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THE HIGHS AND LOWS OF MICHAEL MELTSNER—A TRIBUTE

Corinna Barrett Lain*

I was a relatively young law professor when I came to know Michael Meltsner. I say "came to know" because I knew him virtually—electronically—for a while before finally meeting him in person.

I had become fascinated by 1972's *Furman v. Georgia*[1] and was thinking about writing a legal history piece on it. A mentor had advised me to think long and hard before writing a law review article about a 1972 decision that was overruled four years later, and so I did. I read Michael's *Cruel and Unusual*,[2] and I was hooked. There was no question as to whether I was going to write that piece, and I'm so glad I did, as it began a career-long interest in a subject that I thought would be a passing fancy.

I remember being in awe of *Cruel and Unusual*, and how I had to muster the courage to reach out and ask this amazing man if he would give my draft a read. I didn't know what the etiquette was, but I knew he was something, and I was not. And my reticence to ask for a read wasn't just about the awe. I understood at the time that Michael Meltsner was history in the making, so he was going to know if I had the history wrong, and he wasn't going to hold back if I did. All this was quite scary to me at the time.

But I did reach out, and Michael was—as one could imagine—as gracious and generous and kind as he could be. That article, Furman *Fundamentals*,[3] became my first piece on the death penalty, and Michael Meltsner became a lifelong mentor, as he has for so many.

I wasn't going to meet Michael at a death penalty conference because I wasn't getting invited to any, so I finagled an invite for him to speak at the University of Richmond School of Law, and there we met. He gave a fantastic talk, but what I remember most about that fateful meeting was our walk along the James River

* S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law. I thank Daniel Medwed for inviting me to participate in the festivities honoring Michael Meltsner's work, and Michael Meltsner for humoring me with a conversation about his professional highs and lows. The story I tell here is mostly true, with minor embellishments for the reader's enjoyment.

[1] 408 U.S. 238 (1972) (invalidating the death penalty as it was then applied).

[2] MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973).

[3] Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH L. R. 1 (2007)

when it was over. The trail was close to campus and we had an hour or two before Michael had to leave for the airport, and he talked to me about scholarship, and what I wanted to accomplish in the academy, and the importance of family. Always family.

That's how I came to know Michael Meltsner.

Fast forward to this past summer. I was catching up with Michael sometime in August, as we periodically do when one of us has reprints or a new project or something else exciting to share, and the conversation turned to professional impact, which led to my saying something to the effect of "It's every law professor's dream to have the sort of impact you have had—just to be able to say, 'well, I *was* a part of this…' I mean, being a part of something as big as *Furman* would be the greatest professional accomplishment one could imagine."

And he said, in that devil's advocate, distinctly Michael sort of way, "well, I don't know about *that*."

Wait, what?

"What do you mean *you don't know*?" I asked. "You wouldn't say *Furman* is your biggest professional achievement? Seriously. What could be bigger than that?"

"Well it might surprise you where I come out," he suggested.

And so I bit. "*Really*," I answered. "So what would you say are your biggest professional achievements? Gimme your top 3."

And that led to a conversation. And that led me to ask Michael what his biggest professional disappointments were, and he begrudgingly conjured up three of those. (As Michael says, "I'm not so much for holding onto regrets, or at least I deal in selective amnesia and denial.")

So for the remainder of this short essay, I'll share what I learned, and then pause for a moment to reflect on what those things say about our friend and colleague Michael Meltsner. So here it is: The highs & lows of Michael Meltsner, and what they say about him.

First, the highs.

First on Michael's list was a 1968 case called *Robinson v Tennessee*.[4] Never heard of it, right? Me either.

[4] 392 U.S. 666 (1968).

As Michael tells it, in the mid-1960s, he had received some handwritten scrawl with a copy to the Pope.[5] The police had gotten a statement from a barely literate black man, and upon realizing that they had done so improperly, they sent some journalists to the man's cell, pretending they were doing a story, to get the statement again. That statement was ultimately used to convict the man of first degree murder.

Tony Amsterdam & Michael wrote an *in forma pauperis* petition for *certiorari*, and the Supreme Court granted it on the papers. I looked up the case. It just says, "The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgement is reversed," citing to *Miranda v. Arizona*.[6]

"So, was it being so obviously right that you won without oral argument?" I asked. "Is that what makes this case one of your greats?"

"It wasn't just the case," Michael explained, "It's what it meant. This case always gave me the feeling that justice could be done even when the odds were enormously against you."

The second of Michael's accomplishments was a Fourth Circuit case from 1963, *Simkins v. Moses Cone Hospital*.[7] "This is the case where we forced the hospital to admit two African American board-certified doctors, a pediatrician and a surgeon, after the powers that be had denied them staff privileges on the absurd ground that they were unqualified," Michael explained. He went on to say that at the time, "Staff privileges were handed out to those of the right race, religion, and country club membership, and even in 1963, this just wasn't in question." Michael then related the story of how his father-in-law, who was a physician, just scratched his head about the case and said, "Usually what the chief of the specialty says about staff membership goes even if he does it on the basis of eye color."

When pressed as to why this case made the list—why this Fourth Circuit decision and not others—Michael humbly answered that this one was important because it led to the integration of hundreds of Southern hospitals, and served as a model for what became Title VI of the 1964 Civil Rights Act. Title VI prohibits any entity that receives federal funding from discriminating on

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[5] I feel the need to pause for a moment and observe, who receives a letter like that? A personal letter with a copy to the Pope—I mean, really, who is regarded like that? Michael Meltsner, that's who.

[6] 392 U.S. 666 (1968) (citing Miranda v. Arizona, 384 U.S. 486 (1966)).

[7] 323 F.2d 959 (4th Cir. 1963).

the basis of race, color or national origin[8]—and that was Michael's argument. Michael had argued that "separate but equal" was just as unconstitutional in federally funded hospitals as it was in public schools.[9] The district court had rejected that argument, but the Fourth Circuit sided with Michael, and change followed. This case was important to Michael because it was about equality—about treating human beings as human beings, none more inherently worthy than others—and that cuts to the core of who he is.

Drum roll for the third of Michael's top three. You'd think it's *Furman*. Gotta be, right? It wasn't.

It was a 1970 case that Michael argued in the Supreme Court called *Turner v. Fouche*.[10] *Turner* had two issues. One was racial discrimination in jury selection, and the other was that the county required that a person own real property—have status as a "freeholder"—to be on the local school board. Michael argued that that this requirement violated the Equal Protection Clause and the Supreme Court agreed.

When I asked about this case, Michael said, "What I love most about this case is that it was totally inconsistent with Constitutional originalism, the last refuge of scoundrels. Property qualifications are gone now, but the originalists would like to forget they ever existed." One of the things I adore about Michael Meltsner is that he's a little bit spicy.

"What about *Furman*?" I asked, "Wasn't that important to you?"

"Of course *Furman* was important," Michael answered. "You don't get to save 600-plus lives very often. But the point is that sometimes a *personal connection* or *an idea* really makes you sing even more than a headliner or big time precedent." Anyone who knows Michael gets this.

And as to Michael's greatest disappointments?

First, Michael said he was disappointed in the Supreme Court. I told him that wasn't fair, that I wanted this to be about him, and he replied, "This *is* about me—and after 50 years, I'm entitled to be personally disappointed." (As I said, he's a little spicy.) Here we talked about the Court's "spineless retreat from *Furman*" in

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[8] 42 U.S.C. 2000 et. seq.

[9] *See* Brown v. Board of Education, 347 U.S. 483 (1954) (invalidating "separate but equal" in the context of public schools).

[10] 396 U.S. 346 (1970).

1976[11] and its moral failure in *McKleskey*[12] and well, you get the idea.

Second, Michael said that he was disappointed in himself for avoiding government work, and the politics necessary to do it, in favor of embracing an outsider approach. In particular, Michael said he wished he had been a prosecutor for some period of time so he could wield power for good, and also so he could say he tried a case before a jury. Michael has tried countless civil and criminal cases, and of course argued dozens of appeals in federal court, but he never had a jury trial (except some sort of mock trial that he and his friends concocted in law school—my sense is that there's a story there but I never did get it).

Finally, Michael said he was frustrated that he hasn't been able to get Arnie King out of prison.[13] Arnie committed a terrible murder when he was 19, but Michael explained that the man is now in his 60s, and is a completely different person—a person who nurtures others. People are still working on the case, Michael explained, but he still feels bad about it. "Losing a legal claim you care about is tough," he said, "but even tougher is when you can't get justice for a flesh and blood person you care about."

So there it is. *Furman* is not on the list of Michael's greatest accomplishments, and *Gregg* is not on his list of greatest disappointments. The case for which Michael is most famous wasn't one of his greats at all.

That is not to say that these cases didn't matter. They did. But what has mattered more to Michael is the individual—"*the flesh and blood person you care about*."

People matter to Michael. And service. He is the epitome of the saying that if you want to be great, you must serve others.

And core values. Michael is chock full of core values. An unwavering commitment to justice and equality. A rejection of legal constructs that allow the law to dodge those moral imperatives. A determination to make a difference. A desire to use power for good. And an abiding faith that good can triumph even when the odds are enormously stacked against you.

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[11] *See* Gregg v. Georgia, 428 U.S. 153 (1976) (upholding state death penalty statutes passed in the wake of *Furman*).
[12] 481 U.S. 279 (1987).
[13] For information about Arnie King, and his personal story, see http://www.arnoldking.org/.

These are the highs and lows of Michael Meltsner—worthy of remembrance in their own right, but in this essay, worthy of note for giving depth and detail to the character of a man we already knew had it in spades.