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De Jure Revolution?

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DE JURE REVOLUTION?

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I. INTRODUCTION: THE QUEST FOR LAW REFORM IN THE POST-CIVIL RIGHTS ERA

At first glance, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution, by Jack Greenberg,¹ and Failed Revolutions: Social Reform and the Limits of Legal Imagination, by Richard Delgado² and Jean Stefancic,³ appear to have little in common. Certainly, they are vastly different in genre, subject matter, scope, perspective, and tone. Greenberg, the former Director-Counsel of the NAACP Legal Defense and Educational Fund — also known as the “Inc. Fund,” or simply “LDF” — offers Crusaders in the Courts both as a detailed history of LDF's preeminent role in the creation of twentieth-century civil rights law and as a personal memoir of his thirty-five years there as a litigator and organizational leader. Consistent with the structure and style of many historical and personal reminiscences, Crusaders in the Courts relies heavily on a straightforward chronological narrative peppered with colorful and riveting anecdotes of its protagonists' legendary deeds; in Greenberg's book, the heroes include Thur-

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¹. Professor of Law, Columbia University School of Law.

². Charles Inglis Thomson Professor of Law, University of Colorado School of Law. Delgado is widely viewed as a preeminent scholar of critical race theory and is one of its most prolific writers. See, e.g., CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, AND KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

³. Research Associate, University of Colorado School of Law.
good Marshall, Constance Baker Motley, Robert L. Carter, Greenberg himself, and myriad other LDF lawyers who crafted the legal strategy of the modern civil rights era with such landmark cases as Brown v. Board of Education, Furman v. Georgia, and Griggs v. Duke Power Co. Greenberg’s assessment of LDF’s overall record, though occasionally somber and qualified, is for the most part extremely sanguine about both the success of the “civil rights revolution” and its prospects for continued social, political, and legal progress toward a nonracist, egalitarian society. Using the civil rights revolution forged by LDF’s “dedicated band of lawyers” as a prototype, Greenberg hopefully exhorts a new generation of public interest lawyers and activists to take up the banner of law reform-through-litigation and to continue the noble crusade. He invests considerable faith in the tenet that redemption lies with the right kind of leaders:

Now is the time for a new movement, as tenacious, relentless, and idealistic as that of the 1960s, a new Margold plan, or plans, as prescient as the original, and new leaders — a Charles Hamilton Houston, a Thurgood Marshall, a Martin Luther King, Jr. — who will hold high ideals and at the same time keep clearly in mind what is possible and how practically to achieve it. These new leaders will be large people, large in character, large in vision, who will be prepared to plunge into the struggle personally, wrestling with concrete issues as Thurgood and Charlie Houston did in the early Restrictive Covenant, White Primary, and school desegregation cases, and as Martin did in the Montgomery bus strike and in the strategy and tactics of the Selma to Montgomery march. [p. 516]

Failed Revolutions, conversely, is a bracing theoretical critique of American law reform movements as distressingly and repetitively similar exemplars of the deficiencies of traditional legal thought and practice. Wide-ranging and eclectic in their choice of jurisprudential targets, Delgado and Stefancic identify the structure of mainstream civil rights litigation as but one example of the stagnation of prevalent law reform efforts (p. xv). The authors speak not from career-long experiences as civil rights litigators but as, “respectively, a law professor and a legal writer-information specialist . . . [who] have immersed ourselves in reform movements whose

5. Senior District Judge, United States District Court, Southern District of New York.
6. Senior District Judge, United States District Court, Southern District of New York.
7. 347 U.S. 483 (1954) (Brown I) (holding public school segregation violative of the Equal Protection Clause); 349 U.S. 294 (1955) (Brown II) (declaring that racial discrimination in public schools is unconstitutional and requiring schools to remedy discrimination “with all deliberate speed”).
8. 408 U.S. 238 (1972) (finding the death penalty in certain circumstances to be cruel and unusual punishment).
unfinished states we find deplorable and puzzling” (p. xv). According to Delgado and Stefancic, the conventional “hero” model of the public interest lawyer cannot ameliorate the abysmally regressive state of the current legal system; in fact, the authors argue, such a model can be outright deleterious to social change movements by fostering delusions of incremental progress that mask the desperate need for fundamental change. Although they express considerable admiration for the commitment of such “crusaders” as those Greenberg lauds — and exemplifies10 — the authors posit that movement “saviors” are both “transformative and conservative at the same time” (p. xvii), and they caution against the precipitous embrace of reformers who may derail incipient revolutions by proposing or legitimating moderate rather than truly revolutionary ideas. Rather, Delgado and Stefancic claim, the answer lies not in heroism but in counterhegemony — in challenging the insidious influence of legal ideologies and institutions that limit our capacity to imagine and implement radical solutions to society’s ills (p. 143). Thus, Failed Revolutions’s interpretive stance toward the crusader model of the public interest lawyer is staunchly counterheroic, if not antiheroic, in nature. Even its title’s shared use — with Crusaders in the Courts — of the term revolution reflects a gap of chasmic proportions between the authors’ perspective and Greenberg’s; one can infer, without too much of a stretch, that Delgado and Stefancic adjudge the very same civil rights revolution heralded so proudly in the title of Greenberg’s memoirs to have been a well-intended but ultimately disappointing failure.

Despite their markedly different goals and premises, however, both books engage the question of how to use law, legal institutions, and lawyers as agents of social change in the United States. Although Greenberg cautions that Crusaders in the Courts is “a history and not a blueprint” (p. 516) for a new civil rights movement, the overall tenor of his reminiscences reveals a passionate commitment to such an endeavor. Clearly, he hopes that LDF’s life story — as well as his own — will inspire and provide solace to post-civil rights era reformers. Similarly, Delgado and Stefancic stress that though their critique of the traditional law reform mindset is deeply structural and at times caustically pessimistic, they intend it as a counsel of encouragement rather than despair. They hope to help reformers “persevere even when things look bleakest and victories are longest in coming,” and they suggest that through teaching others to “understand the many ways in which we inscribe and rein-

10. P. xvii. Despite a soberingly critical premise, Failed Revolutions begins on a rather splendidly dissonant and quixotic note, with both a dedication to “the many gallant activists, lawyers and nonlawyers alike, who have struggled over the years against great odds to bring about a more just society,” and a frontispiece quotation from Robert F. Kennedy, “Some men see things as they are and say, why; I dream things that never were and say, why not.”
scribe power and hierarchy, we may perhaps avoid ensnarement by them in the future” (p. xviii). In this respect, therefore, both Crusaders in the Courts and Failed Revolutions seem bound by at least one overarching set of commitments: the advancement of a progressive social reform agenda through creative use of the law11 and the inculcation of a new generation of lawyers, legal scholars, and judges toward this end.

Within these broad parameters of similarity, however, the authors' divergent paths loom with stark and intriguing significance. Greenberg stakes a more moderate and optimistic claim for gradual, piecemeal transformation through a combination of targeted impact litigation, moral suasion, and public education. Delgado and Stefancic advance the more radical assertion that such strategies are tepid, limited, delusionary, and ultimately ineffectual in the face of internal psychological and external societal mechanisms that subtly but inexorably stifle truly meaningful change.

Striking in their differences as well as in their overlapping interests in developing workable law reform strategies for the post-civil rights era, Crusaders in the Courts and Failed Revolutions provide provocative axes of comparison in yet another, although less obvious — as contrasting opportunities to explore the potential for a nexus between critical legal theory and lawyering practice in both facilitating social change and understanding the hidden deterrents to such change. Although neither book explicitly articulates this interrelationship as a central theme — and, in fact, Greenberg largely eschews discussion of theory altogether, as opposed to legal doctrine, in his descriptions of LDF's most momentous courtroom challenges — the potential for a rich connection between critical theory and practice is nevertheless a consideration that infuses both Crusaders in the Courts and Failed Revolutions.

Crusaders in the Courts, published on the fortieth anniversary of the U.S. Supreme Court's landmark decision in Brown v. Board of Education, takes its place in the burgeoning and fascinating genre of historical chronicles and personal reminiscences of the modern civil rights movement.12 These works, far from being mere "war stories" or "period pieces," offer much to the reader interested in

11. Greenberg, and Delgado and Stefancic, of course, may not necessarily agree on a unified progressive social reform agenda, but their overall goals appear to contain enough similarities to warrant a comparison of their disparate methodologies for achieving such an agenda.

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law reform in this reactionary, post-civil rights era of opposition to antidiscrimination laws and race-conscious remedies because they serve as compelling reminders both of just how recently de jure discrimination reigned in this country and of the role of lawyer and nonlawyer "everyday heroes" in resisting and dismantling it. What these chronicles tend to lack, however — even those by movement lawyers such as Greenberg and others — is a theoretical framework within which the authors concretely assess their short-term failures and successes in terms of a long-range vision of social reform. Admittedly, many memoirs in this genre do not aspire to such a goal; as Greenberg observes, "I have written, inevitably, from my own perspective, that of a lawyer who is not as detached as a historian nor as engaged as the plaintiffs themselves" (p. xix). Rather, many civil rights retrospectives aim primarily to educate and inspire through the able telling of fascinating stories — and this itself is no small contribution. Still, after reading an account as voluminous, detailed, and important as Crusaders in the Courts, one yearns for a theoretical context within which to reflect upon Greenberg's description of LDF as "the organization that played a major role — often the leading role and, at some times, the only role — in the legal struggle to obtain for black Americans their full civil rights as citizens" (p. xix). If it is the case that LDF, the nation's most famous and historically most powerful civil rights law reform organization, has had only limited success in achieving its goals, what can present and future progressive lawyers learn from its experiences?

Interestingly, Failed Revolutions — without focusing directly on the subject matter of Crusaders in the Courts or other civil rights movement histories — provides exactly such a theoretical context. It posits that most so-called reformist revolutions fail, despite reformers' best intentions, not because of individually blameworthy culprits or obstructionists, but because of reformers' own inability to identify and move past "the array of preconceptions, meanings, and habits of mind that limit and frame the horizon of our possibilities" (p. xvi). Regardless of the short-term, stopgap successes, Delgado and Stefancic assert, reformist activists and lawyers are doomed to repeat past mistakes so long as they systematically fail to address the conscious and especially the unconscious mechanisms with which they themselves stymie truly meaningful progress.


The authors identify, and seek to resolve, the following prerequisite questions in this regard:

Why does the marketplace of ideas fail to remedy deeply inscribed social ills like racism and sexism? How do judges, including our greatest jurists, continue to hand down decisions that a later time finds shocking and regressive? How do lawyers and legal scholars replicate and rehearse old arguments, seldom breaking free to new planes of legal thought and innovation? Why do maverick thinkers find themselves without a community, and how are outsiders marginalized, their voices tamed and silenced?

Why do ostensibly fair-minded social scientists and observers have difficulty seeing evidence for social reform? How do moderate saviors inhibit reform movements? How do objective rules and practices favor the more powerful? How does the very language the Supreme Court uses frustrate that institution’s role as champion of the weak and powerless? [p. xvi]

In raising and addressing these concerns, Delgado and Stefancic draw heavily upon the emerging field of critical race jurisprudence as well as upon nonlegal disciplines, such as history, literature, and popular culture. Although their observations and tentative recommendations do not constitute, any more than does Greenberg’s book, an action plan for lawyering for social change, they nevertheless present an intriguing overlay of concerns germane to the unanswered questions of Crusaders in the Courts — namely, by what standard should we measure the success or failure of the civil rights, or any other law reform, revolution? What should be the role of the progressive lawyer in such a revolution? Of what, if any, use is critical theory in law reform practice?

This review examines the perspectives of Crusaders in the Courts and Failed Revolutions in light of the above questions. Part II focuses on Crusaders in the Courts, with particular emphasis on Greenberg’s assessment of LDF’s influence in bringing about the successes of the civil rights revolution through a crusader-oriented model of lawyering. In Part III, I examine Failed Revolutions’s implicit rejoinder to Greenberg’s views and discuss Delgado and Stefancic’s theories of both why such revolutions fail and why such well-intentioned reformers fail. I conclude by suggesting ways in which the heavily practice-laden orientation of Greenberg’s approach and the theoretical challenges posed by Delgado and Stefancic’s critique might find mutually beneficial convergence in a theoretics of practice for progressive lawyers.

II. CRUSADERS IN THE COURTS

[Ps]eeking Paul Freund’s metaphor of the courts as “the substations that transform the high-tension charge of the philosophers into the reduced voltage of a serviceable current,” LDF brought the decisions
of these courts back to the people and plugged the current of moral and legal authority into the transactions of everyday life.\footnote{15}

A. \textit{The Role of Law in the “Civil Rights Revolution”}

As Greenberg’s book amply details, the history of what is sometimes termed the civil rights revolution\footnote{16} overlaps to a great extent with the history of LDF. Certainly, \textit{Crusaders in the Courts} is not the first book to point out this convergence, nor is it the only work to accord deservedly central significance to LDF as a progenitor of modern civil rights law.\footnote{17} Formed in 1940 to advance the cause of equal rights for African-Americans through the courts — and benefiting from the influence of such brilliant legal minds as Charles Hamilton Houston,\footnote{18} Thurgood Marshall, and William Hastie\footnote{19} — LDF won in its first decade of existence an impressive string of pathbreaking courtroom victories, including the so-called white primary case of \textit{Smith v. Allwright}\footnote{20} and the restrictive covenant cases.\footnote{21}

These early years in the history of LDF, which Greenberg chronicles in Parts I and II — entitled, respectively, “Preparing the Ground” (pp. 3-81) and “Edging Toward a Showdown: \textit{Brown v.}...”

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\begin{enumerate}
\item\footnote{15}{P. 512 (quoting \textsc{Paul A. Freund}, \textit{The Supreme Court of the United States: Its Business, Purposes, and Performance} 114 (1961)).}
\item\footnote{16}{See, \textit{e.g.}, \textsc{Gerald N. Rosenberg}, \textit{The Hollow Hope: Can Courts Bring About Social Change?} 42-71 (1991).}
\item\footnote{17}{See generally \textsc{Richard Kluger}, \textit{Simple Justice: The History of \textit{Brown v. Board of Education} and Black America’s Struggle for Equality} (1977); \textsc{Mark V. Tushnet}, \textit{The NAACP’s Legal Strategy Against Segregated Education, 1925-1950} (1987).}
\item\footnote{18}{Houston, eulogized by his colleague William H. Hastie (and remembered by Greenberg) as the “Moses” who “guided us through the legal wilderness of second-class citizenship” (p. 3), is one of the most influential figures in the history of civil rights law. A Phi Beta Kappa graduate of Amherst College and the first Black elected to the \textit{Harvard Law Review}, he went on to serve as dean of Howard University Law School and counsel for the NAACP. He is widely acknowledged as the major architect of the step-by-step litigation strategy leading to \textit{Brown v. Board of Education}. Pp. 4-5. \textit{See generally \textsc{Genna Rae McNeil}, \textit{Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights} (1983).}}
\item\footnote{19}{Hastie, Houston’s colleague in private practice as well as at LDF, was also a Phi Beta Kappa graduate of Amherst College, editor of the \textit{Harvard Law Review}, and dean of Howard University Law School. President Franklin Roosevelt appointed him federal district judge in the Virgin Islands (a non-Article III position in 1937) making him the first black federal judge in U.S. history. President Harry Truman appointed him governor of the Virgin Islands in 1944. In 1949, Truman chose Hastie to serve on the U.S. Court of Appeals for the Third Circuit, making him the first black Article III judge in U.S. history. Pp. 36, 529 n.36; \textit{see also \textsc{Gilbert Ware}, \textit{William Hastie: Grace Under Pressure} (1984).}}
\item\footnote{20}{321 U.S. 649 (1944) (striking down Texas’s state convention-run, racially restrictive primary because it violated the Fifteenth Amendment).}
\item\footnote{21}{The most famous of these cases is \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948) (barring judicial enforcement of racially restrictive covenants in property deeds as violative of the Fourteenth Amendment). For a history of the restrictive covenant litigation, see \textsc{Clement E. Vose}, \textit{Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases} (1959).}
\end{enumerate}
also encompassed Greenberg's appointment in 1949 as an LDF staff lawyer, fresh out of Columbia Law School at the age of twenty-four. Greenberg's boss, Thurgood Marshall, himself only forty-one, supervised a small legal staff that also included such notable figures as Motley, Franklin H. Williams, and Carter. Of those times, Greenberg recalls sanguinely:

The mood always was exciting and upbeat, but we were plunging ahead into the unknown. I have friends who were once South African exiles, but who are now back in South Africa. Whenever I asked them when they thought apartheid would come to an end, they'd say they didn't know. One, Albie Sachs, responded, "Ten years ago I said it would be in five years." I have visited them, after their return, in Johannesburg and Cape Town — where I have stayed at Albie Sachs's house — and the transition seems as though it was inevitable. It was the same with us. Our generally upbeat attitudes told us that legal apartheid in America would end. We knew we were helping to end it. But for a long time we never knew how close we were to that end or even if we were yet on the right road through the maze. [p. 25]

Yet, disappointingly, Greenberg's analogy between LDF's crusading revolutionaries and African National Congress freedom fighters fails to follow through on the possible significance of the most salient difference between the two groups: whereas LDF sought to end American apartheid largely through a litigative strategy of fealty to the norms and procedures of the existing legal system, the South African anti-apartheid movement was of necessity predicated upon a direct challenge to both the structural and substantive constraints of that country's laws. Although Greenberg briefly touches on LDF's perceptions of its own choices in this regard, further exploration of a comparative nature would have proven enormously helpful, particularly because it would have come from the perspective of one who served "in the trenches" with such dedication and distinction.

For the most part, the period of LDF's history generally referred to as the civil rights revolution begins with and is dominated by LDF's litigation efforts in the school segregation cases — the era of Brown v. Board of Education. The Brown chapters are absorbing and inspiring. In many ways these cases are the conceptual centerpiece of Crusaders in the Courts. Greenberg renders first-person observations of the musings, deliberations, and courtroom strate-

22. Williams, praised by Greenberg as possibly "the most gifted speaker I ever heard" (p. 32), handled a number of key LDF cases, including Watts v. Indiana, 338 U.S. 49 (1949), and Shepherd v. Florida, 341 U.S. 50 (1951) (the "Groveland" case) (pp. 32-33, 537 n.99, 537 n.98).
gies of Marshall, Motley, Carter, Spottswood W. Robinson III, and Jim Nabrit, Jr. vividly, perceptively, and with clear affection for the individuals involved. Given Greenberg’s role in the entire pre-\textit{Brown} and \textit{Brown} line of cases, it is perhaps understandable that the number and enthusiasm of his anecdotes would outweigh any attempt either to question the limitations of LDF’s strategy in the school segregation cases or to analyze dispassionately the long-term successes and failures of the \textit{Brown} “revolution.” Greenberg perhaps most closely approaches such a critique in the book’s last substantive chapter, “A Summation: Victories and Defeats” (pp. 509-17), and in an arresting part of the Prologue in which he describes a “counterfactual novel” — once contemplated but never written — about “an America in which the NAACP Legal Defense and Educational Fund had never existed, in which Charles Houston had never envisioned the concept of the legal campaign and Thurgood Marshall had never directed the organization that carried it out” (p. 12). In the Prologue, Greenberg speculates that without LDF’s courtroom victories such as \textit{Brown}:

The civil rights movement of the 1960’s, inspired by those victories, might not have been born, at least not at that time and quite likely not as a nonviolent movement. If by some chance it had been born, it could not have long survived without effective legal defense. Without a forceful movement, the Civil Rights Acts would not have been adopted. If by happenstance some similar measures were adopted, they might not have survived the baptism of fire that court challenges exposed them to, and might never have developed into effective instruments for social justice. [p. 12]

In the closing pages of the book, Greenberg underscores this assessment of \textit{Brown} and the civil rights revolution as undeniably transformative of “how blacks were seen and treated, by law and by society in general, not only in schools but in many other areas of life” (pp. 509-10). These optimistic assertions comport fully with Greenberg’s invocation of Paul Freund’s vision of courts as the “substations” of social change — hopeful conclusions indeed given the torpidity with which our society has realized the mandates of the desegregation decisions and indeed of most civil rights laws.  

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23. Robinson, part of the \textit{Brown} legal team, later became dean of Howard University Law School and was appointed to the U.S. Court of Appeals for the District of Columbia Circuit. Pp. 171-72, 519-20, 611 n.521.

24. Nabrit, also on the \textit{Brown} team, later became dean of Howard University Law School and then president of Howard University. Pp. 172-73, 293.

25. See supra text accompanying note 15.

26. More recently, Greenberg has noted the extent to which the promise of \textit{Brown} remains unfulfilled because of societal crises such as drugs and poverty that remain “beyond the power of the courts”; still, he defends \textit{Brown} as instrumental in effecting long-term substantive reform in a range of contexts.

There is now a large black middle class and substantial black political power (forty members of Congress, many mayors) as a result of the civil rights revolution, of which \textit{Brown}
In wishing for more critical introspection on Greenberg’s part on the long-term legacies of Brown and other aspects of the civil rights revolution, I intend neither to underestimate the significance of LDF’s contributions to civil rights jurisprudence nor to devalue the light shed upon those contributions by Greenberg’s memoirs. Rather, I am suggesting that a fuller assessment of LDF’s strategies as exemplars for future public interest litigation necessitates some consideration of the most recent major critiques of the Brown litigation.27 For example, in The Hollow Hope,28 political scientist Gerald N. Rosenberg, after acknowledging the jurisprudential mythos of Brown as “[b]eing ‘nothing short of a reconsecration of American ideals,’ ”29 examines a range of data on public opinion, rates of school desegregation, and other indicia of Southern non-compliance and concludes: “[W]hile there is little evidence that Brown helped produce positive change, there is some evidence that it hardened resistance to civil rights among both elites and the white public.”30 Rosenberg buttresses this rather startling heterodoxy with findings suggesting that the positive extrajudicial effects of Brown in its first two decades of existence were virtually nil,31 and he refutes the assertions of those — including, presumably, Greenberg — who would argue that the courts provided an impetus for a civil rights revolution, if one indeed did occur. Rosenberg characterizes interpretations like Greenberg’s as the “Dynamic Court” model32 and claims:

[T]he Dynamic Court view’s claim that a major contribution of the courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimize the grievances of blacks, and fire blacks up to act is not substantiated.... While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to

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27. Earlier influential critiques include Derrick Bell, Brown and the Interest-Convergence Dilemma, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 90 (Derrick Bell ed., 1980) [hereinafter SHADES OF BROWN], and Derrick Bell, A Model Alternative Desegregation Plan, in SHADES OF BROWN, supra, at 124.

28. See Rosenberg, supra note 16.

29. Id. at 39 (citing Kluger, supra note 17, at 710).

30. Id. at 155.

31. Id. at 107-55.

32. Rosenberg describes this model as premised on the assumptions that:

[C]ourts have powerful indirect effects. Their politically neutral position allows them to teach Americans about the meaning of their constitutional obligations. Court decisions can change opinions, generate media coverage, and inspire action. They can provide the necessary nudge to start the reform process. In other words, they have a unique and important kind of potency.

Id. at 26.
the battle for civil rights. The evidence suggests that Brown's major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it.33

Such a far-ranging thesis calls out strongly for rebuttal, not only in its statistical particulars but in its general conclusion that public interest lawyers perform the largely self-reinforcing function of legitimation through litigation their own progressive legal ideologies. Greenberg's indirect response lies mainly in his general claim that Brown's efficacy did not truly begin to manifest itself until the desegregation implementation decisions of the 1970s,34 and that even then, "the period of equality of educational opportunity . . . moved forward fitfully" and spottily (p. 516).

In Race Against the Court,35 legal scholar Girardeau Spann advances a critique of both Brown and the notion of court-inspired reform in many ways even more troubling than Rosenberg's. Spann claims that the law reformer's reliance upon the courts, particularly the U.S. Supreme Court, to hand down pronouncements of legal equality is not only misguided but ultimately destructive of the minority empowerment it aims to engender. He explains:

The inevitability of Supreme Court review is likely to have an adverse effect on minority interests because the Supreme Court has been structured to operate in a manner that is inherently conservative. Life tenure and judicial independence cause the Court to function as a political force for preservation of the status quo. However, because racial minorities in the United States are disadvantaged by the socioeconomic status quo, the Court's inherent conservatism impairs minority efforts to achieve racial equality. The Court has manifested its inherent conservatism in subtle, yet effective, ways. Brown v. Board of Education, the case most often lauded as the icon of judicial sensitivity to minority interests, has had the ironic effect of luring racial minorities into a dependency relationship with the Court that has impeded minority efforts to acquire political power.36

By this account, therefore, the civil rights litigator — even with the best of intentions — fosters the institutional tendency of courts to perpetuate the "continued subordination of racial minority interests."37 Greenberg's chronicle of LDF's civil rights successes and failures proceeds on a radically different premise: that court-driven reform, though not a panacea, was certainly the linchpin of the civil rights revolution. As such, LDF's revolution occurred primarily in

33. Id. at 156.
35. Girardeau A. Spann, Race Against the Court (1993).
36. Id. at 3 (footnote omitted).
37. Id. at 5; see also id. at 165-69.
the courts, with litigators as the most visible crusaders for justice. Although *Crusaders in the Courts* movingly and spiritedly pro-
pounds this vision, it does not take into account the disheartening possibility that this strategy was not, in the end, "the right road through the maze" (p. 25).

**B. The Public Interest Lawyer as Crusader**

Closely related to Greenberg's concept of the civil rights era as a court-inspired revolution is a model of progressive lawyering honed by LDF as one of the earliest and most influential public interest law firms in the nation. As the Afterword of *Crusaders in the Courts* impressively attests, the roster of past and present LDF-affiliated lawyers is a veritable "Who's Who" of some of the nation's most prestigious judges, practitioners, and legal scholars; Greenberg generously and meticulously lists the names and present affiliations of scores of them, lauding them as "Charlie Houston's band of freedom fighters [who] fought and won the last civil rights revolution" (p. 522).

Greenberg spends less time, unfortunately, exploring what must have been — and must continue to be — the fascinating professional and interpersonal dynamics of such a diverse group regarding the role of the progressive lawyer in facilitating social change. Surely, LDF, even given the vital importance of, and, one might argue, the historical necessity of, the "small band of crusading lawyers" approach of its early years must have had numerous critical junctures of self-reflection regarding the efficacy of its approach to civil rights work — not just in terms of case docket selection and project development, two areas that Greenberg documents well (pp. 366-67, 371-72), but also with regard to the wisdom of various lawyering strategies, or what today might be called lawyering the-

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38. Although Greenberg does acknowledge that "*Brown* marked the end of that phase of the civil rights struggle where all our important victories were won in court," and that "the spirit of revolt," led to massive resistance in the streets, it is clear that his, and LDF's, chosen path lay in courtroom challenges. P. 267; see also CHESTNUT & CASS, supra note 12, at 192:

As a lawyer representing the NAACP Legal Defense Fund in the midst of a street protest movement, I was stretched between competing philosophies and egos, and my own beliefs were challenged. [Martin Luther] King's philosophy that we had a moral right to disobey unjust laws ran counter to my legal training. Though I understood the limitations of the judicial system — white men in black robes had upheld Jim Crow for almost a century — I was trained to believe that you changed the system through the system. You didn't go out and break the law. You went to court.

*Id.*

39. At the time of LDF's founding, Greenberg helpfully reminds us, discrimination against African-Americans and Jews in the legal profession was blatant and rampant. The American Bar Association did not admit African-Americans, and most major law firms would not hire African-Americans or Jews. P. 24. Women of color suffered similar slights; Greenberg recounts an incident in 1946 in which a doorman nearly prevented Constance Baker Motley from entering the headquarters of the Association of the Bar of the City of New York because he would not take her word that she was a member. P. 36.
ory. Greenberg occasionally hints at such differences — for example, in fleeting references to former LDF staff attorney Derrick Bell's disapproval of LDF's direction in its school desegregation cases (pp. 292, 502) — but for the most part such recollections center on what appear to be the personal rather than the philosophical aspects of those disagreements. Given Greenberg's exposure to and leadership of such a distinguished, provocative, and eclectic group of legal minds over a span of thirty-five years, it would have benefited the reader immensely to have more than a glimpse of LDF's deliberations on these concerns.

In the absence of evidence of such dialogue, the primary model of LDF lawyering that emerges in Greenberg's work is that of the lawyer-as-crusader — a prototype of lone heroism and lawyer-centered decisionmaking sometimes criticized today as overly preoccupied with lawyer, rather than client, prerogatives. Particularly in his engaging accounts of LDF strategy sessions during the critical pre-Brown and Brown years, Greenberg strongly conveys the impetus in favor of such a "top-down" approach. He quotes spirited exchanges from a "black summit," including LDF lawyers Marshall and Robinson, sponsored by the Journal of Negro Education to assess the viability of various legal challenges to the "separate but equal" doctrine, and he effectively expresses both the urgency and the vitality of the event (pp. 112-15). Ultimately, however, as

40. The past two decades have witnessed the development of a significant body of scholarship regarding the various theoretical frameworks within which progressive lawyers operate. See, e.g., GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (19(138,824),(278,930)(138,824),(278,930)

41. For example, Greenberg provocatively notes but does not elaborate upon possible substantive reasons for Bell's differences with the LDF:

Bell disapproved of the Fund's school desegregation and other programs as well as of me personally, referring to LDF during the time I was its director-counsel as a "penthouse plantation," and writing that I "evidenced... intolerance based on a sense of hereditary superiority." He encouraged and counseled a black student boycott of me and Julius Chambers when we jointly taught a civil rights course at Harvard in January 1984. P. 292. Moreover, rather than examining the possible philosophical underpinnings of Bell's and others' objections to both Greenberg's LDF leadership and his Harvard appointment, Greenberg unfortunately chooses to interpret such opposition as "racist" or "crazy." Pp. 502-04. Notwithstanding the pain Greenberg obviously and understandably suffered over both disputes, his recounting of these events — especially in the context of an organizational history and not just a personal memoir — would have benefited considerably from a more measured and complex analysis.

42. See, e.g., López, supra note 40, at 24 (decrying what he calls the regnant ideal of progressive lawyers as political heroes and preeminent problem solvers because they "try little to learn whether and how formal changes in law penetrate the lives of subordinated people").
Greenberg stresses, LDF lawyers remained the primary architects of their litigation strategy:

Out of all this deeply held, but often conflicting, advice came the style of attack as the school cases moved from trial courts to the Supreme Court: a clear eye on the goal, cautious probing, with a simultaneous willingness to retreat a bit or accept only modest gains rather than risk a total setback. The legal leadership of the LDF, while always idealists, were never ideologues.\textsuperscript{43}

One of the liveliest and most revealing passages in the book concerns the resolution of such lawyering theory questions in LDF's early years. In a chapter describing LDF's nascent litigation style in the 1940s and 1950s, Greenberg conceptually distinguishes impact-oriented public interest law from what he terms the more traditional form of client-centered lawyering, implicitly defending the former:

The traditional legal model is that of lawyer representing a client, doing the client's bidding and representing only the client's interests, irrespective of the needs of society or groups within it. LDF, however, practiced an early version of what has come to be known as public interest law . . . . Generations later, some critics attacked our kind of legal practice as not responsive to the needs of constituencies who might be affected by the cases we brought and the precedents we helped make, and not fully focused on the special needs of individual clients. LDF rejects those charges now and would have rejected them then, but that debate had not developed at a time when going to court offered the only avenue of reform with any real prospect for success.\textsuperscript{44}

Arguably, Greenberg's generalizations about the "traditional legal model" as "representing only the client's interests," particularly in the context of the progressive lawyer's role, are as sweeping and implicitly condemnatory as he believes those of LDF's critics to be. In addition, Greenberg's seeming dichotomization of the existing array of lawyering approaches as either client-driven or

\textsuperscript{43} P. 115. Although Greenberg does embrace the hero model and moniker to describe LDF attorneys' work, he emphasizes the LDF's cautious and pragmatic manner as well: "One romantic notion has the heroic leader charging into battle, sword held high, ready to smite the enemy, whomever it turns out to be, entertaining no possibility of adjusting the pace or temporarily moderating the goal. But these were of a different breed of heroes." P. 115.

\textsuperscript{44} P. 107. Ironically, although Greenberg describes the individual client-centered approach, as opposed to impact litigation, as having been the traditional method of public interest representation at the time of the LDF's founding, many lawyering-theory scholars today emphasize the former approach as less traditional, more empowering, and more effective in encouraging social change. See generally Anthony V. Alfieri, \textit{Disabled Clients, Disabling Lawyers}, 43 HASTINGS L.J. 769 (1992); Gerald P. López, \textit{Lay Lawyering}, 32 UCLA L. REV. 1 (1984); Gerald P. López, \textit{Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration}, 77 GEO. L.J. 1603 (1989); Lucie E. White, \textit{Seeking "... the Faces of Otherness...": A Response to Professors Sarat, Felstiner, and Cahn}, 77 CORNELL L. REV. 1499 (1992); White, supra note 40.
cause-driven imposes a bipolar model on what is today — and may always have been — a much more complex continuum of human relationships between the progressive lawyer and her clients. As recent works in critical lawyering theory suggest, a collaborative relationship among progressive lawyers, clients, and lay advocates may be more effective, more realistic, and more humane than either a solely top-down model or a solely client-centered relationship. Indeed, Greenberg's own richly descriptive anecdotes, particularly about Marshall's idiosyncratic and allusive lawyering style, suggest that there was in reality more of a theoretical bent to LDF's internal lawyering decisions than meets the eye. It is unfortunate that Crusaders in the Courts, in its emphasis on the crusader paradigm, does not more fully address the complexities of LDF's choices about its approach to lawyering.

III. FAILED REVOLUTIONS

We write for the reader who is troubled by our time's being one of particular stagnation, when most of the serious business of past reform movements seems to be at a standstill. We write for the reader who struggles to understand why momentum appears to be as often backward as forward — why most revolutions, in the words of our title, fail. [p. xv]

A. Why Revolutions Fail

In distinct divergence from Greenberg's optimistic appraisal of the civil rights revolution as a flawed but ultimately noteworthy harbinger of progress, Delgado and Stefancic offer a considerably more solemn estimation of our current social and legal predicament in Failed Revolutions. After reading their grim assessment, one might conclude cynically that modern American social reform efforts characterized as revolutions are, at best, in perhaps only one sense revolutionary: they usually travel circular paths back to their points of origin. Even worse, Delgado and Stefancic contend, the delusions of grandeur that even well-meaning reformers bring to


46. See, e.g., LÓPEZ, supra note 40, at 55 (arguing for lawyer-client collaborative interaction as part of a nonhierarchical, "larger network of cooperating problem-solvers"); Anthony V. Alfieri, Practicing Community, 107 HARV. L. REV. 1747, 1763-64 (1994) (reviewing LÓPEZ, supra note 40) (urging lawyers to work collaboratively with clients and communities based on the realization that "our professional autonomy is linked to the autonomy of others and that our claims of neutrality are false").

47. Although Delgado and Stefancic suggest that failed revolutions exist outside as well as within legal contexts, they focus at greatest length on three such law reform revolutions: race relations and civil rights (pp. 3-22); the antipornography movement and women's rights (pp. 81-92); and the environmental movement (pp. 95-104).
their work have the regressive effect of pushing society even farther backward on the road to social change; this phenomenon occurs precisely because reformers fail to comprehend and deconstruct the larger structural, institutional, and attitudinal barriers that insidiously frustrate truly radical reform. As a result, the authors conclude, "earnest and well-meaning efforts to change things have a way of going for naught" (p. xv).

Interestingly, the authors' principal diagnosis of the problem begins with the self — that is, with the two basic human failings identified as the "fear of extinction, of change that is too far-reaching" and "the 'once done' fallacy — the belief that a problem once addressed is solved, and that once solved is solved forever" (pp. xvi-xvii). Rather than pointing a finger at a particular legal institution or malefactor, Delgado and Stefancic suggest that the vexing dilemma of stymied social reform is far more complex and intractable. Revolutions fail because we deceive ourselves into thinking that revolutions can actually succeed, when in fact our only prospects for long-lasting change lie in an ongoing cycle of interrogation, critique, resistance, and struggle. In other words, the authors argue, reformers should never assume that victory is around the corner. Even optimism can be a trap for the unwary: "Hope, unaccompanied by a comprehensive critique of social institutions, can be a formula for premature capitulation and defeat; paradoxically, the person who counsels simplistic, hopeful philosophies can end up being the real nihilist."48

In support of this hypothesis, Delgado and Stefancic draw upon an impressively broad, creative, and eclectic range of examples from both legal and nonlegal contexts. The structure of Failed Revolutions is unconventional for a legal text in that it neither lists nor describes the reasons why revolutions fail in the linear, case-by-case manner of the advocate; rather, the authors proceed thematically toward their conclusion by discussing overarching and overlapping problems of "imagination, then perception, then reception" (p. xviii). Although the authors' backgrounds and expertise are rooted primarily in the study of law reform, they posit that their conclusions are generalizable to many other contexts. In fact, an implicit assumption underlying Failed Revolutions seems to be that a primary reason so-called legal revolutions are doomed to fail is that lawyers wrongly assume that law can play a catalytic role in correcting injustices. In contrast to Greenberg's embrace of law as a

48. P. 146. In this respect, the authors' conclusions evoke the perspective of another leading critical race scholar, Derrick Bell, regarding the eluctable nature of social reform. Asserting that "[b]lack people will never gain full equality in this country," Bell nevertheless exhorts activists to adopt a "racial realist" perspective and to combat racism regardless of the outcome of such battles. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992) (emphasis omitted).
dynamic solution and courts as substations of social change, Delgado and Stefancic conceive of both as mostly backward-looking and obstructionist.

The authors' thesis proceeds in four major parts.  Part One, "On the Difficulty of Imagining a Better Society" (pp. 1-50), addresses internal human barriers of limited imagination, which stifle revolutionary thought before it has a chance to occur by suppressing "the transformative impulse in ourselves and each other" (p. xvii). The authors offer three primary examples of this phenomenon: In "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Deeply Inscribed Social Ills?" (pp. 3-22), the authors provocatively argue that the dominant model of First Amendment jurisprudence actually subverts rather than encourages democratic ideals by tolerating — and perhaps valorizing — the virtually untrammeled expression of racist stereotypes. In "Judges' Misjudgments" (pp. 23-40), Delgado and Stefancic target the limited imaginative and empathic horizons of judges, particularly those at the appellate level, by considering whether the judges in a sampling of notorious cases might have decided those cases differently if they had had the benefit of access to "saving counternarratives" — that is, narratives that emphasized the humanity of the groups whose rights the judges ultimately denied. The authors conclude that such access either did not or would not have made a difference, primarily because of the structural impediments and personal prejudices that systemically prevent judges from contemporaneously discerning the "serious moral error" of their interpretations (p. 37). In "Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma" (pp. 49. Much of Failed Revolutions is adapted from law review articles published by Delgado and Stefancic between 1989 and 1995.

50. The authors define these notorious cases as riddled with "serious moral error": A decision embraces serious moral error if (1) it proceeds blithely ignorant of moral complexity; (2) it is broadly or universally condemned by subsequent generations, somewhat akin to being overruled; and (3) its assumptions, for example, about women, are roundly refuted by later experiences. Judges will always hand down decisions that will seem offensive to some. We reserve the term "serious moral error" for those shocking cases that virtually everyone later condemns. P. 23. The cases chosen, given in the order in which they appear in the book, are: Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (refusing to recognize the personhood of blacks); Plessy v. Ferguson, 163 U.S. 537 (1896) (declaring separate-but-equal accommodations for blacks and whites constitutional); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (denying Indian tribes the ability to sell land); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (prohibiting the return of a Chinese laborer to the United States under legislation passed since his departure); Hirabayashi v. United States, 320 U.S. 81 (1943) (allowing the government to impose a curfew on individuals of Japanese ancestry); Korematsu v. United States, 323 U.S. 214 (1944) (upholding the constitutionality of Japanese internment during World War II); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding a state's authority to bar women from practicing law); Buck v. Bell, 274 U.S. 200 (1927) (upholding state law mandating sterilization of the mentally disabled); Bowers v. Hardwick, 478 U.S. 186 (1986) (allowing states to criminalize consensual sodomy). Pp. 25-36.
the authors provide a partial explanation for the paucity of saving counternarratives, asserting that traditional library classification systems in legal scholarship operate both to exclude unconventional sources and to discourage innovative thought. The authors conclude that as a result of all of these barriers, reformers fail to grasp not only what truly revolutionary thought is all about but also the limits of their own imaginings in this regard (p. 48).

In Part Two, "On the Difficulty of Hearing What Our Prophets Are Saying" (pp. 51-91), Delgado and Stefancic identify what they call problems of perception, attributable in part to the "variety of marginalizing devices that ensure that reformers are seen as partisan and extreme" (p. xvii). This section focuses primarily on exclusionary practices in the legal academy that attempt to defuse the power of radical ideas and scholarship by characterizing them as un scholarly, intellectually unsound, overly subjective, and political. In "The Imperial Scholar: How to Marginalize Outsider Writing" (pp. 53-66) and "Gathering with the Like-Minded: Symposium Battles" (pp. 67-80), for example, the authors acerbically dissect what they view as the tendency of prestigious mainstream legal scholars — aided by "clubby" law review symposia (p. 78) — to trivialize "outsider" scholarship through ignoring, distorting, or condescendingly addressing its major premises. Delgado and Stefancic proffer this phenomenon as another concrete illustration of why revolutions fail — namely, because radical thought is accepted only after it has been so thoroughly assimilated and tempered that it has lost its original corrosive edge of efficacy:

We take seriously new social thought only after hearing it so often that its tenets and themes begin to seem familiar, inevitable, and true. We then adopt the new paradigm, and the process repeats itself. We reject new thought until, eventually, its hard edges soften, its suggestions seem tame and manageable, its proponents elder statespersons to be feared no longer. By then, of course, the new thought has lost its radically transformative character. We reject the medicine that could save us until, essentially, it is too late. [p. 64]

In the final chapter of Part Two, "Pornography and Harm to Women: 'No Empirical Evidence'?" (pp. 81-91), Delgado and Stefancic examine the perception problem in the context of societal resistance to feminist reformers who advocate the regulation of pornography. Analogizing degrading pornographic images to the

51. Delgado and Stefancic define outsider jurisprudence as consisting of three main strands of legal theory: critical legal studies, feminism, and critical race theory. Many mainstream scholars, the authors contend, try to "muffle and tame" these "insurgent scholars" through a variety of marginalizing mechanisms designed to devalue the originality of outsider contributions. P. 57.

racist stereotypes discussed in the book's first chapter, the authors argue similarly that the very ubiquity of the harms inflicted by such images tend to render the harms invisible. Because, the authors continue, "pornography is a tacitly recognized good that the dominant group depends on to achieve certain ends and is naturally reluctant to relinquish" (p. 81), opponents of pornography regulation deploy a range of mechanisms designed to downplay pornography's injurious effects and to ostracize antipornography feminists as "antimale, antisex, and puritanical" (p. 89).

In Parts Three and Four—"Why We Always Embrace Moderate Solutions (or Saviors)" (pp. 93-111) and "Supreme Court (and Other) Rhetoric: How the Way Powerful Institutions Talk Can Devalue and Marginalize Outsider Groups" (pp. 113-41), respectively—the authors address problems of reception encountered by radical thinkers who try to advance far-reaching and novel theories through litigation and other law reform efforts. Closely linked conceptually to the previous chapters, these concluding sections assert that revolutions fail in part because reformers fail and that reformers fail because our legal system, as well as society more generally, is structurally incapable of accommodating truly daring and original leaders (pp. 101-03, 138-41). Instead, society tends to embrace only the "moderate" savior, the assimilationist who prudently and conservatively bridges the gap between stagnation and radical solutions: "Most serious movements fail because society prefers incremental rather than wide-ranging change. In a version of the maxim that 'bad money drives out good,' we are almost invariably drawn to doomed, moderate approaches . . . when society needs more sweeping, ambitious ones" (p. 96). Thus, in "'Our Better Natures': A Revisionist View of the Public Trust Doctrine in Environmental Theory" (pp. 95-103), the authors offer environmental law scholar Joseph Sax's public trust doctrine as an example of a reformist solution ultimately flawed by its moderation. In "Shadowboxing: An Essay on Power" (pp. 105-11), Delgado and Stefancic critique legal doctrine's ostensibly neutral and reasonable emphasis on objective versus subjective standards as a mask for cultural power plays that routinely devalue or ignore the rights of subordinated groups. Finally, in "Scorn and Imposition — How We Use Language, Consciously or Unconsciously, to Derail Reform" (pp. 115-41), the authors decry the manipulation of language itself, particularly in U.S. Supreme Court discourse, to ridicule radical ideas and reformers: "[The Court] is applying suspicion — cool, sometimes disrespectful treatment — to blacks, welfare recipients, prisoners, gays, and other disempowered litigants. And it is treating with exaggerated respect the military, large corporations, arms of government, and other empowered actors" (p. 116).
In their skeptical evaluation of the role of law in effecting social change — an estimation considerably grimmer than Greenberg evinces in *Crusaders in the Courts* — Delgado and Stefancic draw upon various tenets of critical theory, particularly critical race theory. Prominent among these concerns is a deep-seated doubt about law itself — not only as an instrumentally viable tool for the eradication of subordination but also as an ostensible locus of neutrality through which concepts of justice and equality might be mediated. Terming this skepticism postmodernist, Angela Harris describes the manner in which proponents of critical race theory — or as she calls them, race-crits — strive to question everything in their quest to expand the boundaries of conventional legal categories:

The deeper that race-crits dig, the more embedded racism seems to be; the deeper the race-crit critique of western culture goes, the more useful postmodernist philosophy becomes in demonstrating that nothing should be immune from criticism. By calling everything taken for granted into question, postmodernist critique potentially clears the way for alternative accounts of social reality, including accounts that place racism at the center of western culture.

In many ways a postmodernist critique of the type Harris describes, *Failed Revolutions* applies the above-described interrogative approach to clear the way for alternative accounts not only of race and the civil rights revolution but of the notion of law reform itself. In stark contrast with the vision of revolutionary legal change propounded in *Crusaders in the Courts*, in which LDF by turns battled, cajoled, confronted, maneuvered, shamed, and persuaded the courts to place racial equality at the center of our constitutional culture in decisions such as *Brown* and *Griggs*, Delgado and Stefancic suggest that such litigative legerdemain was probably just “shadowboxing.” Whereas LDF’s civil rights revolution, as described by Greenberg, proceeds in a “brick-by-brick” fashion through decisions won and legislation passed, Delgado and

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53. *Failed Revolutions* in many ways illustrates what Delgado himself described in an earlier article as the fundamental characteristics of critical race scholarship: (1) an insistence on “naming our own reality”; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism — the ways in which legal tools and thought-structures can impede law reform.


55. For an exploration of whether the implications of critical race theory differ significantly from those of more traditional civil rights scholarship, see Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994).
Stefancic claim that revolutions constructed on such a foundation are mired in quicksand. Ultimately, the tantalizing question raised by *Failed Revolutions*’s withering critique of law reform is one the authors address — but do not wholly resolve — in the volume’s conclusion (pp. 143-44): What vision of progressive lawyering can combat, or at least diminish, the tendency of legal revolutions to fail?

**B. The Public Interest Lawyer as Skeptic: Why Quit?**

To the authors’ credit, they do not set forth the grave observations of *Failed Revolutions* without addressing the concerns of progressive practitioners and practitioners-to-be. If they ignored these concerns, one might answer the all-important normative question of “What should be done?” with the world-weary response: “Nothing. Give up. We are doomed to fail.” Instead, consistent with the reconstructive bent of critical race theory, the authors attempt in the book’s Epilogue to inject some measure of cheer and encouragement for the aspiring public interest lawyer (pp. 145-46). Their advice — indeed, their proffered model of progressive lawyering — provides an intriguing contrast with the more upbeat, dynamic paradigm that Greenberg suggests in *Crusaders in the Courts*.

Delgado and Stefancic’s counsel, in short, is for progressive lawyers to be critical, disbelieving skeptics: to realize that the ideal of change through law is, if not panglossian, at least volatile and temporary in nature; and to relinquish the self-aggrandizing fantasy that lawyers can accomplish anything more than incremental improvements (p. 146). Certain aspects of this advice at least superficially resemble Greenberg’s model of the public interest lawyer as crusader. For example, Greenberg would certainly agree that lawyers need to be skeptical and persevering, and Delgado and Stefancic would likely aver that society needs lawyers who are visionary and heroic. Below the surface, however, Delgado and Stefancic’s qualified pessimism hints at a drastically different, counterhegemonic role for the public interest lawyer. Such a role would be rooted in hope, realism, and despair:

Hope is, of course, necessary for any long and difficult struggle. But equally important is an understanding of how society works. An indi-

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56. For an analysis of the reconstructive ideals of critical race theory, especially in comparison with the deconstructive predilections of critical legal studies, see Harris, *supra* note 54, at 750-54 (noting the commitment of critical race theorists to the “liberation of people of color from racial subordination”). *See also* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *Yale L.J.* 1329 (1991).

57. The authors’ dire observations are quite decidedly qualified: “It is important to us that [law students] not see this book as a counsel of despair, for that is not how it is intended.” P. 145.
individual who understands the ways near-universal forces resist change is better armored against self-blame. He or she realizes that failure is not always the result of lack of skill or nerve, that the real question is often not, Why go on? but, Why quit? [pp. 145-46]

If, as Failed Revolutions suggests, the inevitability of law reform as-failure renders necessary the development of both more realistic ways of defining success and more innovative strategies for avoiding the pitfalls of false consciousness, the implications for progressive practice are considerable. Notwithstanding the likelihood that many progressive practitioners, in an era of increasingly conservative legislatures and courts, may already have to console themselves with a “why quit?” attitude, it is worth exploring in detail just how and why such an outlook would operate to the benefit of clients and client communities as well as their attorneys. With respect to the lawyering theory concerns raised earlier in this review regarding LDF’s representational strategies in Crusaders in the Courts, it would be instructive to learn Delgado and Stefancic’s perspective on how their postmodernist critique of law reform could or should affect, for example, the micro-level decisions of client representation, choice of impact strategies, lawyer-client interaction, and client autonomy. In other words, what does it mean — or could it mean — to combine the theoretical insights of critical race jurisprudence with the conservatizing pressures and demands of everyday public interest practice?

IV. CONCLUSION: THE NEXUS BETWEEN CRITICAL THEORY AND PROGRESSIVE PRACTICE

Given Greenberg’s stated objectives for his book, as well as its value as a personal memoir of the civil rights movement, Crusaders in the Courts deserves both a wide audience and high regard. It contains a wealth of historical materials and insights regarding one of the most significant eras in American jurisprudence. Still, Greenberg’s retrospective — especially when considered against the backdrop of the trenchant critique of social reform movements offered by Delgado and Stefancic in Failed Revolutions — leaves this reader wishing for a broader and more nuanced analysis of the many unresolved dilemmas of the post-Brown, post-civil rights era. Although Greenberg and LDF are surely not solely responsible for the ultimate resolution of these quandaries — any more than they were solely responsible for the revolution that preceded them — it

58. See supra notes 40, 42-46 and accompanying text.
59. For an argument that the insights of critical race theory and progressive lawyering can be compatible and mutually reinforcing, see Margaret M. Russell, Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice, 43 Hastings L.J. 749 (1992).
seems both logical and fair to expect *Crusaders in the Courts* to re-flect upon the significance of the present-day deterioration of its past courtroom glories.

*Failed Revolutions*, in comparison, is firmly — and perceptively — anchored in a theoretical dissection of contemporary malaise. Although the authors’ concluding exhortations are cautiously optimistic and intended to be encouraging, it is nevertheless the case that the budding lawyer may be at a loss over exactly *how* to proceed “when ‘the path is long and the night dark’” (p. 146). Delgado and Stefancic offer broad-based conceptual suggestions, ranging from “distrust[ing] the ability of free-market solutions” to “pay[ing] particular attention to what our mavericks and reformers are saying” (p. 143), but the practitioner understandably may hun-ger for more.

Given the widely dissimilar approaches of these works, it may be that one cannot locate them on common ground in any signifi-cant measure; however, their authors’ overlapping concerns with the use of law in the service of social change suggest that increased attention to the nexus between critical theory and progressive prac-tice is in order. Such a theoretics of practice\(^6\) should draw upon the richness of narrative histories of progressive lawyers’ experi-ences in the trenches, as well as modern and postmodern critiques of traditional lawyering strategies. Without attention to both, law reform efforts will inevitably suffer losses of pragmatic and imagini-native perspectives. Even with both, revolution by law may never be realized — but at least we will begin to comprehend why such revolutions fail.