTSNER, *supra* note 1, at 106.

47. *Id.*

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interest courts sufficiently for them to grant stays of execution while they considered that argument, there was no ethical way of denying it to any convict facing execution.

The logic of the abolitionist arguments and the ethics of litigating the claims of a group of convicts so similarly situated as to constitute a virtual class pushed the Fund far beyond its original racially based commitment. Each of the lawyers involved in the campaign when it was extended to all crimes and all defendants seize upon these twin concerns of logic and ethics to explain the shift. Michael Meltsner suggests that “once the lawyers knew the legal theories that could win stays of execution, they felt morally obliged to use them” for all death row convicts, regardless of race.⁴⁸ James Nabrit, III, describes the decision to broaden the campaign with a particularly apt analogy:

One of the most frustrating things about the pre-moratorium stage was the Fund’s inability to represent all death row inmates who needed representation. Our legal arguments created a lifeboat for these people. Everybody was in the lifeboat, so LDF had an obligation to help them all.⁴⁹

This agreement testifies to the persuasiveness of these logical and ethical concerns in the minds of the campaign strategists.

LDF lawyers agreed not only on the potential benefits to be gained from broadening the attack, but also on the possibly lethal cost of such an expanded campaign. This cost was “the possible submerging of special claims of individuals and groups such as southern black rapists in a general effort including all persons sentenced to death.”⁵⁰ It is a well known phenomenon that a judge is likely to scrutinize the special claims of an individual defendant in a less hospitable light when the court is aware that the fates of many similarly situated defendants hinge on that individual’s case.⁵¹ Thus it was a “close question” whether an individual Fund client would truly be helped by “tying his fate to a general campaign against the death penalty.”⁵² More significantly, the entire class of southern black rapists—the class for whom the racial sentencing statistics

48. *Id.* at 108.

49. Telephone interview with James Nabrit, III, *supra* note 17. See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 913 (1982) (“Although the effort commenced with rape cases, the non-racial issues raised were not by nature confined to such cases; consequently, these issues were presented in all capital cases.”)

50. JUDICIAL PROCESS AND SOCIAL CHANGE 444 (J. Greenberg, ed. 1977).

51. Address by John C. Boger, Assistant Counsel at the Legal Defense Fund, Yale Law School seminar (Feb. 21, 1985).

52. M. MELTSNER, *supra* note 1, at 107.

were by far the most compelling and for whose benefit the Fund's involvement had begun—might end up worse off than before if the broad attack failed on broad grounds. “[A] general challenge to capital punishment tended to lump together men who had killed with men who had not, creating a situation in which the fate of the nonkillers would be likely to hinge on the fate of the whole.”⁵³ The Fund, while aware of these possible dangers, nevertheless decided to pursue the campaign on the larger scale. In the battle between motivations and hesitations, motivations prevailed.

IV. *Costs and Benefits*

The statistically demonstrable racist tone of rape sentencing in southern states called out for the involvement of the Legal Defense Fund just as the racism of segregated schools and restrictive covenants had in years past. Both the logic of the arguments which had developed in response to racism in rape sentencing and the rigors of legal ethics prompted the LDF's extension of those arguments to all defendants, black and white, northern and southern, who stood a chance to benefit from them. The logic behind the Fund's decision-making, even in light of the avowed risk to southern black rapists, thus seems virtually unassailable. The wisdom and propriety of the decisions, however, is not so immune from questioning. Early abolitionists not uncommonly worried about how the death penalty should most convincingly and properly be attacked.⁵⁴ Indeed, a number of concerns which ought to have troubled the LDF as it planned its attack are conspicuously absent both from the scarce literature on the LDF's decision-making process and from the thoughts of the lawyers who were involved in planning the death penalty campaign.

53. *Id.* at 108. In fact, a year did elapse between *Gregg v. Georgia*, 428 U.S. 153 (1976), which upheld the constitutionality of the death penalty, and *Coker v. Georgia*, 433 U.S. 584 (1977), which held the death penalty unconstitutional for rape. This was a year, then, in which these fears came to fruition.

54. *Cf. Packer, Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). Here, shortly after the appearance of the dissent in *Rudolph v. Alabama*, 375 U.S. 889 (1963) Stanford law professor Herbert Packer took Justice Goldberg to task for his delineation of the constitutional questions pertinent to the death penalty for rape. Packer first scolded Goldberg for assuming that the Constitution mandates proportionality between crime and punishment, and for implying that rape is qualitatively different, for the purposes of punishment, than other crimes of violence. He pointed out that the abolition of the death penalty for rape on the grounds that no life was taken entailed a legitimization of the death penalty for an act that *did* take life. This, for Packer as an abolitionist, was an unacceptable line of argument.

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A. *Scope*

An elementary question concerns the scope of the campaign. In a 1973 speech to the New York City Bar Association on the subject of campaign litigation, Jack Greenberg identified the power of a campaign to reach a large number of beneficiaries as one of the hallmarks of campaign litigation:

While particular campaigns may involve a single or several test cases planned and brought simultaneously or successively, the principal purpose remains the same: judicial decision-making, especially in appellate courts, which will affect persons similarly situated who are not themselves parties.⁵⁵

In this sense, the campaign of test cases culminating in *Brown v. Board of Education*⁵⁶ was exemplary. Here, the ruling touched the lives of black schoolchildren in segregated school districts across the country. Similarly, after the Supreme Court ruled in *Shelley v. Kraemer*⁵⁷ that the racially restrictive covenant was violative of the Fourteenth Amendment, agreements all over the country which forbade blacks from entering white neighborhoods were struck down. The capital punishment campaign, however, if entirely successful, would benefit only the approximately six hundred men then on the country's death rows.⁵⁸ More remote beneficiaries would be either future defendants charged with what were at one time capital crimes (assuming the abolition campaign entirely successful), or future capital defendants who could enjoy any improvements in capital trial procedure (assuming the abolition campaign unsuccessful). This difference in scale between the capital punishment campaign and other classic campaigns may be a simple one, but it is striking nonetheless.

A further observation along these lines concerns the degree of control the Fund exercised over the range of beneficiaries its litigation was intended to reach at various stages in the campaign. Again, the LDF maintained rigid control in its school desegregation campaign over the class of litigants who would profit from a favorable decision at any given stage. Fund strategists chose first to advance the claims of only those blacks who sought equal graduate-level education,⁵⁹ steadfastly refusing to enlarge the scope of their claims to

55. J. GREENBERG, *supra* note 3, at 9.

56. 347 U.S. 483 (1954).

57. 334 U.S. 1 (1948).

58. In 1971, shortly before the Court, in *Furman*, struck down the death penalty, there were 642 men on death row. *See generally*, H. BEDAU, *THE DEATH PENALTY IN AMERICA* 47-64 (1982).

59. J. GREENBERG, *supra* note 3, at 18.

include the much larger group of elementary and high school students who were suffering equal, or perhaps even more egregious, wrongs. Similarly, although litigation planners were surely as outraged by the use of private restrictive covenants to exclude blacks as by segregation ordinances, they restrained their efforts for years to benefit only the victims of the latter form of discrimination. The death penalty campaign saw no such restraint. Within two years of the initial decision to render aid to all those facing execution for rape, and without first seeing this initial task through to fruition, the Fund had decided to broaden its objectives to include the cases of all those facing execution for any crime.

B. *Control*

The issue of control over campaign litigation speaks to more than the mere number of beneficiaries of the LDF campaign. Although Jack Greenberg emphasizes that "too much that occurs in court is not subject to control,"⁶⁰ and Meltsner analogizes a lawyer's control over a campaign to "riding a bucking horse,"⁶¹ there is no question that the LDF and NAACP campaigns which have been well received by the courts and lauded by observers have also been those over which planners exercised a considerable degree of control. Yet the campaign against capital punishment seemed to defy control at every turn.

Jack Greenberg, in his 1973 speech, fleshed out the notion of campaign litigation control in the following way:

If sequence is important, if adverse precedent is to be eroded in small steps, perhaps based on records of great injustice, a degree of control can be critical. An adverse precedent may be qualified slightly to do justice in a limited case and several such decisions may leave the precedent with little or no force.⁶²

The campaign against restrictive covenants sheds light upon this notion. The general social ill which NAACP lawyers sought to remedy was racial segregation in housing. Such segregation was enforced through two mechanisms: segregation ordinances and private restrictive covenants. The easier mechanism to attack was the racially restrictive ordinance, since the constitutional requirement of state action was more readily apparent. Thus it was here that the lawyers first attacked, successfully invalidating restrictive ordinances in

60. *Id.* at 10.

61. Interview with Michael Meltsner, *supra* note 8.

62. J. GREENBERG, *supra* note 3, at 21.

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Buchanan v. Warley, *Harmon v. Tyler*, and *City of Richmond v. Deans*.⁶³ This last case spelled the demise of the racially restrictive ordinance, for the Court there showed its resolve to invalidate restrictive ordinances no matter how ostensibly harmless they appeared. Then, and only then, did the lawyers begin to develop a theory which would bar enforcement of private covenants as well.⁶⁴ Thus the campaign divided itself into two deliberate stages.

The better-known litigation effort against segregated education demonstrated an even greater emphasis on careful control than the restrictive covenant campaign. Indeed, it was on this score that the *Brown* campaign earned itself the designation of campaign litigation “par excellence” by Jack Greenberg.⁶⁵ The adverse precedent which lawyers whittled away was, of course, the holding in *Plessy v. Ferguson*⁶⁶ that statutorily mandated separate facilities for blacks and whites did not violate the equal protection clause of the Fourteenth Amendment. At first, lawyers pursued a litigation strategy which demanded the fulfillment of *Plessy*’s implicit promise of separate yet truly equal facilities, thereby attempting to make segregation simply too expensive to maintain. When it became clear that this approach gave southern officials too much leeway to misdescribe facilities as “equal,” lawyers explicitly shifted their attack to challenging the legality of segregation. However, they were careful to begin chipping away along segregation’s most obvious fault lines. The initial cases thus attacked states’ denials of graduate and professional education to blacks when it was furnished to whites.⁶⁷ Although these cases affected only a handful of people in each state, their significance was great: “the marginal consequences of one or two students entering a graduate school were not of sufficient immediate practical importance to warrant the effort; only long-term law-making was.”⁶⁸

63. In *Buchanan v. Warley*, 245 U.S. 60 (1917), the Court invalidated a Louisville, Kentucky restrictive ordinance; *Harmon v. Tyler*, 273 U.S. 668 (1927), reinforced the holding of *Buchanan* for the new crop of reworded ordinances which had sprung up in *Buchanan*’s wake. Finally, two years later, a restrictive ordinance based ostensibly on racial intermarriage rather than race per se was also struck down in *City of Richmond v. Deans*, 281 U.S. 704 (1930).

64. The theory which developed through subsequent cases was that court enforcement of racially restrictive covenants was the requisite state action. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948). Initially, however, lawyers refused to challenge the holding of *The Civil Rights Cases*, 109 U.S. 3 (1883), that, in enforcing the Fourteenth Amendment, Congress could not penalize discrimination against blacks by private parties.

65. J. GREENBERG, *supra* note 3, at 18.

66. 163 U.S. 537 (1896).

67. *University of Maryland v. Murray*, 169 Md.2d 478, 182 A. 592 (1936); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

68. J. GREENBERG, *supra* note 3, at 18.

The two LDF cases *Sweatt v. Painter*⁶⁹ and *McLaurin v. Oklahoma State Regents*⁷⁰ took another measured step toward the ultimate goal by inducing the Court to scrutinize the quality of the allegedly equal graduate facilities which these states provided for blacks.⁷¹ It is crucial to note, as Greenberg does, that the "more difficult graduate and professional school issues found in *Sweatt* and *McLaurin* . . . were not presented until the groundwork had been established" in the earlier cases.⁷² Finally, with an even stronger foothold established, the LDF could advance the high school and elementary school cases grouped under the name of *Brown v. Board of Education of Topeka*,⁷³ in which the sixty-year-old rule of *Plessy* finally fell. This ruling had been cultivated by years of careful planning and near iron-clad control.⁷⁴ Furthermore, the Fund attorneys were speaking to a Court whose receptiveness to the claims they were advancing they had stimulated and whose jurisprudence they had fostered.

The LDF's campaign against the death penalty showed little of the sort of architectural planning which characterized the restrictive covenant and education campaigns. The Fund found itself arguing its hardest case before it had laid any of the necessary groundwork.⁷⁵ When the Fund entered the capital punishment area, the Court had yet to take even a first step toward abolition.⁷⁶ And when

69. 339 U.S. 629 (1950).

70. 339 U.S. 637 (1950).

71. The Court in both cases determined that separate was unequal in these instances, but refused to advance to the proposition that separate could not constitutionally be equal. The issues in these two cases were quite tricky. In *Sweatt*, the liability determination required close scrutiny of separate educational facilities provided for blacks in the wake of a state court determination that such separate facilities were constitutionally required. In *McLaurin*, a graduate student was admitted to the white facilities, but was restricted in his classroom, library, and cafeteria seating.

72. J. GREENBERG, *supra* note 3, at 21.

73. *Briggs v. Elliot*, *Brown v. Board of Education of Topeka*, *Davis v. County School Board of Prince Edward County, Virginia*, *Gebhart v. Belton*, 347 U.S. 483 (1954).

74. "The lawyers who brought the cases had adequate financial resources and an organizational base which could produce cases which presented the issues they wanted decided, where and when they wanted them. . . . In essence, there was a large measure of control, a substantial ability to influence the development and sequence of cases." J. GREENBERG, *supra* note 3, at 20.

75. Meltsner notes this distinction in CRUEL AND UNUSUAL: "Observers of the Warren Court would have been surprised by a decision in the mid-1960s that the death penalty was unconstitutional; the Supreme Court had not taken even its first step toward abolition. By analogy, in 1938, sixteen years before *Brown v. Board of Education* doomed the 'separate but equal' doctrine, the Court had chipped away at the legal foundation of racial segregation" in *Missouri ex rel. Gaines v. Canada*. M. MELTSNER, *supra* note 1, at 66.

76. The meaning of the Eighth Amendment's prohibition of cruel and unusual punishment had scarcely been unpacked by the Court. The principal cases prior to the capital campaign which attempted to give the Eighth Amendment meaning were five: *Wilkerson v. Utah*, 99 U.S. 130 (1878)(upholding the constitutionality of death by shooting); *In re Kemmler*, 136 U.S. 436 (1890)(upholding the constitutionality of death by

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the Fund decided to broaden the scope of the campaign to include all death row inmates who sought LDF assistance, the Court *still* had not taken an appreciable step toward abolition. Rather than await a favorable holding on its easier rape claims, the Fund impatiently went ahead with its much more difficult murder cases. In so doing, the Fund may have deprived the Court of a chance to develop an Eighth Amendment jurisprudence with which it could feel comfortable.⁷⁷ Meltsner points out that the Court often had opportunities to address the Eighth Amendment claims early on in the campaign and repeatedly ducked them.⁷⁸ This fact does not, however, make the Fund's rush to litigate its hardest case appear any less precipitous. Indeed, the decision to litigate for all death row inmates resembles the abortive 1899 segregation case *Cumming v. County Board of Education*,⁷⁹ in which the plaintiffs sought to shut down the local white high school when the Board of Education closed the local black high school due to insufficient tax revenue. The plaintiffs, over fifty years prior to *Brown*, were arguing for liability under a *Brown*-type rationale, and for a remedy which even exceeded the scope of *Brown*. The Court was entirely unpersuaded. Coming on the heels of the *Plessy* ruling, *Cumming* argued for too much with too little precedent to support it. The broadening of LDF's capital punishment campaign seems almost equally untimely.

C. Public Relations

Another prominent consideration which the Fund all but ignored in its decision to attack capital punishment was the "public education" aspect of campaign litigation. Because the Fund has repeatedly been at the cutting edge of judicially encouraged or mandated social change in this country, its efforts have often captured public

electrocution); *Weems v. United States*, 217 U.S. 349 (1910)(striking down the penalty, borrowed from the Spanish Penal Code, of lengthy imprisonment and deprivation of rights for the crime of "misrepresentation of truth" as foreign to American traditions); *Trop v. Dulles*, 356 U.S. 86 (1957)(striking down as cruel and unusual punishment the penalty of loss of citizenship for desertion during wartime); *Robinson v. California*, 370 U.S. 660 (1962)(invalidating a statute which criminalized the status of narcotics addiction).

77. Interview with Michael Meltsner, *supra* note 8.

78. This is no doubt true. Wherever possible, the Court disposed of capital cases on the narrowest possible ground, without addressing the Eighth Amendment claims which the LDF raised. *See, e.g.*, *Maxwell v. Bishop*, 398 U.S. 262 (1969)(remanding to District Court for inspection of the propriety of the exclusion of certain potential jurors); *Boykin v. Alabama*, 395 U.S. 238 (1969)(reversing conviction on involuntariness of plea); *McGautha v. California*, 402 U.S. 183 (1971)(making a Due Process, rather than an Eighth Amendment, evaluation of capital trial procedure).

79. 175 U.S. 528 (1899).

attention. Jack Greenberg identifies public education as a principal feature of social reform litigation:

These efforts do more than bring about judicial decisions. They may stimulate legislation or bring about administrative reform. Publicized law suits also spur public discussion of issues that might otherwise lie dormant. So much so, that we sometimes hear it said, "I don't care whether we win the case, it will educate the public."⁸⁰

Although this function of litigation carries with it the obvious danger that the public might learn only that a crucial case was lost, public response is an unavoidable feature of the LDF attorney's work.

Jack Greenberg nonetheless maintains that public interest litigators must avoid overemphasizing the public education aspect of their work.⁸¹ The history of LDF campaign work, however, has not entirely confirmed Greenberg's observation. For example, some of the common goals which Jonathon Casper discovered in his interviews with Fund staff attorneys involved in the civil rights demonstration cases in the 1960s were "to use litigation to teach their communities lessons in tolerance, using the courts as a vehicle to impress upon their fellow citizens the illegitimacy and immorality of racial discrimination," and "to use the courts as a lever to influence action by Congress."⁸² Likewise, in the restrictive covenant campaign, attorney Charles Houston emphasized that "we use the Court as a forum for the purpose of educating the public on the question of restrictive covenants because, after all, the covenants reflect a community pattern."⁸³

Not surprisingly, public education was an avowed goal of the school desegregation campaign as well. In the influential Margold Report, a plan for the proper expenditure of funds granted to the NAACP and earmarked for attacking racial discrimination in education, author Nathan Margold observed that one important effect of suits brought seeking equal facilities would be to "focus as nothing else will public attention north and south upon the vicious discrimination in the apportionment of public school funds so far as Negroes are concerned, in certain of [the] states."⁸⁴ The LDF and the NAACP thus mapped out each of these substantial projects with an eye to the importance of public response.

This eye deliberately closed when the campaign against the death

80. J. GREENBERG, *supra* note 3, at 10.

81. Interview with Jack Greenberg, *supra* note 13.

82. J. CASPER, *LAWYERS BEFORE THE WARREN COURT* 145 (1972).

83. C. VOSE, *CAUCASIANS ONLY* 60 (1967).

84. *JUDICIAL PROCESS AND SOCIAL CHANGE*, *supra* note 50, at 50.

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penalty began. Jack Boger, a staff attorney at LDF, candidly admits that the Fund consciously disavowed any responsibility for the public-relations ramifications of its advocacy.⁸⁵ The Fund's reluctance to recognize that the capital punishment venture entailed serious problems of public response most likely stemmed from the fact that the project involved the most violent and distasteful group of clients the LDF had ever known. Yet even this was a factor which other LDF campaigns were able to incorporate. One of the darkest fears of those opposed to the mixing of blacks and whites in the schools was that academic interaction would lead to social interaction. Thus, in choosing the case that would go to the Supreme Court along with *Sweatt v. Painter*, Marshall gave careful consideration to the attractiveness of the possible plaintiffs.⁸⁶ Similarly, in the LDF's fairly brief campaign to abolish the money bail system, one of the most significant planning problems with which staff lawyers grappled was how to find an inoffensive defendant.⁸⁷ The time constraints imposed by the procedural expedition of the cases of defendants unable to make bail forced the Fund to advance a record to the Court which was far from perfect; certiorari was denied and the campaign foundered.⁸⁸

The possibility of choosing an appealing litigant was a luxury which the planners of the capital punishment campaign could not enjoy. As a group, their clients were the most violent, ugly, and hated dropouts from American society. Of course, the Fund preferred to highlight the cases of the more sympathetic defendants within that pool of clients. However, with death threatening on its

85. Letter from John C. Boger to Tracy Thompson (March 29, 1985)(discussing public education aspects of the death penalty campaign).

86. "The Dixiecrats and the others said it was horrible. The only thing Negroes were trying to do, they said, was to get social equality. As a matter of fact, there would be intermarriage, they said. The latter theory was the reason we deliberately chose Professor McLaurin. We had eight people who had applied and who were eligible to be plaintiffs, but we deliberately picked Professor McLaurin because he was sixty-eight years old and we didn't think he was going to marry or intermarry. . . . They could not bring that one up on us, anyhow." Thurgood Marshall, quoted in R. KLUGER, *SIMPLE JUSTICE* 266 (1977).

87. "That the indigents involved in the litigation would necessarily be accused of criminal offenses led LDF lawyers to attach great significance to finding what might be called an attractive defendant; . . . the facts of the crime were not to inflame emotions; . . . the defendant should not have a long record, especially not one involving inflammatory crimes or crimes of violence." J. GREENBERG, *supra* note 3, at 33.

88. See *People ex rel. Gonzalez v. Warden*, 21 N.Y.2d 18, 286 N.Y.S.2d 240, 233 N.E.2d 265 (1967)(holding that the adoption of nonfinancially oriented bail system was more within the province of the legislature than the courts, and that the court did not abuse its discretion in setting bail at \$1000), *cert. denied*, 390 U.S. 973 (1967); See also J. GREENBERG, *supra* note 3, at 31-35.

own schedule, without regard for the attractiveness of its victims, Fund attorneys were generally prompted more by an impending execution date than a sympathetic character in plotting the campaign's next steps. An excellent example of this was the group of cases decided under the name *Furman v. Georgia*.⁸⁹ The case originally slated to head this group of cases was *Aikens v. California*.⁹⁰ Aikens was, in Meltsner's words, "an absolute monster;" he was convicted of the brutal rapes and murders of two women, and linked to a third rape and murder. After oral argument on these cases in the United States Supreme Court, the California Supreme Court retroactively struck down the California death penalty statute as violative of the state constitution.⁹¹ This removed *Aikens* from the Supreme Court for mootness,⁹² leaving *Furman*, a case involving a more sympathetic defendant, as the head case. Meltsner says that the LDF staff

heaved a collective sigh of relief when *Anderson* was decided in California and *Aikens* dropped out, because some of the Justices, especially Burger, and the public at large, probably would have made a great deal of hay out of the heinousness of Aikens' crimes.⁹³

The turn of events in California may have been fortunate for the Fund and for the campaign's public image, but it was also entirely fortuitous. The *Aikens* affair suggests a litigation campaign more in control of its planners than its planners of it.

Another issue related to the public aspect of the campaign which might have given the LDF decision-makers a moment's pause was the possibility of a backlash of public opinion. As Meltsner observes in *Cruel and Unusual*, the history of the 1950s and 1960s was to some extent the story of white America coming to terms with its own involvement in the creation of racial stereotypes, among which figured prominently the notion of "black criminality."⁹⁴ The Fund's repeated seeking of stays of execution for the most violent black criminals may have served to reinforce such racist notions. The litigation and relitigation of the claims of rapists and murderers paraded vicious black offenders across the front pages of America's newspapers. Such exposure undoubtedly focused the attention of a substantial portion of white America more on the heinousness of these defendants' offenses than on the injustice of their treatment.

89. *Furman v. Georgia, Jackson v. Georgia, Branch v. Texas*, 408 U.S. 238 (1972) (striking down the death penalty as it was being applied by the states).

90. *cert. dismissed*, 406 U.S. 813 (1972).

91. *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal.Rptr. 152 (1972).

92. 406 U.S. 813 (1972).

93. Interview with Michael Meltsner, *supra* note 8.

94. M. MELTSNER, *supra* note 1, at 37.

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As Hugo Bedau has observed, the movement for judicial abolition of the death penalty “in the absence of public clamor for legislative repeal . . . fed the fires of middle class anxiety as well as racist resentment.”⁹⁵

Even if, as Greenberg suggests, public education was not a controlling factor in Fund decision-making, these negative media effects were regrettable, and insofar as they were foreseeable to LDF planners, they were risks that merited consideration. Indeed, since the risk was high that the campaign would create potentially inflammatory publicity, the need for effective public education was correspondingly great. In an interview for this Comment, Jack Greenberg asserted quite straightforwardly that the LDF did not worry about this backlash effect; when asked to comment, he claimed that it was “the first time [he had] ever heard of it.”⁹⁶ Furthermore, he explained, these murder and rape cases were already as well publicized as they were going to be. LDF’s involvement added little to the amount of press coverage they received.

That this was the first time Greenberg had heard of the risk of backlash from the capital punishment campaign is indeed surprising. After all, strategists involved in other campaigns made frequent reference to this very danger. For example, in the Margold report, a plan for the proper expenditure of NAACP funds earmarked for attacking racial discrimination, the author explicitly warned of “the danger of stirring up intense opposition, ill-will and strife as a result of any attack upon a custom so deeply entrenched in popular prejudice as is the segregation of races in public schools.”⁹⁷ It is perhaps more accurate to say, as do Michael Meltsner and Jack Boger, that the Fund simply did not consider the difficult task of public education on the death penalty issue as one of its important responsibilities. Meltsner asserts that litigating lawyers properly see their role as developing strategies and winning cases, and that any public education which occurs “must play off of that.”⁹⁸ Jack Boger also points out that the Fund has always seen

95. H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 89 (1977).

96. Interview with Jack Greenberg, *supra* note 13.

97. N. Margold, Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the NAACP, *reprinted in* JUDICIAL PROCESS AND SOCIAL CHANGE, *supra* note 50, at 56. Margold goes on to advise that, with carefully planned strategy, “accompanied by extensive, carefully supervised publicity, I feel certain that the danger of inciting ill-will and alienating enlightened public opinion can be reduced far below the point where it is outweighed by the ultimate goal to be accomplished.” *Id.* at 57.

98. Interview with Michael Meltsner, *supra* note 8.

itself as a law office rather than a lobbying organization, in part due to the fact that the parent NAACP retained all lobbying responsibilities when it and the Fund severed ties.⁹⁹ These explanations for the Fund's failure to concern itself with educating the public do not alter the fact that the campaign ran the risk of stirring up considerable hostility, or the fact that the Fund was traditionally quite attentive to like risks in other areas.

D. *Institutional Integrity*

The LDF's campaign against capital punishment also posed a number of seemingly unaddressed difficulties to the Fund as an institution. These problems, insofar as they spoke directly to the very nature and character of the Fund and its activities, were issues of even greater concern than the strategic problems suggested above. The most obvious of these institutional quandaries concerned practical issues of fundraising and the budget. The LDF had become a very diverse and expansive litigation organization by the time it committed its energies and assets to saving death row inmates. It operated on money from private contributors alone. The death penalty campaign taxed the Fund's tight budget in two distinct ways. The more apparent of these budgetary strains was the expense of financing the litigation and the social science research which supported it. The other, more subtle cost incurred by the campaign was its inherent inability to elicit contributions. "Capital punishment," Meltsner laconically points out, "is not a big money-raiser."¹⁰⁰

Unlike the battle against restrictive covenants, for which flyers were circulated imploring potential contributors to "JOIN NAACP \$50,000 CAMPAIGN TO BREAK RACE RESTRICTIVE COVENANTS . . . NAACP IS LEADING THE FIGHT,"¹⁰¹ the capital punishment campaign did not bring in money to support itself. Of course, Greenberg notes that within broad limits, campaign lawyers are free to pursue their own ideas, "not influenced a great deal with regard to particulars by the constituencies they have chosen or which have chosen them, and affected little or not at all by contributors."¹⁰² Furthermore, contributors and Fund lawyers "usually share a common social outlook" according to James Nabrit, III, who

99. Letter from John C. Boger to Tracy Thompson, *supra* note 85.

100. Interview with Michael Meltsner, *supra* note 8.

101. C. VOSE, *supra* note 83, at 71.

102. J. GREENBERG, *supra* note 3, at 38.

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remembers no substantial disagreement among LDF Board members and contributors regarding the goals of the campaign.¹⁰³ The LDF's commitment to abolition of the death penalty nonetheless involved it ever more deeply in a campaign which drained its coffers, yet did little to replenish them.

Coupled with these practical worries about financial matters were more theoretical concerns about the nature of the Fund's commitment. The death penalty campaign tucked under the Fund's protective wing defendants who were not only white, but culled from the most racist segment of white society. From 1968 through 1972, nearly half of the inmates on death row were white.¹⁰⁴ This alone was unusual in terms both of LDF's history and of its charter. Michael Meltsner describes this tension in these words:

Look, this was a civil rights organization. Its contributors and staff and constituency were there to represent black people. The clients we were representing at the broadened stage would have been drawn from the most racist segment of the society. It's to the credit of the organization that it never let things like that stand in its way.¹⁰⁵

Such representation was, beyond doubt, to the organization's moral credit. However, such representation also clashed considerably with the Fund's thirty years of institutional development as a law firm litigating the claims of black people. More specifically, it clashed with the Fund's own historical involvement in the death penalty area.¹⁰⁶ The Fund's handling of all death row inmates who sought assistance also left the Fund looking remarkably like the general legal aid society which founder Arthur Spingarn had sworn it would never become.¹⁰⁷

Furthermore, the capital punishment campaign's logic distorted the Fund's traditional focus on the treatment of the black American. Although the Fund's involvement at first stressed traditional issues of racial discrimination, non-racial formulations soon crept into the campaign's arsenal. By the time Greenberg and his staff had decided to realign their attack toward the goal of full abolition of the death penalty, it had become difficult to determine whether, at very bottom, it was the mere presence of racism in the capital process, or the ominous possibility of death at the end of that process, which was truly propelling the campaign. To any observer, race had al-

103. Telephone Interview with James M. Nabrit, III, *supra* note 17.

104. An average of 46% of all death row inmates throughout this period were white. See, H. BEDAU, *THE DEATH PENALTY IN AMERICA* 63 (1982).

105. Interview with Michael Meltsner, *supra* note 8.

106. See *supra* notes 9 to 16 and 25 to 41 and accompanying text.

107. Affidavit of Arthur B. Spingarn, *supra* note 12.

ways been the top issue on the Fund's agenda; now race stood to be either submerged within, or entirely eclipsed by, the larger issue of a state's power to kill certain of its citizens:

[L]urking in the background of each case was the awareness that what was at stake was not merely justice, not just the legal standards that evolve out of new situations, not simply the number of individuals affected, but the irreversible fact of death.¹⁰⁸

Suddenly the Fund was spending a good part of its time talking about moral and philosophical issues it had never dealt with before. It was advancing arguments which, although supported by social science data, really pushed beyond racism to more basic moral questions of life, death, and the power of the State. Although the LDF continued to offer racial data to rationalize a pro-abolitionist decision, the campaign also invited judges to reach the deeper moral dilemma independently of the racial statistics.

The obvious reply to this observation is that the imposition of the death penalty so intertwines racism and death that the two cannot meaningfully be separated. This is certainly the case if one accepts the Fund's statistics and believes that no death penalty statute can ever be written to wring racism out of the system. However, to accommodate those who either do not accept these statistics, do not appreciate their thrust, or do not hold such high expectations for the procedure which sends people to the electric chair, non-racial formulations must also be advanced. Indeed, these non-racial arguments, by engaging more fundamental questions about criminal justice and human worth, invite disinterest in the racial claims. Significantly, the Court's opinion in the LDF case which finally declared the death penalty unconstitutional for rape *nowhere mentions race*.¹⁰⁹ Clearly, this campaign placed the LDF in an unusual position with respect to the issue that it, as an institution, has traditionally deemed most important.

The death penalty campaign also placed the Fund in an unusual position as to the future of progressive lawyering and rule-making in the criminal justice system. The types of relief prayed for in the campaign—extraordinary stays of execution, greater opportunity for collateral attack than in non-capital cases, enhanced procedural

108. Greenberg & Himmelstein, *supra* note 35, at 112.

109. *Coker v. Georgia*, 433 U.S. 584 (1977) Rather than address the racial data on rape sentencing, the Court in *Coker* rested its decision on the grounds that the Eighth Amendment forbids punishment which is excessive in relation to the crime committed, that the death penalty for crime which does not take life is excessive, and that rape of an adult woman is such a crime.

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safeguards for capital defendants, abolition of the penalty itself—all turned crucially on the notion that death is different from all other constitutionally permissible punishments. The difference between ten and fifty years in prison is a difference in degree; the difference between life imprisonment and death is a difference in kind. Thus although we might accept mistake, racism, and imperfection in the non-capital portion of the criminal justice system, the argument implied, that system should meet more rigorous standards when it decides to take someone's life.

This argument placed the LDF in two perplexing conceptual binds. First, even a successful attack on the penalty which gave birth to new safeguards in capital trial procedure could effectively foreclose any extension of such changes back down the rungs of the criminal justice system. For if the argument which sparked such innovation was that death is different, courts would surely be reluctant to grant similar relief where death is not threatened. In fact, Greenberg recalls that the Fund actually felt the pinch of this bind:

After we won *Furman* there were efforts to extend the *Furman* rationale beyond capital punishment. They weren't really very extensive efforts, because people were busy litigating the cases that went up in *Gregg v. Georgia*. But there were efforts. They got absolutely nowhere.¹¹⁰

In this respect, the Fund's logic was germane to this campaign alone and therefore hardly instrumental to broader goals of change in the criminal justice system.

Furthermore, if it is safe to consider the Fund's broadest aim in the criminal justice system to be the eradication of racism from that system's administration, then there is something intellectually disturbing about advancing arguments which implicitly condone the influence of racism anywhere in that system. This is, however, just the position which the Fund found itself suggesting in the campaign. The argument that "death is different" had the unfortunate and unintentional entailment that racism might be tolerable where death is not a possible penalty. In some sense, the Fund's commitment to the capital punishment campaign brought about a silent yet total abandonment of its general policy goals in the criminal justice system. That a law firm so committed to cleansing the American legal order of racist considerations should advance a theory so potentially at odds with its own institutional orientation is quite curious. And that that law firm should do so with so little visible strain or discom-

110. Interview with Jack Greenberg, *supra* note 13.

fort (as evidenced in writings of, and conversations with, its lawyers) is truly perplexing.

V. *Death Is Different*

Capital punishment involved the Legal Defense Fund in a type of campaign which that organization had never before encountered. The capital project elicited a larger investment of time and money for a smaller group of clients than had other traditional Fund activities. It also allowed the Fund little control over either the selection of the clients it would assist or the appropriate moment at which to provide that assistance. It forced the LDF to rush ahead in advancing its arguments in a way that no controlled campaign had done before. In so doing, the campaign denied the Fund's planners an opportunity to create a favorable judicial attitude toward the Fund's more daring and controversial claims. And it elicited an uncharacteristic insensitivity to the ability of campaign litigation either to educate a receptive public or horrify a hostile one.

Furthermore, the capital punishment campaign placed institutional strains on the Fund which were as unprecedented as the above strategic concerns, and possibly more troublesome. It drained the Fund's budget, but was not itself appealing enough to excite potential contributors. The capital project garnered as beneficiaries of the Fund's efforts nearly as many whites as blacks. Finally, it forced the LDF to advance and rely heavily on arguments which had no obvious or intimate connection with racial issues, and which in fact not only inhibited further reform of the criminal justice system, but actually implied acceptance of racism in the overwhelming majority of criminal cases.

The institutional significance of these concerns cannot be overstated. Within the space of a few years, a single issue wrenched the Fund's law-making and policy-making goals from their traditionally parallel tracks, twisting them until they neared direct opposition. By the time of *Furman*, the Fund could entertain no serious hope that the Supreme Court's capital punishment jurisprudence would include a position on racism and criminal justice with which the Fund could feel comfortable. In fact, LDF could expect only that the Court would either accept an argument that racism was constitutionally intolerable only in death penalty cases, or ignore the insidious work of racism even in the death penalty area. The Court chose the latter option, and the Fund has ever since had to struggle to convince the Court that the decision to ignore racism was incor-

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rect.¹¹¹ The argument might be made that the Fund's core commitment was to eradicating racism, even if the legal arguments designed to achieve the eradication engaged other issues. This was undoubtedly true in the hearts and minds of LDF attorneys. Yet a reading of the case law which the campaign developed not only conceals this motivation behind other weighty issues, but denies the motivation entirely in the non-capital criminal justice system.

Why, then, did the Fund take on a campaign involving such strains and risks? Why, once the effort had begun, did the Fund not tailor its involvement to address or avoid them? The easiest explanation for the Fund's involvement—and the explanation which first comes to the minds of Fund attorneys—is that the LDF was the only organization willing or even able to undertake the advocacy.¹¹² Indeed, only the ACLU and the LDF were sufficiently large and organized in the mid-1960s to handle a broad attack on capital punishment, and until 1965 the ACLU denied that capital punishment presented “a civil liberties issue.”¹¹³

Even accepting, however, the above explanation for the *fact* of LDF involvement, the larger question concerning the unprecedented *nature* of LDF's developing involvement remains. The answer lies in the twisting, distorting, and corroding effect of death. In the adjudicative segment of the criminal justice system, the specter of death which pervades the capital trial shatters procedural rules which pass muster in non-capital cases, distorts conventional doctrines of substantive criminal law which seem clear on a textbook page, and charges judges and juries with an emotionalism and an uneasiness unknown to the non-capital courtroom. Not surpris-

111. In *McClesky v. Kemp*, 753 F.2d 877 (1985), the Eleventh Circuit *en banc* considered the state-of-the-art statistical evidence on racial influences in the imposition of the death penalty. Accepting for the purposes of argument that the statistics were valid, the Eleventh Circuit held these statistics insufficient as a matter of constitutional law to show that Georgia's death penalty law was administered in an arbitrary and capricious manner, even though “the statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole.” 753 F.2d at 897. The statistics also show that “in a group involving blacks and whites, all of whose cases are virtually the same, there would be more blacks receiving the death penalty than whites and more murderers of whites receiving the death penalty than murderers of blacks.” 753 F.2d at 895. Since this statistical evidence tended to show only a racial effect and not a racial motive, the court reasoned, it revealed no defect of constitutional magnitude.

112. In Michael Meltsner's words, written in 1973, “[o]nly recently have lawyers associated in numbers to bring court cases in a systematic attempt to change the character of American institutions. The ranks of defense funds, public interest law firms, community law offices, and legal centers which now readily challenge corporate and governmental conduct. . . were almost empty ten years ago.” M. MELTSNER, *supra* note 1, at 4.

113. *Id.* at 54.

ingly, this specter of death affects lawyering much as it does adjudicating. Michael Meltsner explains the distortion in LDF decision-making with a very telling reference:

We couldn't win any other way. With people who stood to be executed, we weren't willing to commit ourselves to a forty year strategy. *Brown v. Board of Education* was fine, but it took a little too long for a scenario where people were getting executed.¹¹⁴

With clients who stood to be executed, then, the Fund simply could not commit itself to the kind of controlled and reasoned campaign it normally pursues. Death would not allow that.

This distortion of normal LDF functioning is not only an unmistakable effect of the capital punishment campaign, it is also wholly understandable. One senses that the lawyers who planned the campaign, facing daily the possibly lethal consequences of their decisions, acted as much out of human instinct as lawyer's instinct.¹¹⁵ The intensely personal, intimate, and spontaneous decision-making structure of the LDF only indulged such human and personal responses to the task at hand. Indeed, in a law firm where the evolution of strategy reflects the evolution of the lives of the people in that firm,¹¹⁶ personal responses to perceived injustices must carry a weight in the decision-making process directly proportional to the fervor of those responses.

Although the effect of the distortion of death on the Legal Defense Fund was understandable, a separate question is whether that effect was justified. To attempt an answer to this question is to engage in speculation: How might the Fund have handled the campaign differently? Had the Fund waited for *Coker*¹¹⁷ to advance its murder cases, *Furman* might have attracted five Justices to the idea of wholesale abolition, rather than only two. Or, even if not abolishing capital punishment outright, *Furman* might have produced a coherent Eighth Amendment condemnation of the statutes as applied, rather than the nine-opinion mess it turned out to be. The Fund might have formalized its decision-making structure, measuring the developing capital campaign either against its own history or against a uniform set of criteria. Removing the decision-making process from the intimacy of close personal interaction and dissecting the

114. Interview with Michael Meltsner, *supra* note 8.

115. In CRUEL AND UNUSUAL, Meltsner observes that "at bottom, the lawyers who decided to challenge the death penalty acted as much for themselves and for the order of things they wished to call into being as for the condemned." *supra* note 1, at 36.

116. Interview with Jack Greenberg, *supra* note 13.

117. See notes 44 and 53 *supra*.

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decision in a more clinical way might have sensitized the LDF more effectively to the implications of its advocacy. Finally, individual Fund attorneys setting LDF policy might have made a greater effort to balance the demands of campaign law-making with the emotion inherent in capital representation. These proposals are, however, mere conjecture, and conjecture alone cannot suffice to applaud or condemn the actions of lawyers acting frantically to save human lives.

That the campaign against the death penalty showed less of the careful counting of costs and benefits which marked other LDF efforts was thus unquestionably understandable, even if only arguably justifiable. Jack Greenberg, explaining the LDF's involvement, stresses that "people thought that capital punishment was sufficiently horrible. . . that you just didn't have to count up the numbers."¹¹⁸ Meltsner echoes these thoughts, emphasizing the intimacy of the process:

I think for me personally, there was never any question that I wasn't making neat and nice distinctions in a cost-benefit sense. Once you were involved with representing people on death row, you did it until you dropped. The greatest good for the greatest number was a factor, but only one of many. More important was just the kind of person I was.¹¹⁹

Deborah Fins, a current LDF staff member, cannot avoid the use of military imagery to express her, and LDF's, commitment. Perhaps, she observes, there are some litigators who are like army generals, sending off battalions of troops to their certain deaths for the sake of the general war effort. If this is so, she concludes, "then I'm just not a general."¹²⁰ In this sense, the tragedy of the capital punishment campaign was that it would not allow the Fund to go into battle in its customary array—as a finely trained corps of generals.

—Eric L. Muller

118. Interview with Jack Greenberg, *supra* note 13.

119. Interview with Michael Meltsner, *supra* note 8.

120. Address by Deborah Fins, Assistant Counsel at the Legal Defense Fund, Yale Law School seminar (Feb. 21, 1985).