AMERICAN JOURNAL
of LAW *and* EQUALITY

THE MANY LIVES OF CONSTANCE BAKER MOTLEY

Michael Meltsner*

Leon Edel, the celebrated biographer of Henry James, famously observed that practicing his art was a little like falling in love. But the affair, "however exhilarating, has to be terminated if a useful biography is to emerge." Given an understandable admiration for her subject, the challenge facing Tomiko Brown-Nagin was formidable. She had to maintain a passionate connection with Constance Baker Motley without lapsing into hagiography and, on the other hand, set out the missteps that always emerge in any serious contemplation of a life. "In the writing of the life," as Edel put it, "changes occur, discoveries are made. Realities emerge." Brown-Nagin has largely met the challenge—though some reservations will follow—producing a readable, comprehensively researched, and evocative life of a woman who cut an extraordinary figure in the law and whose "heroic achievements," as Henry Louis Gates Jr. said of them, deserve far more attention than they have received.

With the present-day emergence of Black women as leaders in a variety of professions and, even more to the point, one—at this writing—on the verge of joining the United States Supreme Court,[1] this is clearly the time for a biography of Motley (who died in 2005 at the age of 84), a great female Black lawyer and judge at a time when few women, Black or White, could boast of appearing in any major legal forum. Having observed her at work over the course of many years, I can attest that regardless of race or gender, she was as powerful a courtroom figure as the last century can boast.

If Motley could have chosen her biographer, she couldn't have done better than Brown-Nagin, who has very much walked the walk. She comes to the task as an award-winning historian and Harvard Law School professor, the author of *Courage to Dissent:*

*Matthews Distinguished University Professor of Law, Northeastern University School of Law. His latest book is *Mosaic: Who Paid for the Bullet* (2022).

1 On the day of her nomination to the High Court, Judge Ketanji Brown Jackson spoke to how she was "inspired by the late Constance Baker Motley, the first Black woman appointed to a federal judgeship."

https://doi.org/10.1162/ajle_a_00033

Atlanta and the Long History of the Civil Rights Movement (2011), a complex story in which Motley was a major figure. Unusual for civil rights history, the book (for perhaps the first time) unpacked in detail deeply felt community tensions and class divisions in the effort to integrate the public schools of a major southern city. In a respectful and farsighted review, legal historian Kenneth Mack described the book as a granular narrative that pointed out, inter alia, the limits of the classic approach of centralized control from NAACP Legal Defense Fund lawyers in desegregation cases. It was "civil rights history from the bottom up." While *Civil Rights Queen* is not a book that sheds much light on her subject's inner life, Brown-Nagin is a formidable scholar who seems perfectly suited to take the full measure of a woman hardly remembered until recently. Constance Baker Motley's presence and performance placed her near the center of every arena she entered in a long, distinguished, and, as Brown-Nagin also described her in *Courage to Dissent*, oft-controversial career.

What follows is in three parts. First, part I is this reviewer's assessment of the biography. The bottom line: if you are interested in civil rights history, a cameo of 1960s New York State politics, or what the first Black female federal judge faced from not only some Manhattan litigators but also judicial colleagues, then get this book from your public library or purchase *Civil Rights Queen* from a local bookstore or even for your Kindle. You won't regret it.

Second, in part II I'll write not as a reviewer but as a witness who was a colleague of Motley's for almost five years; as a judge, she appointed me to represent criminal defendants. Some of my testimony here is seriously at odds with Brown-Nagin's narrative. As the last and, alas, only living lawyer hired by Thurgood Marshall at the Legal Defense Fund (LDF) before he joined the Second Circuit Court of Appeals—a time when Motley was a highly placed staff lawyer—I have both experience and memories that do not always jibe with Brown-Nagin's conclusions. There may, however, be many views on the issues in question. Mine are, of course, what I believe to be the accurate ones, but like the opinions and memories of any witness, they are properly subject to the scrutiny that any testimony, especially as to matters that reach back in time, deserves. As I hope I was clear about in my own memoirs of the period in question, the book on history is never closed.[2]

Finally, in part III I want to address a topic largely untouched by *Civil Rights Queen*—though ever present in *Courage to Dissent*—but clearly suggested by Motley's career and of continued great importance: the promise, achievements, defeats, and limitations of litigation as a vehicle for advancing equality.

2 Michael Meltsner, The Making of a Civil Rights Lawyer (2006); Michael Meltsner, With Passion: An Activist Lawyer's Life (2017).

I.

Motley's life story isn't a rags-to-riches fairy tale, but it does read as Lincolnesque. Arguably the two most important interventions in her career were the funding of her higher education by the wealthy White businessman Clarence Blakeslee—his construction company built the Croton aqueduct that brings drinking water to New York City—and her hiring as a student law clerk and then staff lawyer by Thurgood Marshall. Both decisions reflected her obvious intelligence, work ethic, and capacity for growth, but they were each unexpected and very much cut against the grain of the way women of Motley's race and class were treated in the 1930s and '40s.

Motley came from a large West Indian family (lower middle class, as she put it) that immigrated to New Haven, Connecticut, from the Caribbean island of Nevis. In a home environment dominated by a stern and demanding father, education was deeply valued. Willoughby Baker was physically imposing, a trait he passed on to his daughter. For many years, he worked as a chef at Yale University, often preparing meals for the elite male members of the secret society Skull and Bones. Blakeslee entered Motley's life serendipitously. He heard the precocious youth speak at a public meeting explaining why Black people hadn't much used the community center facilities he had built for them (there were no Black members on the governing board, she argued). At the time, Motley was only fifteen years old, though she pointed out that given her appearance, she seemed much older. In recognition of the great potential he saw in her and his commitment to raise the fortunes of the Black community, Blakeslee offered to pay for both her college and law school education.

After a series of 1930s youthful flirtations with the radical left that would later provide fodder for the efforts of segregationist lawmakers in the United States Senate to block her confirmation as a federal judge, she attended college at all-Black Fisk University in Nashville—her first deep experience of a Jim Crow environment—and then transferred to NYU. She entered Columbia Law School during the Second World War, when admission of the few women was certainly aided by the number of males who were off fighting the war. After her first research job clerking with Marshall in 1945, at a time when the LDF was still part of the NAACP, she was hired after her graduation as a staff lawyer. She often said that if Marshall had not hired her, no one would have ever heard of Constance Baker Motley. I doubt this—no matter the field of endeavor, her talents were such that she would make a mark—but it is, of course, true that then and for many years thereafter bigoted hiring practices at law firms were commonplace.

At about the same time, Marshall brought on board Jack Greenberg, who had returned from commanding a Navy landing craft in the brutal invasion of the Japanese-held island of Iwo Jima and had also graduated from Columbia Law. Both Motley and Greenberg filled the roles of junior staffers while the small group of NAACP lawyers in New York and a national network of other lawyers and academics plotted the series of higher education cases from Texas and Oklahoma that set the stage for the ultimate attack on *Plessy*

v. Ferguson's approval of separate but equal schooling. Brown-Nagin labors a bit dealing with Motley's role in the handling of *Brown v. Board* itself, which was in fact minor. She certainly prepared a draft of the complaint used to initiate the Kansas case; it is unclear whether it was amended by others or used in the Virginia and South Carolina cases. She doesn't appear to be listed as counsel on court documents initiating the case, and she didn't argue any of the five cases that ultimately were presented to the Supreme Court. While all the principal lawyers in the *Brown* cases were male, it is unlikely that in the 1950s any gender blockage, explicit or implicit, played a role in their selection. The lawyers involved were far more experienced than she was; most of them came from the jurisdictions in which the cases emerged. Greenberg was selected to argue the Delaware case because of a specific connection to the state. She is barely mentioned—and one mention is a pejorative quote from a "colleague"—in Richard Kluger's authoritative history of *Brown*, *Simple Justice*. Six of the nine male lawyers in the classic picture of the 1954 group of lawyers taken on the steps of the Supreme Court building were NAACP-cooperating attorneys who hailed from the South or the District of Columbia. The others were Marshall, Robert Carter, and Greenberg.

Still, the way the NAACP legal team operated was highly collaborative. Motley was trusted by Marshall and present at many of the key meetings and court arguments. He sent her to Mississippi in 1949 in an effort (ultimately unsuccessful) to force the state to pay Black teachers and administrators what it paid Whites. While discreet in the way good lawyers are supposed to be, it is highly likely she voiced her opinions in the heated strategy debates over the strategic and tactical choices that the lawyers faced in deciding whether and how to move ahead, but her major role in the decade leading to *Brown* was as the NAACP's and later LDF's leading lawyer dealing with rampant discrimination in housing.

Curiously, Motley never mentions the many residential housing discrimination cases she fought (and mostly lost) in her autobiography, *Equal Justice Under Law* (1998); Brown-Nagin barely touches them. This is perhaps a reminder that lawyers take cases as they are; even great lawyers lose cases. When journalists note, as they seem to do obsessively, that a lawyer has argued a certain number of cases and has a winning batting average, that may say as much about the cases as the quality of the advocacy.[3]

Motley's major responsibility during the years when her colleagues were intensely focused on the steps leading to the the 1954 and 1955 school desegregation decisions was a series of ambitious housing discrimination cases in Shreveport, Louisiana; Savannah, Georgia; Birmingham, Alabama; and Detroit, Michigan. Only the Detroit public housing case was in any way successful. While not listed as counsel, she plainly advised Marshall in

3 NB: The present writer has had the unique experience of arguing the same case twice before the United States Supreme Court and losing both times.

the tragic 1949 losing effort to quash the exclusion of Black people at Metropolitan Life's massive lower Manhattan Stuyvesant Town housing project. The New York courts ruled that the project sponsor was a private entity and that under the state law at the time, MetLife could discriminate as it saw fit. Ironically, the company later built a "separate but equal" high rise on the edge of Harlem where Motley and colleagues Robert Carter and Marshall would for a time reside.

The housing cases were all extremely difficult both legally and politically. Violent resistance from White homeowners was common. Many of the racist practices challenged would not be ruled illegal until the late 1960s, and, of course, implementatation of even the new laws has always been weak. Residential housing segregation, both public and private, has remained largely unabated in the United States to this day.[4] But housing litigation, not working on public school integration, would during these years be at the center of Motley's work; for example, she filed the Savannah case in 1954, four days after the Supreme Court decided *Brown v. Board*. In 2021, a graduate of Duke Law School, Donovan Stone, published a fifty-three-page, 411-footnotes article in the *Utah Law Review* entitled *Constance Baker Motley's Forgotten Housing Legacy*. Apparently both Motley—a senior status federal judge when she wrote her autobiography—and her biographer had forgotten too.

It was the years that followed *Brown* until she left LDF in the mid-sixties that mark the full flowering of Motley's powerful and persistent advocacy in major desegregation cases. Her housing litigation history may have been forgotten, but she is well remembered as the lead lawyer in the remarkable series of higher education cases she brought, managed, tried, and appealed aiming to open up universities in Alabama, Mississippi (aided here importantly by my LDF office mate Derrick Bell), Georgia, and South Carolina. These cases were vigorously contested. Obvious segregation was still denied by university officials. The prospective Black students were vilified. Fears of campus violence were ever present. Motley was constantly under threat, especially at the time of the murder of Mississipppi NAACP leader Medgar Evers, a close colleague. There were federal judges who declined to order admission who had to be overruled by appellate courts. And, of course, the riot and federal intervention at Ole Miss in 1962 is a prominent marker in civil rights–era history. Brown-Nagin takes the reader carefully through this phase of Motley's career, demonstrating her courage, forbearance through numerous court appearances before hostile judges, and legal smarts under enormous pressure. It was here and in dealing with Martin Luther King, Jr.'s right to march in Albany, Georgia, and Birmingham, Alabama, that she became, at least to Black and liberal constituencies, a public figure.

Her brief career as a politician followed these remarkable courtroom successes and the name recognition that came with them. Though, at first, she remained second in

4 The sad history of government policy mandating housing segregation is set out in brilliant fashion by Richard Rothstein, The Color of Money (2017).

command at LDF on a part-time basis, powerful Harlem and Tammany Hall political leader J. Raymond Jones—known to all as The Fox—had fingered Motley in 1964 to fill a vacancy as the first Black female New York state senator. In short order she was reelected, but after serving just a year, she became, again with muscle from Jones, the first female borough president of Manhattan and finally left LDF in 1966, twenty years after she had been hired by Marshall.

Brown-Nagin unearths the tangled political moves that brought her to service in these posts, events likely unfamiliar to even close followers of Motley's career. Democratic political operatives fought over influence and control of candidate selection and various positons in local government. Motley seemed a step removed, almost a mere observer of much of this typical sausage-making process, even though she was the subject of some of the controversies. She was ultimately drawn into supporting a candidate opposed by Robert Kennedy who would later turn cool after his initial support of her judgeship.

As significant as the barrier-breaking aspects of her selection were, Brown-Nagin, unlike Motley in her autobiography, makes much—too much, in my view—of her actual achievements in both posts. Her policy initiatives in her brief time in the state Senate were progressive, but they consisted of bills that either failed to pass or worked but small changes. Brown-Nagin also treats her short tenure as borough president, which included service as a member of the City's Board of Estimate, as if it amounted to a more powerful position than was the case. The Board, a unique New York City institution, had then the power to pass on major municipal policy decisions, but it was well understood by New Yorkers that while the five borough presidents along with other City officers had votes, Board decisions were regularly dictated by political operatives and the mayor's office.[5]

Motley's two years as a politician ended in 1966 when President Johnson nominated her to the federal bench. While Brown-Nagin describes Motley's political engagement in some detail, nothing about the experience rivals the drama or import of her post–*Brown v. Board* civil rights work. Her reputation was such that LBJ had originally planned to name her to the court of appeals, but he was ultimately persuaded that confirmation politics were such that he should go instead with a district court position. It appears that Bobby Kennedy's lack of enthusiasm played a role in the decision.

Motley was a federal trial court judge for decades, becoming, due to seniority, the chief judge of the Southern District of New York in the early 1980s and taking senior status in 1986. Brown-Nagin describes several of her high-profile decisions as well as a series of indignities, what today might be called microaggressions or worse, visited on her by a few lawyers and judicial colleagues. To give but one example of many, at a judicial seminar, after extensive descriptions of other (male) participants, a fellow judge introduced her as simply having "served on the board of United Church Women and the board

5 The Board had its powers removed in 1989 by a decision of the U.S. Supreme Court.

of trustees of the YWCA." Former Supreme Court Justice Tom C. Clark, co-chairing the event, was shocked. He took the microphone and proceeded to give a full account of the ten cases she had argued before him while he served on the Supreme Court. Motley displayed the same sangfroid in reacting to these slights that had characterized her mode of dealing with bigotry in the South. She took note of the insulting behavior, memorializing it for later use, but took action only when it was clearly called for. Her sense of self—of who she was—was unaffected. She was a favorite of her law clerks, and an objective assessment of her judicial record shows a willingness to advance the law in the service of fairness and equity even when doing so might ask the court of appeals to do likewise for the first time. It should be remembered that while Brown-Nagin accurately presents summaries of her more notable cases, the overwhelming business of a federal trial judge involves the efficient management and deciding of cases that are of moment only to the litigants involved. In decades as a federal judge, such unremembered quotidian lawsuits are what took up the vast majority of Motley's time and energy.

I will comment here on but two of these cases, one that received great public attention and another in which she appointed me as counsel that remains obscure. Both represent her willingness to take risks to advance the law toward her conception of justice as well as the lawyerly care with which she moved forward. In 1969, she heard a case involving Black Muslim and prison reformer Martin Sostre, who had been held in solitary confinement for over a year at Green Haven Prison while serving a sentence for a drug-related crime that he claimed was a result of being framed by the police. Sostre was a jailhouse lawyer, a Marxist, and a writer of incendiary revolutionary tracts. He was also a thorn in the side of prison authorities, having earlier won a landmark ruling establishing the right to practice his religion, a case that widened a crack in the then-prevailing "hands off" doctrine that protected prison authorities from judicial intervention.

After a long trial featuring powerful expert testimony about the impact of long-term isolation on the mind and body, Motley ruled that Sostre's treatment by the state was cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. She ordered that he not be removed from the general population and that before solitary could be used by wardens certain due process procedures had to be followed, and she protected the status of his jailhouse lawyering. With respect to a warden's seizure of Sostre's writings, she found, "It is not a function of our prison system to make prisoners conform in their political thought and belief to ideas acceptable to their jailers." Motley also awarded Sostre over $10,000 in damages. Her extensive decision was controversial, lauded by many as bold, humane, and long overdue and reviled by others as empowering criminals and hamstringing correctional officials. Brown-Nagin devotes considerable attention to those who believed the decision of momentous importance and less to its ultimate resolution.

The *Sostre* case is a great example of Motley breaking new ground in the service of personal dignity and pushing back at ill treatment in prison, but it is an overstatement

to claim it had a more general effect on solitary-confinement policy. While she wrote a wide-ranging opinion after an extensive trial, only now, decades later, is there significant momentum to restrict a practice that amounts in many respects to torture and is often totally unnecessary. These efforts have been met with but partial success, even after solitary confinement has been criticized by a Supreme Court justice and President Obama. Indeed, in a tendentious and cringe-worthy opinion reviewing her decision, the court of appeals, unusually sitting en banc, ruled that although the conditions Sostre endured were severe, "we cannot agree with the district court that they were 'so foul, so inhuman, and so violative of basic concepts of decency.'" In a finding that today seems painful in its moral blindness but probably reflected the law of the day, Judge Irving Kaufman found that Sostre was at fault because he could have been released from solitary confinement if he had only agreed to participate in group therapy meetings. Motley's orders were upheld with respect to communications between a prisoner and counsel and to a prisoner's writings, though even here the court imposed some limitations. In short, Motley's pushing-the-envelope decision energized many but failed to change the law of solitary. We will return to the relation of litigation to social change in part III.

Despite the court of appeals' treatment of her *Sostre* decision, Motley was undeterred in finding constitutional violations when she believed the facts warranted them. In 1970, after almost ten years at LDF, I joined the faculty of Columbia Law School. Because of my familiarity with criminal law, I received requests to represent indigent defendants in cases pending before the United States District Court for the Southern District of New York. One day in 1972, I got a phone call from Roberta Thomas, Judge Motley's longtime secretary and confidant, telling me that the judge hoped I would take on the case of James C. Haynes, a Black man who had been convicted of robbery and grand larceny in the New York state courts and believed his constitutional rights had been violated. As in *Sostre*, Motley had been randomly selected to decide his claims. Roberta explained that Haynes was indigent and had no counsel. The opportunity to appear before the judge was such that I agreed to take on the case (not mentioned in *Civil Rights Queen*) as counsel without knowing any of the facts.

It turned out that Haynes, who was being held in state prison, had taken his case through the state courts and lost. He claimed he had an alibi for the night of the robbery, but in a case like this a factual question like acceptance of an alibi defense didn't count; only violation of a federal constitutional right would get him a new trial. After studying the trial record, with the help of a Columbia student in a clinical law course I was teaching, I filed a petition arguing that Haynes had been implicated in a co-defendant's confession and should have been tried alone and that he was denied counsel at a police-held lineup. I had little confidence in these claims, and indeed Motley rejected them. I relied most on a long series of pointed remarks by the prosecutor in his summation before the jury. While he never outright said convict this man because he is Black, the prosecutor could be easily understood as demeaning Haynes and his race. I argued this prejudiced his right to a fair trial.

Some of the prosecuting attorney's remarks were as follows:

1. I know that [petitioner's state counsel] Mr. Gold, in his experience, he has dealt with people for many years of the colored race. There is something about it, if you have dealt with colored people and have been living with them and see them you begin to be able to discern their mannerisms and appearances and to discern the different shades and so on. Any of you that have never been exposed to them would never be able to. I don't see, I have been exposed to some degree, that isn't what I am getting at. What I am getting at is those who are living with them, dealing with them, and working with them in a sense, have a much better opportunity to evaluate what they see to identify what they see.

2. Now, counsel for the defendants told you, and Attorney Gold is probably as well versed with the colored race as any man I know in the legal profession. He knows their weaknesses and inability to do certain things that maybe are commonplace for the ordinary person to do or remember or know certain things.

3. Here she is, a young girl about 13 [referring to a prosecution witness, who was Black]. And I know that you have recalled this young McCray girl, who is the tall sister of Jones. That young lady [also Black] had her first baby at 15. She is now married at 16 with another baby on the way. The maturity among these people becomes quite evident quite quickly.

4. It gets confusing when you talk to some of these youngsters like that because they don't express themselves as clearly as you and I might possibly be able to do so.

5. Eyvonne Martin true enough is 13 years old. Again I point to the fact she is a colored girl. She knows her own. She knows the young bucks in that neighborhood and she knew Terry Cox [petitioner's co-defendant].

6. I know that it is the custom and the habit of many colored people to try and straighten their hair. I don't know what the reason for it is. But in any event it is not uncommon to observe colored people with a heavy pomade grease or hair dressing in their hair. It is also not uncommon to find colored people with somewhat exotic hairdos, male and female. Most of the exotic hair-dos take the form of a skull cap type hair-do, plastered down. You may have seen this. Others are taking the trend of the current day, of the long hair. It seems to be a fad. May I say that I cannot participate in that. The tendency on the part of these faddists, if I can call them that, is that they use this black

> bandana type, you have seen it, to hold the hair down. The effect of this grease is to straighten that hair out. And that would bring the hair down. The long hair as described by Mrs. Balon, being pulled down, plastered down on the side of the head and by Investigator Demler, who described it as long. This is not the type of sideburns that we usually think of when we think of sideburns.

We argued, and Judge Motley found, that these overt racial referces crossed the line of fair comment and constituted an invitation to the jury to base its verdict not on the evidence in the case but on the petitioner's race, bolstered by the failure of the trial judge to intervene. In this way, the prosecuting attorney had treated Haynes as if he were other than a member of a group of regular human beings, effectively communicating his own hostility toward the defendant to the jury in a manner totally inconsistent with the fair and impartial jury trial which was petitioner's right under the Fourteenth Amendment.

Motley held, "The court holds that such prosecutorial argument, in the presence of a jury, is a trial error of constitutional magnitude. Indeed, where a prosecutor maligns a defendant's race before the jury, the very integrity of the trial process is destroyed and the trial becomes little more than a mockery of justice." Viewing the case with twenty-first-century eyes, you might think it a slam dunk. Nothing like that was true in 1972.

The state responded to the ruling by arguing that even if the prosecutor's language was tasteless it didn't amount to a violation of the Constitution and pressing the point that there was much evidence of Haynes's guilt. Any error was harmless; Haynes would have been convicted regardless. The judge rejected this claim on the ground that when a prosecuting attorney makes prejudicial remarks to a jury concerning a defendant's race, creed, or color, the error destroys the fundamental fairness required in dealing with the jury. But the state's position was worrisome. Federal courts did not like upsetting state court verdicts, and there were no successful cases just like this one. A *Sostre*-like appeals court could look high-minded by condemning the prosecutor's behavior but still keep the defendant in prison by finding the error harmless. Motley had cited a raft of cases, but the arguable indirectness of the language made the *Haynes* ruling an unusual one; once again she had fearlessly confronted racial injustice, evoking for me now a remark she made to Lynn Huntley, one of her clerks, in another case where she ordered a retrial after both lawyers before her had made numerous racial references:

> I said to the judge when I learned of her decision that it might be overturned on the grounds of "harmless error," in light of the mass of independent evidence of the defendant's guilt. All the judge said to me, half glasses pulled down on her nose, was, "Let those judges on the Second Circuit tell me that I don't know racism when I see it."

Fortunately for Mr. Haynes, we drew a friendly panel for the state's appeal. Vermonter James Oakes agreed with Motley's approach. Former Fordham Law School dean William Mulligan believed that references to "these people" were racially coded. The only dissenter was Paul Hays, Motley's former teacher at Columbia. He thought the prosecutor remarks "vulgar" but on the right side of the law because he never said, "Blacks are more likely to commit crimes than Whites."

I was, of course, happy with the result, pleased to be of service to my former colleague, and impressed by the elegant way she had handled a difficult set of issues. I'm sure she was pleased to be affirmed by a higher court; we were both winners. For Charles Haynes, however, the victory was real but, as is often the case, constrained: he had already served seven years of his sentence when the court of appeals ruled.

II.

I was hired as a staff attorney by Thurgood Marshall in 1961, a year out of Yale Law School (which I had spent traveling and working in Europe and the Middle East), on the recommendation of my constitutional law professor, Alexander M. Bickel. At first, I shared a tiny office with Norman Amaker and Derrick Bell. The only other lawyers on the staff were Jack Greenberg, Constance Baker Motley, James M. Nabrit III, and Marshall. Norman soon left for Germany, one of the reservists deployed to Berlin by President Kennedy to deter Soviet aggression. Marshall joined the Court of the Appeals for the Second Circuit in December, reducing the staff to five. Norman returned in 1962, and Greenberg, who had succeeded Marshall as Director-Counsel of LDF, later that year hired three more lawyers, Frank Heffron, Leroy Clark, and George Bundy Smith. With a growing docket of hundreds of civil rights cases emanating from the school segregation cases, the sit-ins, and the freedom rides, responsibility came fast. Two weeks after becoming a staff attorney, despite no previous practice experience, I was writing a petition for a writ of certiorari asking the United States Supreme Court to review the convictions of 187 peaceful South Carolinians protesting segregation.[6]

The physical space of the office on the seventeenth floor of a building at Ten Columbus Circle in Manhattan was small. Memo writing was usually unnecessary if you stood in the hall and spoke loudly. Everyone soon knew something about any case that came into the office. The secretaries, most but not all African American women, were astonishing workers, able to produce typed and proofed manuscript after manuscript in, of course, pre-computer days. The feeling in the office during the early sixties was of an embattled team on a mission. Spouses and girlfriends might arrive after their own workday to collate documents, bring in food, or just hang out. In the first year, my wife and I were invited to

6 Edwards v. South Carolina, 322 U.S. 229 (1963).

dinner at the Motley apartment on West End Avenue and at Greenberg's Long Island home. We danced and dined with Derrick and Jewel Bell and spent many evenings with Jim and Jackie Nabrit. As time went on, LDF grew, both in space and population; relationships shifted. In a group of lawyers dealing with human rights issues, belligerent adversaries, and demanding judges, debates intensified. But the workplace culture at LDF remained largely positive, and I can remember only a few serious intramural tensions in the years Connie's time and mine overlapped.

As a junior lawyer, Derrick, who had been hired a year before me, worked closely with and was supervised—though the term was never used—by Mrs. Motley, who soon called me Mike, permitting me to call her Connie. I worked closely with and was supervised by Jim Nabrit. About him, the most I can say is he made me a lawyer; before his tutelage and modeling I was just a guy with a piece of paper from a fancy school.

But Connie stood out. She was then making her mark with the series of major case breakthroughs. If ever in the shadow of other lawyers, she was no more. She had just facilitated the admission of Charlayne Hunter and Hamilton Holmes to the University of Georgia. The Meredith case—her most famous—was heating up. Clemson would soon experience her advocacy. At the same time, she had a docket, as we all did, of public school cases that involved struggling with the South's massive resistance approach and coping with blowback from the Supreme Court's go-slow "all deliberate speed" decision. She was the only woman on the legal staff, but while one cannot separate out gender, it was her presence, intellectual and emotional as well as physical, that was indelible. In my 1972 book *Cruel and Unusual*, I described her as "solid as an oak tree," by which I meant not only her physical presence but the obvious strength of her character. I would add that the impact she had on others also came from the clarity and tone of her voice. Whether the way she used the instrument was planned or natural, when she spoke you listened; in my presence she never raised her voice in anger, but that doesn't mean she didn't express emotion. She just did so in a manner that allowed you to take in what she had to say. It was this trait, I think, that allowed her to cope—unflappable is the way it was described—with the many slings and arrows aimed at her in Southern courts and later in her own courtroom.

Connie was sometimes described as difficult to approach, perhaps too formal. I never found her that way. Indeed, she was composed and secure, as only a person who knows exactly who she is—her role, her virtues, her limitations, what is known and what is not—can be. She knew how to laugh; in my presence she did so only when confronted, as we all often were, with the ever-present ironies of our work. I never heard anyone describe her as a queen, and it is plain to me that if anyone had done so in her hearing she would have conveyed some form of distance or displeasure. I don't object to Brown-Nagin's title—titles are difficult and if they help to sell a good book that's fine with me—but I admit to some queasiness about the number of times in the text that she refers to Connie as "Civil Rights Queen." For me it evokes the sometimes satirical, sometimes

hostile, and sometimes affectionate designation of Dr. King as "De Lawd." And "queen" has many potential meanings and associations, making it an easy label to exploit linguistingly. Connie was imposing, but she came from an unlikely place to the heights; she was a citizen not a queen but one who made her adult way by her own efforts. She inherited much from her family but not, I think, the legal skills that placed her at the top level of the civil rights hierarchy.

What I remember most, however, was her moral courage. Brown-Nagin describes the many incidents in hostile environments where it was displayed. I focus on a particular situation in a particular lawsuit that is not mentioned in her book, though covered in detail in one of mine. It took place in Charleston, South Carolina, where Black students and their parents were for the first time suing to desegregate the all-White schools. While LDF had a docket of over a hundred such cases pending, this one was so unusual that Jack Greenberg sent both Connie and me to litigate it. Funded by out-of-state segregationist money, local White parents and the defendant school board hired, for a hefty sum, a Washington lawyer and his team to present a series of "expert" witnesses to supposedly prove that Blacks were so inherently inferior and socially dangerous that the courts should retract *Brown*. The district court judge, Robert Martin, knew this was a stunt and could have refused to let legally irrelevant evidence in, but he decided to let the witnesses testify. We were there to make sure the community moved toward integration but also to stop the quackery in its tracks. In the courtroom, we heard nothing but junk-science testimony. Supported by graphs and charts, the witnesses told us the relative brain weights of Blacks, Whites, and dolphins; the results of a variety of standardized tests; and the supposed dysfunction of integrated communities.

We decided not to cross-examine these supposed expert witnesses, thereby signaling it was a dog-and-pony show of no legal significance. But, as I wrote about the case elsewhere, "It was difficult to sit silently to listen to what really was hate speech, especially as the jury box … was filled with a clutch of reporters avidly scribbling in their notebooks." We squirmed but endured it until the last witness, the local school superintendent Thomas Carrere, took the witness stand. After he answered questions about the school system from the defendant's lawyer, Connie couldn't take it anymore. She rose to cross-examine him. I thought she would ask him a few questions about the logistics of converting the schools from a segregated to an integrated system, but that's not what she did. Instead, with a theatrical flair, she displayed irritation and demanded of him: "You've heard the testimony … Do you agree that the Negro children you were hired to educate are so different than Whites that they can't learn together?"

Panic spread instantly across Carrere's face. His discomfort was obvious, but he mumbled an answer—something about how he had to believe what he'd just heard from the witnesses. She asked a few more challenging questions; then she dismissed him as a witness but stood her ground close to but not quite blocking his way as he stepped down. As he passed between her and the jury box to leave the courtroom, she fixed a hard stare

not at Carrere but at the cluster of reporters in the jury box. Speaking in a voice they could plainly hear, she laid the man down. "You should be ashamed of yourself." Carrere slunk away, looking like he had been punched in the stomach. If Judge Martin heard, he gave no sign of it. Later he issued an order integrating the Charleston schools.

The last case I worked on with her was her final argument before the Supreme Court in a capital case called *Swain v. Alabama*. I had written part of our brief arguing that the Alabama jury selection system violated the Constitution, and I helped prep her for her appearance. It was the only case of the ten that she argued before the High Court that she lost. Twenty-one years later, the Supreme Court admitted it had made a mistake in *Swain* and ruled that a prosecutor's use of peremptory challenges in a criminal case—dismissing jurors without stating a valid cause for doing so—may not be used to exclude jurors based solely on their race.

In her memoir, Connie told the story we all knew of the bad blood between Marshall and his former first assistant Robert Carter, who many believed deserved the appointment as LDF leader and whom he had shunted off to a job as general counsel of the NAACP, where money was in short supply, after the organizations split. The treatment of Carter was payback for slights Marshall felt. Connie said that Greenberg's appointment was a "stunning" development—even Greenberg was surprised—but didn't air any personal grievance about his selection even though she was the only other in-house option. She admitted it wasn't time for a woman to head LDF: "the women's movement of the 1970s had not yet emerged." And she had no supporters except her friend Bella Abzug. Greenberg's credentials were "impeccable"; the only issue involved, she wrote, was his race. The reaction at the NAACP—whose leadership hoped the transition would allow them to retake control of LDF—was "muted and private."

Writing thirty-seven years after the event, she described how Roy Wilkins, the NAACP leader, had no problem with Greenberg because he would not be a rival like Marshall as spokesman for the Black community. Perhaps her true feelings at only getting the second-in-command slot came out when she commented that Greenberg was a consummate lawyer but "he viewed his job with LDF as exactly that, a job that gave him an opportunity to practice his profession. He was not like the white liberals who were committed body and soul to advancing the cause of black Americans."

Brown-Nagin views the transition differently. She states that Connie "secretly" hoped to become Marshall's successor. Motley "believed the Civil Rights Queen would become the next standard-bearer of the civil rights movement's legal front." Citation for these statements include only a reference to pages 139–40 in *Courage to Dissent* (gender likely played an indirect role in Marshall's decision); a reference to Motley's autobiography, page 151, referred to above, where she wrote that it would be difficult for a woman to be placed in the position; and a reference to a Thurgood Marshall oral history: "Reminiscences 1994 [page] 28." My search for this source was futile. There was no listing for a Marshall oral history 1994. The justice died in 1993, but I asked the Columbia Library to

hunt for other sources for the reference, and the Oral History Project provided me with three page 28s from the three transcripts that could be found, but none were pertinent.[7] While I have no doubt that Connie would have accepted the position if it had been offered and that she would have performed with distinction, Brown-Nagin's view that some sort of a snub was involved is not persuasive, nor do I know without more evidence whether her wishes at the time were truly secret. On the surface, my difference of opinion on this point may not seem significant, but Brown-Nagin continues from it to describe Greenberg's accession as generating "tremendous controversy" and to say that after the announcement, "[t]umult soon erupted." One of the very few published references she cites is from Jim Hicks of the *Amsterdam News*, a friend of Greenberg's who believed a Black lawyer with greater seniority should have gotten the job. She doesn't mention a similar comment from a Black journalist, Louis Lomax, who the following year wrote that "Jews would die before they would let a Negro rise to the leadership of one of their organizations."[8] There were a few letters of complaint to Roy Wilkins of the NAACP—who of course had no power over the matter and also had no problem with the appointment—and some grumbling that hardly amounted to a "tremendous controversy."

My views don't conform perfectly with Connie's either—as stated in her autobiography—though I agree with her that if there was in-office or NAACP objection, it was muted. I disagree completely, however, with her latter-day comment about Jack Greenberg's lack of emotional attachment to the goals of the Black community. To be sure, he was not a touchy-feely guy. But in twenty-three years as LDF head, he showed not only lawyerly savvy but a total attachment to LDF's goals. He was deeply respected by leading civil rights figures. Brown-Nagin's approach here just seems at odds with the objective evidence. It is certainly inconsistent with my own memory of the time. None of my colleagues conveyed a sense of "tumult" or "overarching controversy"; if there was dismay, Connie never showed it in the office, and if she had serious regrets, from 1961 on she was much too busy with all-consuming case responsibilities to linger over them. Derrick Bell, as I have written elsewhere, became Bob Carter's friend and ally; he certainly may even in those early days have been disheartened, but given our relationship, I strongly suspect he would have mentioned it in the many hours we spent in our closet-like office. Like me, Derrick was at the time a very junior lawyer recently hired by Marshall. The imposing figure in the legal world that he became was years away.

7 I suspect this is merely a result of the usual difficulty in a highly sourced work of keeping all references completely accurate. In another era, I would have attempted to read all the Marshall transcripts at Columbia, but COVID restrictions made that impossible. Perhaps the reference here was mislaid or misfiled.

8 In her autobiography, Motley mentioned that Greenberg and Marian Perry, who left in 1948, were the only White lawyers who worked on the staff. My feelings were hurt; I got over it. While on the subject of name recognition, Brown-Nagin interviewed me in 2013. I am mentioned twice in *Civil Rights Queen*, in a list of interviewees and in the caption of a photo. My name is often misspelled, but the copyeditors at Pantheon have broken the record, as for the first time in the same publication it has been misspelled two totally different ways.

Finally, some context is appropriate: Jack Greenberg had been administering LDF as well as handling important cases for months before the transition. Thurgood had the authority to choose his successor, and it should be noted that because he saw how Greenberg had performed, he had solid evidence that he could do the job. In the twenty-four years Greenberg headed LDF, he raised millions to support our work; doubled and tripled the staff; won the big cases, including the incredible victory quashing hundreds of sit-in convictions; organized implementation of the new civil rights laws; hired the computer-knowledgeable lawyers necessary to successfully sue huge corporations for employment discrimination; and found ways for us to represent Dr. King and a raft of other civil rights figures and organizations. If, as Brown-Nagin writes, some people believed he wasn't up to the job, those people were proved wrong. The Marshall-Carter rivalry and machinations were ugly, but when it came to a selection between similarly qualified candidates such as Greenberg and Motley, Marshall just chose the leader he thought best fit the job. Sometimes you lose because you were snubbed; sometimes, because the boss just chose someone else. Motley's subsequent conduct while at LDF says she knew the difference.

I do want to be clear: Greenberg made mistakes. I have described one of them at length in the first of my memoirs. He shared with Thurgood Marshall, and by the way with Connie Motley, a fear that far-left lawyers would undermine the Movement, a view that led to some poor decisions. At times, he may have been overly protective of the LDF brand. Brown-Nagin describes his responsibility for a more structural lack in *Courage to Dissent*, but given the range of Greenberg's responsibilities and the treacherous landscape in which LDF operated, I think him heroic.

III.

Life is full of contingencies. People hire lawyers to control or evade them, but in litigation for social change contingency is unavoidable. One constant about litigation in our society is that it will happen with overarching frequency, employed by parties from every corner of the land, from every angle of approach. Generalizations about its role, its virtues and vices, potentials and limits, victories and defeats should be greeted with skepticism. But not indifference. A skeptical approach is not immediate rejection but rather requires proof and persuasion.

The great virtue, for example, of Brown-Nagin's *Courage to Dissent* is that it tells a compelling story of a community at odds—the interaction of protagonists and institutions over a confined set of civil rights issues in a specific venue—even if one feels a need for more proof when she moves from local knowledge to advance a broader understanding of the impact of centralized control of civil rights litigation.

Sometimes the gap between what we know and what we want to know is particularly formidable. One important aspect of Connie Motley's career is unappreciated and difficult

to tease out, though of significance. For want of a better label, I'll call it her role as a teacher of how to make the most out of litigation. I do not refer here to anything in a classroom. At LDF, especially in her years there, a tight-knit group constantly processed individual experience with a view to making the most of every case—not only win for the party before the court but for all those in similar situations whose plight due to lack of resources or opportunity would not be the subject of litigation, even class action litigation. The way Connie did her work and her attention to its broader implications—often rendered to the rest of us not by her but by her co-counsel Derrick Bell—was common currency. And while I cannot put numbers on the power of her model or the larger impact of her victories, I have few doubts of their potency.

A quote from Kenneth Mack's 2012 review of Brown-Nagin's *Courage to Dissent* helps to set the table for what I want to say: "Ambitious legal scholars now make their careers by explaining how, as a descriptive or normative matter, one should not expect courts to be agents of social change." Many readers will immediately recognize that he is referring to theses arising from the works of Gerald Rosenberg, Richard Klarman, Cass Sunstein et al. that find litigation producing meager or unexpectedly negative results. Sunstein's pithy phrase encapsulates how this approach holds that—contra to the manifest hopes and expansive claims of how this or that litigation campaign (or even individual cases) has changed a part of our world—the Supreme Court most of the time acts by "reflecting rather than spurring social change."

The debate is an old one, and it applies to the growing crop of conservative (think anti-abortion; anti–affirmative action) NGOs as well as progressives. Though few quote Finley Peter Dunne these days, his character Mr. Dooley famously saith that "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns." Cornell Law professor Michael Dorf, writing in *Verdict*, observed recently that while it is true the Court follows the election returns, it is also true that the election returns can follow the Supreme Court's rulings. And that puts the paradox in the proverbial nutshell. In every era there are winners and losers, and if you are disappointed today you may be ecstatic tomorrow when the mix changes. This is one reason the Court survives so well efforts to change its membership or limit the tenure of the justices. Our most visible contemporary canary in the coal mine, Justice Thomas, claimed the least dangerous branch was becoming the most dangerous branch. True if you take a picture of the current Court on your iPhone—though not perhaps the way he meant it—but harking back to the 1930s or 1960s turnarounds, the narrative can just as easily flip back. What abides is the process of litigation itself and the structural opportunities and constraints embedded in it. These structures can, of course, also alter, but that is a more deliberate, even tedious, generational process.

In a previous section, I briefly described the clamor that followed the far-reaching Motley demolition of the rationalizations supporting liberal use of solitary confinement in a New York State prison. Though this was an individual civil suit—not a class

action—as Brown-Nagin reports, the decision was followed by editorials and activist celebrations of a new day. Humane values had triumphed in a farsighted judge's court. But then another court with appellate powers by a wide margin reenforced the authority of prison officials to do what they wanted when they wanted it when dealing with long-term isolation of their charges.

Was social change produced by *Sostre* or did it dash hopes? Or did it simply lay waste to a lot of critical resources, the hopes of many, and the time of judges? The answer is all of the above. On one side of the scale, true reform of the unnecessary brutality of most lengthy isolated confinements still awaits us, though national changes may now be in the works. The appellate court slapped down Judge Motley in the way appellate courts handle such matters: the glove was velvet, but the hand inside was a fist. On the other side, *Sostre*, because of what Motley did and how she did it, forced a higher power to acknowledge a problem and use gymnastics to make it go away. The case plainly contributed to altering the prevailing judicial notion that prisons were a law-free zone. It was not the only case on this ride, but the pernicious "hands-off" doctrine would be much removed from its place as a guiding principle. And of equal, or perhaps greater, import, activism was stimulated, voices were found that before had been muted.

This is but one instance of the complexity of measuring the impact of litigation serving as an "agent of social change." Aspects of my understanding here can certainly be contested, but I hope it begins to explain my mixed reaction of laughter (because I found it absurd) and horror (because it was so well treated in respectable quarters) to aspects of Gerald Rosenberg's 1991 book *The Hollow Hope: Can Courts Bring About Social Change*, which found *Brown v. Board* lacking in impact. To be clear, Rosenberg's thesis was not limited to the outrageous delay and ultimately tangled enforcement of school integration; it was, rather, the impact of the decision on the range of American life. He took the same view of *Roe v. Wade*, not weighing heavily in his calculus, as I understand him, the number of legal abortions that were authorized or back-alley deaths avoided. But this is not the place for a serious critical assessment of anti-impact scholarship. A body of literature on the subject can be easily found by anyone interested; my own entry is cited in a note.[9]

In the space available, I hope to display a range of outcomes and impacts, with one exception, from my own and also the Motley litigation history, that lay out the complexity of judging the accomplishments and failures of litigation for social change, including as well some conditions that facilitate its success.

1. Because my work history and writings are tied in part to the campaign to abolish capital punishment, I am often asked by journalists and by my students whether winning

9 Meltsner, The Making of a Civil Rights Lawyer, *supra* note 2, at 170–91.

Furman v. Georgia was a good thing, replaced as it was four years later by the Supreme Court's approval of a new legal regime governing the imposition of the death penalty. To the question I have both a short answer and a long answer. The short one is that litigation saving over six hundred lives needs no further justification. The longer response is that time—though too much time—has vastly reduced the practice, converting it into an increasingly infrequent event. The skeptic will ask if this might have occurred without *Furman*. It's a legitimate question, but any answer would be rank speculation. That's why I stick so closely to lives saved.

There is a link here to those who doubt the larger impact of *Brown v. Board* on our law and culture. They must add to their assessment the consequences of either not bringing the litigation or the decision going the other way. At the time, there were voices urging the Court that ending Jim Crow was a legislative matter; dissents in *Furman* made the same point. I do not believe that a Congress (or state legislatures) populated by White supremacists was likely to act in this manner; no data suggest otherwise.

2. The 1964 World's Fair was promoted by the New York power broker Robert Moses as a great celebration of industrial growth and corporate genius, but it failed to gain international acceptance; nor did Moses realize the financial gain that he hoped would finance more of his park and residential projects. In planning the Fair, he made no effort to employ Black New Yorkers, which led to a threatened highway drive-in on the Fair's opening day. Moses also banned leafleting and picketing within the Fair grounds. Because his project would have been impossible without public money and free public land as well as state legal support, Roy Wilkins of the NAACP and James Farmer, the leader of the Congress of Racial Equality, felt they had no way to protest the employment discrimination. I was retained to challenge the prohibitions on bringing their message to the Fair-attending public on First Amendment constitutional grounds. I represented both leaders and their organizations before a Manhattan federal judge.

Our case was partially successful. The judge ruled that leafleting was protected free expression but also that picketing in the confines of the venue might be disruptive, though it was a large plot of parkland. He asked, as was typical in such cases, for a draft of the injunction he would enter to require the Fair to permit entry by NAACP and CORE members to distribute handbills to attendees. He was about to sign it but paused; to our astonishment, he told us that a bond would be required to indemnify the Fair if the leafleting caused property damage. A bond of this sort is authorized by federal law, but requiring one is up to the discretion of the judge. As it was difficult to imagine a scenario where a person handing out leaflets would be the cause of property damage, and bonds of this sort are costly, this was a stunning development. As the judge certainly knew, given his history as a former Justice Department official, in 1964 both organizations were short on funds due to having to post thousands of dollars of bail money to free anti-segregation demonstrators in the South. They could not post the bond. The case was over.

3. In the 1960s, reforming the money bail system was a goal of the Legal Defense Fund. With money from the Ford Foundation, LDF set up a program called the National Office for the Rights of the Indigent (NORI) that brought both civil and criminal cases to bolster the rights of the poor. One of the cases NORI brought asked the Supreme Court to declare unconstitutional the system that held in jail only those too poor to obtain a bail bond and thereby led to a host of negative ancillary effects—loss of employment, pressured guilty pleas, ballooning jail populations, and many others. But the public at large was not engaged with the issue. No previous decisions stood as building-block precedents suggesting the justices had an interest. No community-based organizations placed bail reform high on their agenda. Certiorari was denied, Justice Douglas dissenting. There were legislative reforms and several innovative release programs at the time, but the pretrial incarceration of the poor has survived. Only recently, however, with challenges to mass incarceration, visible lapses in law enforcement, and the criminal justice system exposed by the Black Lives Matter movement, has bail reform returned as a viable issue. Such progress that has occurred is the direct result of legislation and judicial rule making. Litigation has played at most a marginal role.

4. A true analysis of impact often turns on the response of the losing party. In 1973 while I was still litigating the *Haynes* case, my colleague at Columbia, Philip Schrag, and I interviewed Michael Davidson, an LDF staff lawyer (and future counsel to the Unites States Senate) about post-litigation strategy in civil rights cases. We asked him what public-interest lawyers do when, after winning a court decree, a defendant interprets the court's ruling in the most narrow possible way and then takes subsidiary action to impede implementation.

He told the story of a case against a city in New York State that tried to stop construction of a federally subsidized housing development in a White section by rezoning the property, imposing a moratorium on any building, and declaring a hold on installing any new sewers. A federal court enjoined these efforts, but the City adopted a slew of new tactics that blocked the project for at least three years by imposing new costs and building requirements on the developer.

We asked Davidson what steps he could take to get the housing constructed. He offered a range of options, some more promising than others. He thought the threat of the contempt power might conceivably be effective, but courts disliked using it. The best course possible in this case would be to get the federal government and the Army Corps of Engineers involved because any challenge to the City's latest moves would require costly and time-consuming technical studies. Another possibility was to seek damages and counsel fees, but any of these steps other than going back to court immediately and seeking a supplemental injunction would lead to further delay.

Then he told a very different story. In 1969, LDF won a case for an evicted public housing tenant by requiring local housing authorities to give tenants the reasons for

eviction and to afford them an opportunity for explanation or reply. But the ruling was narrow, and Davidson wrote letters to the Secretary of Housing and Urban Development (HUD) urging him, now that the Supreme Court had authorized HUD to issue guidelines, to flesh out the full procedural due-process rights of tenants. The letters were not answered. But one day, months later, he received a panicked call from an assistant secretary of HUD asking him to come to Washington to talk about his due process proposal. It turned out that District of Columbia public housing tenants were threatening major demonstrations protesting poor conditions in their buildings. Davidson first met with DC tenant representatives and decided to ask HUD for a tenant bill of rights. Ultimately national organizations got involved and the Department issued a model lease and a tenant-friendly grievance procedure. In 1973, a federal court of appeals found the new provisions were fully authorized by federal law.

We asked him whether a public-interest lawyer has a role to play after losing a case. One of the first things you do after losing, he suggested, is ask whether the issue can be relitigated, perhaps in a different forum like a state court. As an example, he cited the Supreme Court's reversal on federal-law grounds of a lower court ruling requiring that state educational funds be distributed to school districts equitably. Lawyers then took the issue to state courts and, using state law, won a number of victories.

Finally, we asked him how to counsel a community group in the event a lawsuit is lost. A lawyer must, he thought, make clear at the outset that litigation isn't an exclusive strategy; the group should prepare how to fight on even if the case isn't successful. Community group members should be told it just isn't true that "problems are settled when a lawyer takes over." After losing a case, you may be able go to other agencies or seek legislation—just as successful court action often follows a legislative loss—or bring embarrassing facts to public attention. "So community groups should be educated to think of litigation as just one battle in a wider war."

5. In 1963, I met with a group of doctors and dentists in Greensboro, North Carolina, who, like their patients, had been denied use of the City's two major hospitals. Both facilities had received significant amounts of federal money from a federal statute called the Hill-Burton Act that authorized hospitals to segregate. We filed suit claiming unconstitutional discrimination and were joined by the Kennedy Justice Department. The appeals court gave us a total victory; the opinion itself by Judge Simon Sobeloff served as the intellectual basis for what the following year would become Title VI of the Civil Rights Act, which bars discrimination by entities receiving federal funds.

So far so good, but there were at least 250 to 300 medical facilities mostly in the South that excluded Black doctors, dentists, and nurses from staff privileges; if Black patients were admitted they were kept far apart from Whites.

At first, the vast majority of hospitals asked to fill out a government compliance form falsely claimed they had no racial exclusion or separation practice. With a full docket of

civil rights cases, LDF did not have the resources to engage in across-the-board enforcement of Title VI. Moreover, requiring compliance was really the responsibility of the federal government. We complained to the Office of Civil Rights at the Department of Health, Education and Welfare (HEW) and were told bluntly that given the small staff, nothing would happen unless the Office received on-the-ground complaints of discrimination. I contacted many of the lawyers who worked with LDF and begged them to solicit letters of complaint from local people who had knowledge of or experience with segregated hospitals. I was surprised by the number of letters I received back and the speed with which they came.

After the complaints were filed with the agency, compliance efforts accelerated, but ending racial exclusion and segregation required field investigation scrutiny throughout the South. Critical interventions from political leaders made this happen. John Gardner, the HEW Secretary, with support from an aide of Attorney General Robert Kennedy and ultimately a push from President Johnson, organized a task force of inspectors from a variety of agencies. Hospitals began to comply. In 1965, after LBJ signed Medicare into law, no medical facility could reap its financial benefits unless it had eliminated Jim Crow.

Conventional political science wisdom has it that regulated industries will soon come to dominate their government regulators. The end of explicit racism in American hospitals—to be sure, still leaving manifold other racial inequities—presents a different story. It began with community support that led to a successful test case litigation in a single jurisdiction. A judicial opinion laid the basis for an important statutory provision enacted by Congress; a host of citizen complaints and the support of political leaders resulted in an active response from a usually slow-moving bureaucracy. A new law added a financial incentive that forced resistant institutions to end overt racial practices.

6. The series of cases that Connie Motley tried and managed, beginning with Autherine Lucy's courageous battle to attend the University of Alabama and followed by litigation in Georgia, Mississippi, and South Carolina, led to the integration of Southern colleges and universities. After the violence at Ole Miss, change came gradually, but it came. In 1963, she filed the Harvey Gantt case. Clemson College (now Clemson University) admitted the future mayor of Charlotte, North Carolina, in 1965. South Carolina and Clemson knew they had to accept defeat and decided that the state was not going to be like Mississippi. Gantt's days at Clemson were largely peaceful. Today, Southern universities are integrated, though in similar fashion to schools across the nation, minorities are represented at lower numbers than their proportion of the general population.

As a judge, Connie used her powers to bring civil rights values to the cases before her, but always in a thoroughly professional way. Several lawyers unsuccessfully attempted to force her recusal, as if only female Black judges come to the courts with a background that influences their world view. On the question of impact on agents of social change, unlike *Sostre*, one need only look at Brown-Nagin's retelling of the case against a major law firm,

Sullivan & Cromwell—brought by my Columbia colleague Harriet Rabb—that opened up Wall Street firms to women.

7. The pattern of elementary and high school compliance is far less sanguine. The story is long and complicated, full of moderate gains and manifest failures that expose how many Americans move toward hard-core resistance when certain forms of integration are threatened. Relevant to our present focus is the clear extent to which progress and regress have been deeply affected by Supreme Court decisions. The 1955 "all deliberate speed" principle was exploited by school officials to put the brakes on all but token integration until 1968; in the New Kent County case in which in which I played a minor role, the Court said the principle no longer applied. Three years later it approved busing as a means of facilitating integration. These decisions led to progress in the South, but in other decisions the justices blocked positive results in northern urban districts. Then in the 1980s, desegregation as a court-mandated matter began to be dismantled. Districts could declare they were "unitary," meaning they were presumed able to assign students any way they wished unless lawyers could prove clear segregation intent. This loophole became a means of avoiding any responsibility to integrate flowing from *Brown*. In this century, the Roberts Court has issued rulings that went further, removing voluntary policies that sought racially balanced outcomes.

Events emerging from battles over public school integration over the course of more than sixty-five years do not greatly increase our understanding of the extent to which litigation produces advances in racial equity. But that court decisions, both pro and con, had an impact is undeniable. Litigation certainly failed in many places to meet the goal of general integration, a result clearly tied to variables like housing patterns as well as to the values and conduct of White parents that no lawsuit could overcome. But writing with his colleagues in 1996, Gary Orfield—the leading academic expert in the field—pointed to an important marker of positive change: school integration "is viewed as a success by both White and minority parents whose children experienced it."[10]

8. I conclude with a brief reference to the outcome of the 1990s state-generated tobacco lawsuits, cases in which I had no part but followed avidly. While not emerging from the civil rights world, the story illustrates how difficult it is to fix large social problems through mega-damage suits brought by multiple parties using the expertise of private lawyers. A settlement of over $246 billion (paid over ten years) intended to fund anti-smoking programs was diverted by many states to general budget purposes. The lawyers

10 In 1964, Connie and I tried another case with a bizarre aspect, *Willis v. Pickrick Restaurant*, which upheld the Civil Rights Act ban on discrimination in public accomodations. Lester Maddox's decision to close the Pickrick rather than submit to integration paved his way to victory in Georgia's 1966 gubernatorial contest.

involved were paid hundreds of millions. Smoking still kills hundreds of thousands of Americans each year. And in the present day, the courts are still grappling with how to handle the large-scale tort cases dealing with the dangers and costs of opioid use. Several courts have reached contrary results. The legal theory is unprecedented, and the drug was approved for prescription by the government. Difficulties abound, but there doesn't seem to be any alternative to litigation to repay the states for the addiction services they provided. As in the tobacco cases, there will eventually be major financial settlements. The question remains whether diverting large sums to the states will achieve the goal of stemming the addiction crisis.

CONCLUSION

If our inquiry focuses on the use of litigation to advance social reform, my experience, as set out above, strongly suggests that going to court is often necessary but often insufficient; the gaps in sufficiency must be filled for many of the public-interest lawsuits to realize the results they seek. It is instructive to consider some of the signal litigation campaigns that followed the staged movements that led to 1954. The series of cases advancing gay rights seem connected to a social movement that changed popular perception by presenting LGBTQ-oriented folks as "otherwise just like you and me." Victories with a broad reach followed. The series of cases establishing the equal rights of women, associated with Ruth Bader Ginsburg, both came from and were energized by a strong grassroots Women's Movement, which may explain why their impact was substantial despite being the result of individual, rather than group-centered, action. Environmental law cases were successful in specific places, but win or lose they forced Americans to debate issues—environmental racism for one—that had previously been invisible. A court-based movement to improve the welfare system won some important procedural battles limiting unbridled powers of administrators, but the Supreme Court ultimately refused to address a larger goal—changes in financial allocations—as beyond its authority.

The intended impact of test cases and, even more, test-case campaigns, as opposed to traditional lawsuits of concern to just the individuals and entities involved, is to change the law and by court orders change behavior. But these actions inevitably nurture other forms of expression—political positions, protest demonstrations, money raising, public education, community involvement—and significantly maximize chances of victory when they emerge from them. Recent scholarship has confirmed the details of how *Plessy v. Ferguson* itself was a test case, though a deeply unsuccesful one. Indeed, the same label might even be attached to *Marbury v. Madison*, but the modern version goes back to the momentum derived from the now-forgotten 1930s Garland Fund and the work of Nathan Margold. Under the dirction of Charles H. Houston and Thurgood Marshall, the form was crafted in a fashion that with suitable alterations is today a commonplace tool of those, right or

left, seeking social change. But knowing how successful litigation works is an art that forces a lawyer to consider not only the law, the locale, and the world that surrounds it but, just as importantly, herself. In her years at LDF, Constance Baker Motley showed us a true artist in this realm. She did it with style and stamina, and she continued, despite the constraints, to move the needle forward as a judge. We must thank Brown-Nagin for bringing her back to life. Courage is always in short supply, and we need flesh-and-blood examples to bring it home. Connie is missed, but her memory shines a bright light and marches steadily on.