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Martin Luther King, *Walker v. City of Birmingham*, and the *Letter from Birmingham Jail*

*David Benjamin Oppenheimer**

INTRODUCTION

On Good Friday of 1963, Dr. Martin Luther King, Jr. was arrested and jailed in Birmingham, Alabama. A few weeks later,

* Associate Professor of Law, Golden Gate University; J.D., Harvard Law School, 1978; B.A., University Without Walls/Berkeley, 1972. I am grateful to Vivian Auslander, Rose Bird, Taylor Branch, Marcy Kates, David I. Levine, Anthony Lewis, and Michael Zamperini for their support and suggestions; to my U.C. Davis Law Review editor Alan Richardson; and to the following students at Golden Gate University School of Law, whose research assistance contributed substantially to this Article: Jeremy Blank, Alexandra D'Italia, Rod Fliegel, Gina Harmon, Juliet Herman, Barbara Herz, Sarah Hughes, Deborah Kramer, Carla Minnard, and Kerry O'Gorman. This Article was written for all my students, that they may better understand the struggle for dignity that gave birth to, and is so frequently ignored in the study of, *Walker v. City of Birmingham*. It is dedicated to my step-sons, Joel and Alex DiGiorgio, with the hope that they may be judged by the content of their character.

he was convicted of violating a court order enjoining him from picketing, marching, demonstrating, or praying in public. In *Walker v. City of Birmingham*,[1] the Supreme Court affirmed his conviction, requiring him to return to Birmingham to serve his sentence.

Most law students will study the *Walker* decision at least once, and many will encounter it several times, before graduating from law school.[2] Yet few will be informed, even in passing, that it concerns an event of great importance in American history.[3] Rather, they will study the case as an illustration of an abstract legal principle, totally divorced from its social significance. This Article attempts to correct that gap in legal education, and in the process to highlight the role that lawyers, and the legal system, played in the oppression of African Americans during the mid-twentieth century. It is written with the hope that it will serve as an introduction or supplement to the study of the *Walker* decision.

The decision's historical significance can be described briefly.[4] In the spring of 1963, Dr. Martin Luther King, Jr. led a desegregation campaign in Birmingham, Alabama. On the eve of Good Friday a local court issued an injunction, on an ex-parte petition, prohibiting King and other civil rights activists from demonstrat-

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[1] 388 U.S. 307 (1967).

[2] *See infra* notes 214-24 and accompanying text.

[3] *See infra* notes 214-35 and accompanying text.

[4] This description, as well as the lengthier narrative that comprises Parts II, III, and V, relies substantially on several secondary sources regarding the American civil rights movement and Dr. Martin Luther King, Jr. In the absence of citation to primary sources, the following secondary sources were consulted: RALPH DAVID ABERNATHY, AND THE WALLS CAME TUMBLING DOWN (1989); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); DAVID J. GARROW, BEARING THE CROSS (1986); MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT (1964) [hereafter KING, WHY WE CAN'T WAIT]; DAVID L. LEWIS, KING, A BIOGRAPHY (1978); CHARLES MORGAN, JR., A TIME TO SPEAK (1964); A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (James M. Washington ed., 1986) [hereafter ESSENTIAL WRITINGS]; VOICES OF FREEDOM, AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT (Henry Hampton & Steve Fayer eds., 1990) [hereafter VOICES OF FREEDOM]; ALAN F. WESTIN & BARRY MAHONEY, THE TRIAL OF MARTIN LUTHER KING (1974); and JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 (1987). Also highly recommended reading is David Luban's critical essay on the *Walker* decision and Dr. King's *Letter from Birmingham Jail*. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).

ing. The civil rights movement placed a high value on acting within the law, and King agonized over whether to obey or defy the court's order. He and his colleagues believed that if they complied with the injunction their campaign in Birmingham would fail. His decision to defy the order led to his arrest and incarceration on Good Friday, and to the rejuvenation of the Birmingham campaign.

In the weeks that followed King's arrest, many of the African American children of Birmingham were trained in the practice of non-violence and followed King into the streets, where they were attacked by the police with dogs and high pressure fire hoses; thousands were jailed. Birmingham became the focus of a renewed national consciousness about segregation, and a spark that incited over a thousand civil rights campaigns throughout the summer of 1963, culminating in the "March on Washington."[5] The Kennedy administration responded by introducing a major civil rights bill, which passed the following spring. That bill, the Civil Rights Act of 1964,[6] banned segregation in public accommodations[7] as well as discrimination in employment.[8] King attributed its passage to the events in Birmingham. Many view the Birmingham demonstrations as the turning point in the civil rights movement of the 1960s, and King's decision to violate the injunction as the turning point in the Birmingham campaign.

Part I of this Article reviews the legal and social status of segregation in Birmingham in the spring of 1963. This Part describes and analyzes segregation as a legal system, dependent for its existence on the active repression of human rights by lawyers, judges, and other legal workers. Part II describes the Birmingham campaign up to the point when the court issued the injunction. The campaign is examined as an attempt to challenge segregation through direct action, rather than traditional lobbying and legal reform.

Part III is concerned with the issuance of the injunction, and King's decision to disobey it. The use of injunctions to prevent demonstrations played an important role in the suppression of the civil rights movement. Without examining King's prior expe-

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[5] *See infra* notes 211-13 and accompanying text (discussing March on Washington).

[6] Pub. L. No. 88-352, July 2, 1964, 78 Stat. 241 (Title 28, § 1447; Title 42, §§ 1971, 1975a-1975d, 2000a-2000h-6).

[7] Civil Rights Act of 1964, 42 U.S.C § 2000a (1988).

[8] *Id.* § 2000e.

rience with such injunctions, it is impossible to fully appreciate his decision to defy the injunction issued in Birmingham. This decision is discussed as a turning point in the Birmingham campaign, and in King's life as a civil rights leader.

Part IV describes King's Good Friday jailing, and his writing the civil rights movement's most important statement of principles, the *Letter from Birmingham Jail*.[9] The *Letter* is a powerful and important defense of civil disobedience. In it, King justifies violating unjust civil laws in order to obey moral law, an argument rejected by the Court in the *Walker* decision. Part V describes the events following King's incarceration and conviction, in particular the children's campaign that transformed the Birmingham movement and carried it to victory.

Part VI describes the Birmingham campaign's impact on the enactment of the Civil Rights Act of 1964, which both King[10] and John F. Kennedy[11] attributed to Birmingham. Part VII analyzes the treatment of the *Walker* decision by the major casebooks in the areas of civil procedure, constitutional law, and remedies. An examination of these texts discloses that the case is rarely presented so that it can be taught with reference to its social and political context; not only is the background of the case omitted, but rarely is King's involvement as a defendant even mentioned.

I. BIRMINGHAM, ALABAMA IN 1963

When Dr. Martin Luther King, Jr. arrived in Birmingham, Alabama on April 2, 1963,[12] Birmingham was known as "the most segregated city in America."[13] Alabama's new Governor, George Wallace, had been inaugurated only two and a half months ear-

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[9] *See infra* notes 131-48 and accompanying text. The letter has been widely distributed. King's authorized version appears in KING, WHY WE CAN'T WAIT, *supra* note 4, at 76-95. By permission of the Heirs of the Estate of Martin Luther King, Jr., King's authorized version is reprinted immediately following this Article.

[10] ESSENTIAL WRITINGS, *supra* note 4, at 351 (*Playboy* interview, January 1965); WESTIN & MAHONEY, *supra* note 4, at 2.

[11] *See Transcript of the President's Address*, N.Y. TIMES, June 12, 1963, at 20; *see also* WESTIN & MAHONEY, *supra* note 4, at 153-54.

[12] BRANCH, *supra* note 4, at 706-07. *But see* ABERNATHY, *supra* note 4, at 238 (placing King's arrival date as April 3); GARROW, *supra* note 4, at 234-36 (also placing King's arrival date as April 3).

[13] KING, WHY WE CAN'T WAIT, *supra* note 4, at 50; *see also* BENJAMIN MUSE, THE AMERICAN NEGRO REVOLUTION: FROM NONVIOLENCE TO BLACK POWER 1963-1967, at 5 (1968).

lier, pledging in his inaugural address to fight for "segregation now, segregation tomorrow, segregation forever."[14]

By local ordinance, restaurants in Birmingham were not permitted to serve both African Americans and whites.[15] As a result, African Americans were excluded from all downtown eating places, including the lunch counters of the downtown department stores.[16] The ordinance similarly prohibited integrated drinking fountains, bathrooms, or dressing rooms. When the department store owners relaxed their enforcement of the ordinance in response to a boycott that began in the summer of 1962, the local authorities immediately cited them and threatened to close the stores. The restrictions were reimposed.[17]

In 1963, segregation in transportation was still common throughout the South. Under the law at that time, in the absence of state action it was entirely legal. Birmingham's buses had been recently ordered desegregated, but only after the City Commission had attempted a legal maneuver to avoid the Supreme Court's decision that public bus segregation was unconstitu-

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[14] PETER M. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA 579 (1969); Joe D. Brown, *Birmingham*, SAT. EVE. POST, Mar. 2, 1963, at 11, 14.

[15] BIRMINGHAM, ALA., GENERAL CODE § 369 (1944), contained in the Supreme Court Record of Walker v. City of Birmingham, 249 October 1966 Term at 33a [hereafter Supreme Court Record]. The Supreme Court invalidated the ordinance as the Birmingham campaign was drawing to a close, in one of several decisions determining that the segregation ordinances of various southern cities violated the Constitution. *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244 (1963) (holding local segregation ordinance in violation of fourteenth amendment); *see also* Gober v. City of Birmingham, 373 U.S. 374 (1963) (reversing convictions for criminal trespass based on invalidated local segregation ordinance); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) (invalidating aiding and abetting convictions because Court reversed convictions for criminal trespass). In April of 1963, however, the ordinance was not only enforced, it had been recently held valid by the Alabama Supreme Court. *See* Gober v. City of Birmingham, 133 So. 2d 697 (Ala. 1961).

[16] This exclusion particularly angered King, because the same African American customers were welcome in, and essential to, the mercantile departments of these stores. *See* KING, WHY WE CAN'T WAIT, *supra* note 4, at 54-55.

[17] Brown, *supra* note 14, at 18; KING, WHY WE CAN'T WAIT, *supra* note 4, at 53; WILLIAMS, *supra* note 4, at 182. The agreement by the merchants to end some of their apartheid practices, followed by their reversal under pressure from the city government, contributed to King's decision to come to Birmingham.

tional,[18] by privatizing the bus company, and thus privatizing the segregation rules.[19] Other aspects of Birmingham's transportation system remained segregated. African Americans were not permitted to ride in taxies used by whites.[20] Although the Birmingham train station had been ordered integrated[21] and an Interstate Commerce Commission order required the bus station to be desegregated,[22] shortly before King's arrival the bus station manager had been jailed for permitting African American passengers to use the white waiting room.[23] Ambulances, police paddy wagons, even elevators were segregated.[24]

Local law required completely separate rest room facilities for African Americans and whites,[25] segregation of theaters[26] and ball parks,[27] racially divided jail cells,[28] white or African American

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18 Gayle v. Browder, 352 U.S. 903 (1956) (per curiam), *aff'g* Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956). This case resulted from a challenge to the State of Alabama's and City of Montgomery's bus segregation laws, filed by King and the Montgomery Improvement Association in conjunction with a boycott of the buses. *Browder*, 142 F. Supp. at 710-11; *see* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 151-53 (1958) [hereafter KING, STRIDE TOWARD FREEDOM]. In gauging the extent to which segregation was ingrained in the United States in the 1950s and early 1960s, it is worth noting that the aim of the boycott was not the desegregation of the buses; King merely sought: (1) the opportunity for African Americans to apply for driver positions, (2) a rule that when the white section of the bus was filled, white riders not be permitted to displace African Americans already seated, and (3) an end to the rudeness of drivers toward African American passengers. *Id.* at 63-64.

19 *See* Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960) (finding state action when city repealed its bus segregation ordinance but simultaneously authorized city-licensed bus company to promulgate seating rules which police would enforce).

20 Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960, at 1, 28.

21 Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958).

22 Regulations Governing Discrimination in Operations of Interstate Motor Common Carriers of Passengers, 26 Fed. Reg. 9166 (1961) (formerly codified at 49 C.F.R. § 180a).

23 KING, WHY WE CAN'T WAIT, *supra* note 4, at 49-50.

24 MORGAN, *supra* note 4, at 13-14 (ambulances), 119 (paddy wagons), 169 (elevators).

25 BIRMINGHAM, ALA. BUILDING CODE § 2002.1 (1944), contained in Supreme Court Record, *supra* note 15, at 33a.

26 MUSE, *supra* note 13, at 5.

27 Salisbury, *supra* note 20, at 28.

28 ALA. CODE §§ 4, 52, 121, 122, 123, 172, 183 (1958). These statutes

only hospitals[29] and cemeteries,[30] segregated hotels,[31] and an absolute ban, subject to criminal penalties, on African Americans and whites together playing cards, checkers, or dice.[32] The city had given up its minor league baseball team rather than permit it to be integrated.[33] In 1960, a campaign had been waged to "forbid 'Negro music' on 'white' radio stations."[34]

In 1963, marriage between African Americans and whites in Alabama, and several other states, was still prohibited.[35] It remained so at least until 1967, when the Supreme Court, on the same day it handed down the *Walker* decision, overturned a criminal conviction for "miscegenation" in *Loving v. Virginia*.[36] Even after *Loving*, mixed marriages in Alabama were still prohibited by some county clerks. The United States District Court finally struck down the anti-miscegenation sections of Alabama's constitution in 1970.[37]

At the time of King's arrival, the United States District Court for the Northern District of Alabama had recently ordered the desegregation of Birmingham's park system.[38] The judge, however, went out of his way to suggest that the city need not actually integrate the parks; it had the alternative of simply supplying no

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were invalidated in Washington v. Lee, 263 F. Supp. 327, 332-33 (M.D. Ala. 1966); *see also* MORGAN, *supra* note 4, at 120.

29 KING, WHY WE CAN'T WAIT, *supra* note 4, at 47.

30 MORGAN, *supra* note 4, at 14. In addition, it was the practice of the "white" newspapers not to print obituaries of African Americans. *Id.*

31 *Id.* at 120.

32 BIRMINGHAM, ALA. GENERAL CODE § 597 (1944), contained in Supreme Court Record, *supra* note 15, at 33a.

33 Brown, *supra* note 14, at 17.

34 Salisbury, *supra* note 20, at 28.

35 ALA. CONST. § 102; Jackson v. Alabama, 72 So. 2d 114 (Ala. Ct. App.), *cert. denied*, 72 So. 2d 116 (Ala.), *cert. denied*, 348 U.S. 888 (1954) (affirming criminal conviction for miscegenation and stating that antimiscegenation law does not violate fifth and fourteenth amendments because whites and African Americans are equally forbidden to intermarry); *see generally* ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 115 (1972).

36 388 U.S. 1 (1967).

37 United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970). The Alabama Constitution provides, "The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro." ALA. CONST. § 102. Although adjudicated to be invalid, the section has not been repealed.

38 Shuttlesworth v. Gaylord, 202 F. Supp. 59 (M.D. Ala. 1961), *aff'd*, Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962).

recreational facilities at all.[39] Taking the court's lead, the city government closed all of the city's sixty-eight parks, thirty-eight playgrounds, six swimming pools, and four golf courses.[40] Even such a begrudging order of desegregation could not be counted on as a certainty from the federal courts. Several of President Kennedy's recent appointees to the federal bench in Alabama, named with the advice and consent of Democratic "Dixie-crat" Senators, were firmly committed segregationists.[41]

Despite the Supreme Court's 1954 decision in *Brown v. Board of Education*[42] requiring desegregation of public schools, Birmingham's schools remained segregated in 1963, and would continue to be segregated, by order of the local school board, until 1969.[43] The public library, located near the courthouse, was for the use of whites only.[44] The courthouse itself was open to African Americans (although its water fountains and bathrooms were segregated), but its function as the location where voters were registered was largely limited to whites; because of massive white interference with voter registration, only thirteen percent of the State's eligible African American voters were registered.[45] Of the county employees who worked in the courthouse, and in related law enforcement positions, not a single one was African American.[46]

The rigid segregation of Birmingham was held together by both the power of the segregation laws and the power of racist violence. Beatings of civil rights protesters had occurred on numerous occasions prior to King's arrival in 1963, most notably

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39 *Shuttlesworth*, 202 F. Supp. at 63.

40 MORGAN, *supra* note 4, at 109.

41 *See* Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 106 (1963). These appointments were the source of potent political attacks by liberal Republican Nelson Rockefeller, who hoped to run against Kennedy in 1964 as the candidate supporting civil rights. BRANCH, *supra* note 4, at 699-700; *President Rejects Charge by Rockefeller on Judges*, N.Y. TIMES, Mar. 7, 1963, at 1.

42 347 U.S. 483 (1954).

43 Armstrong v. Board of Educ., 333 F.2d 47 (5th Cir. 1964) (ordering high schools and junior high schools to be desegregated within three years; elementary schools to be desegregated at rate of one class per year).

44 *See* KING, WHY WE CAN'T WAIT, *supra* note 4, at 98; Salisbury, *supra* note 20, at 28.

45 DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965, at 19 (1978).

46 MORGAN, *supra* note 4, at 12, 119-20.

on Mothers' Day of 1961, when "freedom riders"[47] attempting to integrate the city bus terminal were badly beaten by the Ku Klux Klan. By prearrangement, the police had given the Klan fifteen minutes to carry out the beatings before arriving on the scene.[48] Bombings of African American leaders' homes and churches were so commonplace that Birmingham had earned the nickname "Bombingham."[49] The city's best African American neighborhood was known as "Dynamite Hill."[50] In the period between 1957 and 1962 there were between sixteen and twenty reported bombings in Birmingham of African American churches and civil rights leaders' homes.[51] In the immediate wake of the success of the Birmingham campaign, three more bomb attacks were carried out, aimed at King and his brother, Birmingham minister A.D. King.[52] The Kings escaped harm, but on September 15, 1963, the bombers murdered four African American girls attending Sunday school at the Sixteenth Street Baptist Church—the church from which the desegregation campaign had been orchestrated.[53] In the demonstrations that followed the church bombing, two African American teenage boys were killed, one by a police officer, the other by two white Eagle Scouts.[54]

But the power of violence in maintaining segregation in Birmingham was overshadowed by the power of law. Segregation existed as a legal system, protected by the legitimacy of the law. It was enforced by lawyers and judges, and by law enforcement

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47 The "freedom riders" were integrationist demonstrators who rode on interstate busses into the South in the spring of 1961 to test compliance with recently promulgated federal regulations banning segregation of interstate bus lines. They commonly met with mob violence in southern cities. *See generally* ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 55-63 (1990) (describing freedom riders' activities and violence against them).

48 BRANCH, *supra* note 4, at 420-22.

49 WILLIAMS, *supra* note 4, at 179; ESSENTIAL WRITINGS, *supra* note 4, at 347 (*Playboy* interview, January 1965).

50 Michael Riley, *Let Me Out of Here!*, TIME, Feb. 3, 1962, at 24.

51 MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 99 (1987) (20 bombings); MUSE, *supra* note 13, at 5 (18 bombings); Brown, *supra* note 14, at 13 (17 bombings); Jack Stillman, *Current of Compromise Flows Through Tension Here*, BIRMINGHAM NEWS, Apr. 14, 1963, at A2 (16 bombings).

52 BRANCH, *supra* note 4, at 793-94; GARROW, *supra* note 4, at 260.

53 The murdered girls, ages 11-14, were Addie Mae Collins, Denise McNair, Carol Robertson, and Cynthia Wesley. MORGAN, *supra* note 4, at 161-63.

54 BRANCH, *supra* note 4, at 890-91.

officers, under the penalties imposed by law. It was dependent on the power of the government to execute the law, and on the power of the judiciary to enforce the law. King's arrival in Birmingham coincided with the election of a new "moderate" city government which was expected by the white citizens to bring on a "new day" in race relations.[55] But that expectation was based on the moderates' belief in a more even-handed and moderate segregation,[56] as opposed to the hard-liners' belief in extreme segregation. Both the moderate segregationists and the hard-line segregationists were committed to the rule of law as the primary instrument by which their apartheid system would continue to flourish.

For the civil rights movement in 1963, the role of the law as a source of oppression was the source of a great contradiction. Prior to 1956, most of the gains of the post-war period were the result of legal actions by civil rights groups, in particular the National Association for the Advancement of Colored People (NAACP) and its Legal Defense Fund. Law reform, through litigation and lobbying, was at the heart of the NAACP strategy against segregation. Then, beginning in 1956 with the Montgomery bus boycott, King began to lead the movement in a different direction, depending on non-violent confrontation—"direct action" in King's words—as the centerpiece of the movement. Direct action depended on confronting unjust laws through civil disobedience, thus taking the movement outside the law.

King's direct action approach was highly controversial; it was scorned by many in the NAACP[57] and either belittled or ignored by large segments of the African American press.[58] King, himself, was not opposed to using the courts; he had done so in Montgomery to support the bus boycott with a parallel legal challenge to the segregation ordinance.[59] But at its heart, King's approach to eliminating segregation was essentially a religious and moral crusade aimed at altering a legal system. His mechanism was confrontation of the immorality of the segregation laws; hence the name of the Birmingham campaign—"Project C," or "Project

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55 *New Day Dawns for Birmingham*, BIRMINGHAM NEWS, Apr. 3, 1963, at 1.

56 *See* Stillman, *supra* note 51, at A2.

57 *See* ABERNATHY, *supra* note 4, at 335; *see generally* BRANCH, *supra* note 4, at 186 (discussing King's differences with NAACP).

58 *See* BRANCH, *supra* note 4, at 761.

59 *See supra* notes 18-19 and accompanying text.

Confrontation."[60] The clash between NAACP-style law reform litigation and King's direct action civil disobedience approach was at the very heart of the developing conflict in Birmingham.

II. PROJECT CONFRONTATION

Martin Luther King came to Birmingham at the invitation of Rev. Fred Lee Shuttlesworth, former minister of the Bethel Baptist Church.[61] Shuttlesworth was the founding leader of Birmingham's major civil rights group, the Alabama Christian Movement for Human Rights (ACMHR), which he established in 1956[62] when the State of Alabama succeeded in having the NAACP enjoined from all activities in the State.[63] He was a board member of the Southern Christian Leadership Conference (SCLC), the civil rights group of which King was president. Shuttlesworth was himself the target, and at times the plaintiff, in numerous legal actions, including at least eight cases decided by the United States Supreme Court.[64] When he attempted to implement the

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[60] BRANCH, *supra* note 4, at 690.

[61] ABERNATHY, *supra* note 4, at 232; Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 835, 835-36 (1993) [hereafter King, *Letter from Birmingham Jail*]. Shuttlesworth had left Birmingham in 1962, moving to Cincinnati, but he continued to play an active role in the civil rights movement there, and returned for the desegregation campaign.

[62] BRANCH, *supra* note 4, at 187-88; WESTIN & MAHONEY, *supra* note 4, at 16.

[63] The injunction was ultimately lifted by order of the United States Supreme Court in 1964. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964).

[64] Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101 (1958) (per curiam) (affirming district court decision holding constitutional Alabama's School Placement Law, permitting continued school segregation under different name); *In re* Shuttlesworth, 369 U.S. 35 (1962) (directing district court to consider ordering Alabama courts to release Shuttlesworth on bail while he appealed conviction for disorderly conduct stemming from demonstration against public bus segregation); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) (setting aside conviction for aiding and abetting "criminal trespass" by supporting student sit-in, setting aside sentence of six months hard labor, and holding unconstitutional trespass ordinance prohibiting integrated food service); New York Times v. Sullivan, 376 U.S. 254 (1963) (reversing defamation judgment against newspaper and civil rights leaders holding that, in defamation action by public official, plaintiff must prove that defendant acted with reckless disregard of truth); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (per curiam) (reversing conviction for interfering with police officer where Shuttlesworth allegedly attempted to block officer from taking freedom rider into

Brown decision by bringing his children to a white public school in 1957, he was chain-whipped by a white mob, and his wife was stabbed.[65] His church was bombed twice, in one case destroying his home.[66] Shuttlesworth had been the chief architect of an African American boycott of Birmingham's downtown businesses during the summer of 1962. At its height, that boycott had substantially reduced African American patronage of the downtown stores.[67] The boycott ended in a negotiated settlement to remove the "white only" signs from dressing rooms and drinking fountains, but the agreement was almost immediately breached by the white merchants at the insistence of Birmingham's city officials.[68]

In December 1962 King sent SCLC Executive Director Wyatt Tee Walker and chief aide Andrew Young to Birmingham to begin planning the campaign.[69] A larger planning meeting was held in January with Shuttlesworth, SCLC Treasurer Ralph Abernathy, Walker, Young, and four others to further develop their plans.[70] Rev. Walker was the principal organizer. His basic plan was to train hundreds of African American Birminghamians in the philosophy and tactics of non-violent confrontation. Once trained, they would picket the downtown stores, "sit-in"[71] at the

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protective custody); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (setting aside conviction for loitering while standing in front of department store during boycott, and sentence of nine months hard labor, holding loitering ordinance unconstitutionally overbroad as applied); Walker v. City of Birmingham, 388 U.S. 307 (1967) (holding that petitioners could not seek review of constitutionality of injunction because they violated it first); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (holding unconstitutional Birmingham's ordinance prohibiting parading without permit).

65 WILLIAMS, *supra* note 4, at 181.

66 WESTIN & MAHONEY, *supra* note 4, at 12.

67 Brown estimated the reduction of business at 90%. Brown, *supra* note 14, at 18. Branch reported a far more conservative 40%. BRANCH, *supra* note 4, at 643.

68 Brown, *supra* note 14, at 18; KING, WHY WE CAN'T WAIT, *supra* note 4, at 53; WILLIAMS, *supra* note 4, at 182.

69 *See* BRANCH, *supra* note 4, at 688-89.

70 *Id.* at 688-90; GARROW, *supra* note 4, at 231; WILLIAMS, *supra* note 4, at 181-82.

71 The lunch counter "sit-ins" consisted of sitting down at a lunch counter and asking (or waiting) for service. When African Americans (or whites accompanying African Americans) sought service, they would sometimes simply be ignored, or refused service. Other times, the store would close the counter until they left. But often they would be arrested, either for violating the segregation laws or for trespassing, disturbing the

lunch counters, and march on segregated city facilities. They planned to start with an economic boycott of the downtown business district, with small sit-ins at the segregated lunch counters. Each night they would hold mass meetings in the churches to build support for the campaign. As the sit-ins grew, they would move to larger demonstrations, with mass arrests. As more and more people were arrested, they hoped to overwhelm the jails. The campaign would continue until the downtown businesses agreed to end both their segregationist practices and their refusal to employ African Americans in non-custodial positions.[72] The planning included selecting primary sites (stores containing segregated lunch counters), secondary sites (government buildings), and march routes from the Sixteenth Street Baptist Church (the starting point for the marches). The campaign organizers also planned for training programs in non-violence and establishing a bail fund so that arrestees could be quickly returned to the picket lines.[73]

Although the planning of Project C began in December, 1962, the actual demonstrations were to begin on April 3, 1963, eleven days before Easter.[74] The period before Easter was selected for both practical and symbolic reasons. In practical terms, it was an ideal time for a boycott because it was the second busiest shopping season of the year, second only to Christmas.[75] Thus, the boycott by African American consumers would be felt more dramatically. Symbolically, to boycott during Lent, a time of self-sacrifice and deprivation, was fitting. And the possibility of martyrdom close to Good Friday added to the drama. The plans for Easter Sunday called for "kneel-ins" at white churches: demon-

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peace, or vagrancy; sometimes they would be beaten by white mobs. The tactic was first used on February 1, 1960, when four African American college students in Greensboro, North Carolina sat in at a Woolworth's lunch counter. WESTIN & MAHONEY, *supra* note 4, at 32-33.

72 Foster Hailey, *Dr. King Leaves Birmingham Jail*, N.Y. TIMES, Apr. 21, 1963, at 70 [hereafter Hailey, *Dr. King Leaves Jail*].

73 GARROW, *supra* note 4, at 231, 234; VOICES OF FREEDOM, *supra* note 4, at 125-26.

74 Initially the demonstrations were planned to begin in March, at the commencement of Lent. They were moved back to avoid any charge that the demonstrations had interfered with the results of a run-off election for mayor that was being waged between the extreme segregationist Eugene "Bull" Connor and a "moderate" segregationist, Albert Boutwell. GARROW, *supra* note 4, at 231-34; LEWIS, *supra* note 4, at 177.

75 KING, WHY WE CAN'T WAIT, *supra* note 4, at 55.

strations in which African American demonstrators would enter white churches and attempt to pray, until they were accepted, arrested, or forcibly removed.[76]

The day before the demonstrations were to begin, the campaign organizers sought a permit to march and demonstrate. Such a permit was required under the City Code.[77] Lola Hendricks of the ACMHR and Rev. Ambrose Hill of the Lily Grove Baptist Church went to see the Public Safety Commissioner, Eugene "Bull" Connor. Connor, the losing candidate in the just-completed mayoral race, denied the request, exclaiming: "You will not get a permit in Birmingham, Alabama, to picket. I will picket you over to the City Jail."[78] Rev. Shuttlesworth then made a second attempt to apply for a permit from Connor; he too was refused.[79]

On Wednesday, April 3, the demonstrations began. As many as three hundred and fifty people had volunteered to engage in civil disobedience, but to King's disappointment, only sixty-five appeared.[80] They proceeded to five stores, including those of national chains Woolworth's and Kress, to sit-in at lunch counters; approximately two dozen were arrested.[81] On Thursday even fewer, between ten and twenty, were arrested.[82] These numbers were far below King and Walker's expectations. Unless there was a dramatic increase in the number willing to subject themselves to arrest, the strategy of commanding widespread attention by filling the jails would fail.

With the weekend, demonstration activities picked up. Ten

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76 Foster Hailey, *Negroes Defying Birmingham Writ*, N.Y. TIMES, Apr. 12, 1963, at 13 [hereafter Hailey, *Negroes Defying Writ*]; *Negroes Attend Two White Churches*, BIRMINGHAM NEWS, Apr. 15, 1963, at 2. These demonstrations had already had some effect in Birmingham, where a number of "moderate" white churches had set aside a roped-off area in which African Americans were permitted to attend services. BRANCH, *supra* note 4, at 738.

77 *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149-50 (1969) (citing BIRMINGHAM, ALA. GENERAL CODE § 1159).

78 Supreme Court Record, *supra* note 15, at 352-55.

79 *Id.* at 415-16, exhibits A, B (telegrams between Shuttlesworth and Connor).

80 BRANCH, *supra* note 4, at 708.

81 *Id.* at 708-09; GARROW, *supra* note 4, at 236; *Negroes Get Stern Warning by Boutwell*, BIRMINGHAM NEWS, Apr. 3, 1963, at 40; James Spottswood, *Boutwell Warns "Outside Agitators,"* BIRMINGHAM NEWS, Apr. 4, 1963, at 7.

82 GARROW, *supra* note 4, at 237 (10 arrested); Spottswood, *supra* note 81, at 7 (20 arrested).

were arrested for sitting-in on Friday, while another thirty to forty-five, including Rev. Shuttlesworth, were arrested as they marched on City Hall.[83] Close to sixty more marchers were arrested on Saturday and Sunday.[84] But on Monday there were no arrests at all.[85] Then, on Tuesday, April 9, the Alabama Legislature dealt the campaign a serious blow. It passed a bill raising the bail limit for misdemeanor arrests in Birmingham, and Birmingham alone, from $300 to $2,500.[86] With the plan to overwhelm the jails failing, and the ability to bail out those who were arrested threatened, the campaign appeared to be withering, and with it Martin Luther King's role as a major civil rights leader. Of this moment, King's biographer Taylor Branch writes:

> Of the handicaps early in the Birmingham crisis, perhaps the most serious was King's image as a reluctant and losing crusader. He had been largely out of the public eye for eight months, since his retreat from Albany. His name had faded. He appeared to be a worthy symbol from the 1950s who had overreached himself trying to operate as a full-fledged political leader.[87]

III. THE INJUNCTION

At 9:00 p.m. on Wednesday, April 10, one week from the day the demonstrations began in Birmingham, City Attorneys John M. Breckenridge and Earl McBee submitted an ex-parte application to Alabama Tenth Circuit Court Judge William A. Jenkins, Jr., seeking an order prohibiting further demonstrations by the SCLC and ACMHR, and specifically naming Revs. King, Walker, Abernathy, Shuttlesworth, and 129 other civil rights activists.[88] The application claimed that King and the other activists had, by their demonstrations and sit-ins, violated the parade permit laws and trespassing laws, and thus endangered the city's peace and safety. It further alleged that without an injunction such activities would

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[83] BRANCH, *supra* note 4, at 709; GARROW, *supra* note 4, at 237; LEWIS, *supra* note 4, at 181; Foster Hailey, *10 More Negroes Seized in Birmingham Sit-ins*, N.Y. TIMES, Apr. 6, 1963, at 20.

[84] *See 32 Negroes Jailed After March Try*, BIRMINGHAM NEWS, Apr. 6, 1963, at 2; *26 Negro Marchers Arrested Here*, BIRMINGHAM NEWS, Apr. 8, 1963, at 2.

[85] *Bailey Lauds Police; To Ask State Aid Only if Needed*, BIRMINGHAM NEWS, Apr. 9, 1963, at 2.

[86] WESTIN & MAHONEY, *supra* note 4, at 68; *see also* BRANCH, *supra* note 4, at 726 (stating that white officials drafted bill to raise appeal bond).

[87] BRANCH, *supra* note 4, at 709.

[88] Supreme Court Record, *supra* note 15, at 25-26.

continue to disrupt the peace and safety of Birmingham.[89] Judge Jenkins reviewed the papers and immediately issued a temporary injunction, setting a trial date of April 22 to consider whether the injunction should be made permanent.[90] At approximately 1:00 a.m. Thursday morning, the notice of injunction was served on King, Walker, and Shuttlesworth.[91]

The injunction raised a special problem for King and the other named respondents. Until the injunction was issued, the demonstrators had been arrested for violating local ordinances: trespass for sitting-in in violation of the segregation rules, vagrancy, and parading without a permit.[92] These ordinances, passed by an all-white government, and never judicially reviewed, held no inherent legitimacy for King. They were unjust laws to be resisted.[93] The very purpose of the campaign was to repeal the legal, as well as the social, structure of segregation. But an order from a judge was different. A judge, even a Southern segregationist judge, embodied greater authority than mere political power. Here the judge had specifically reviewed the legitimacy of the laws relied on by the City Attorney, and had determined that the demonstrations were unlawful. His order was not a general rule to be interpreted by the public, police, and courts. It was a direct order to cease all demonstrations.

King had expected an injunction to be sought in Birmingham;[94] experience had prepared him for it. In his first major civil rights campaign, the Montgomery, Alabama bus boycott, the movement was almost destroyed by an injunction prohibiting King and his colleagues from organizing and operating a private car pool system to transport the boycotters.[95] The injunction failed to crush the movement only because the Supreme Court, on the day the injunction was issued, affirmed a district court decision in an NAACP-type action brought by the boycotters, holding that

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89 *Id.* at 31-37.

90 *Id.* at 37-38.

91 WESTIN & MAHONEY, *supra* note 4, at 72; Foster Hailey, *Negroes Defying Writ*, *supra* note 76, at 13; *More Racial Moves Set*, BIRMINGHAM NEWS, Apr. 11, 1963, at 8.

92 *See* Hailey, *Dr. King Leaves Jail*, *supra* note 72, at 1.

93 *See supra* notes 55-60 and accompanying text (discussing movement to resist segregation ordinances).

94 GARROW, *supra* note 4, at 240-41; KING, WHY WE CAN'T WAIT, *supra* note 4, at 70.

95 KING, STRIDE TOWARD FREEDOM, *supra* note 18, at 158-60.

Montgomery's operation of a segregated public bus system violated the Fourteenth Amendment.[96] Thus, although the Montgomery campaign was seen as a major victory for direct action, a well-timed injunction almost killed it. The direct action campaign almost failed due to the efforts of segregationist lawyers and the segregationist courts; in the end it succeeded only because of the accompanying law reform litigation.

In King's last major campaign prior to Birmingham, in Albany, Georgia, an injunction had been used successfully to undermine the movement, a fact of which King was painfully aware in planning for Birmingham.[97] King had been invited to Albany in December of 1961 to assist in leading a general desegregation campaign there. The campaign had been jointly organized by a coalition of activists and civil rights groups, including King's SCLC, the Student Non-Violent Coordinating Committee (SNCC), and local leaders in the NAACP.[98] The Albany campaign got off to a slow start, in part because of organizational problems and events surrounding King's three arrests, but by early summer the momentum of the demonstrations was growing, and a sense of optimism and promise prevailed.[99] Then, in late July, the United States District Court issued an injunction ordering King and the other movement leaders to cease all public demonstrations.[100]

The Albany injunction was issued by Judge J. Robert Elliot, an avowed segregationist recently appointed by President Kennedy.[101] The SNCC leaders and local activists viewed the injunction as illegitimate, and urged disobedience.[102] King's lawyer William Kunstler believed that the injunction improperly inter-

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96 Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956); *see* KING, STRIDE TOWARD FREEDOM, *supra* note 18, at 159-60. The injunction was issued on the theory that the car pools constituted a public nuisance and an unlicensed private transit system. *Id.* at 159.

97 KING, WHY WE CAN'T WAIT, *supra* note 4, at 70-71.

98 BRANCH, *supra* note 4, at 54; GARROW, *supra* note 4, at 176, 180; WILLIAMS, *supra* note 4, at 168.

99 *See* WESTIN & MAHONEY, *supra* note 4, at 44-45.

100 *Id.* at 45; *see also* Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963) (dissolving district court's injunction).

101 WESTIN & MAHONEY, *supra* note 4, at 45; *see also supra* note 41 and accompanying text (discussing Kennedy's appointments of segregationist judges).

102 BRANCH, *supra* note 4, at 610.

fered with the demonstrators' First Amendment rights, and could be overturned on appeal.[103] But an appeal would take time, and the movement's momentum would be lost.

King felt divided.[104] He believed that the demonstrations were gaining force, and that it was important to press on. But he also believed that it was important to show respect for legal authority, particularly the federal courts, even while protesting unjust laws. He was building ties to the Kennedy Justice Department, which was beginning to take civil rights cases seriously. The Justice Department was itself attempting to uphold the legitimacy of federal court injunctions,[105] and was prosecuting Mississippi Governor Ross Barnett for his disobedience of an injunction ordering him to admit James Meredith to the University of Mississippi.[106] Attorney General Robert Kennedy personally called King to urge compliance with the injunction.[107]

King decided to obey, and appeal, the Albany injunction.[108] Although he won the appeal,[109] his decision was nonetheless fatal to the Albany campaign. Absent the demonstrations, the movement fizzled.[110] In November of 1962 King left Albany, having met none of the goals of the campaign.[111] He saw his decision to obey the injunction as critical to the failure of the campaign.[112] As he reflected on his decision, he vowed not to let another court order keep him from demonstrating.[113] A month after leaving Albany, King began planning Project C.

In Birmingham, King's lawyers warned him that whatever the political consequences of obeying the injunction, there were significant legal consequences from its disobedience because of the

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103 *See* WESTIN & MAHONEY, *supra* note 4, at 45.

104 *See* BRANCH, *supra* note 4, at 610-15.

105 James Free, *U.S. Plans No Intervention in Situation Here*, BIRMINGHAM NEWS, Apr. 14, 1963, at A3.

106 WESTIN & MAHONEY, *supra* note 4, at 87. It is ironic, although hardly surprising, that King ultimately was required to serve his sentence for violating the Birmingham injunction, while Governor Barnett was never punished for violating the Oxford injunction.

107 BRANCH, *supra* note 4, at 610-11.

108 *Id.* at 611.

109 Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963).

110 WESTIN & MAHONEY, *supra* note 4, at 46.

111 *Id.*

112 KING, WHY WE CAN'T WAIT, *supra* note 4, at 70-71.

113 *Id.* at 70.

collateral bar rule.[114] If arrested for violating the ordinance, the demonstrators could challenge the validity of the ordinance. But if arrested for violating the injunction, under the collateral bar rule they would only be permitted to challenge the court's jurisdiction to issue the injunction; the constitutional validity of the ordinance limiting demonstrations, both on its face and as applied, would be unreviewable.

This rule had its American origins in the suppression of the labor movement, beginning in the late nineteenth century.[115] In 1894, the American Railway Union began a strike against the Pullman Company which spread throughout the entire railway industry, threatening to cripple commerce.[116] The federal government sent in the army to run the trains, and then, on behalf of the railroad companies, sought an injunction prohibiting the union and its members from striking. When the strike continued, union President Eugene V. Debs and several other union officers were charged with criminal contempt, convicted, and sentenced to jail.[117] The Supreme Court affirmed the convictions in *In re Debs*,[118] disregarding the union leaders' objection that absent the injunction their conduct was not illegal, and that the injunction was therefore invalid. The Court found that the conduct interfered with interstate commerce and was thus illegal, but added in dicta that even if the prohibited conduct was legal, the proper

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[114] WESTIN & MAHONEY, *supra* note 4, at 81.

[115] *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) (discussing use of injunctions to suppress labor movement).

[116] ALMONT LINDSEY, THE PULLMAN STRIKE 122-24 (1942).

[117] *In re* Debs, 158 U.S. 564, 572-73 (1895). Jailing the union leadership had its desired effect of crushing the strike. *Debs* explained:

> As soon as the employés found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained . . . . [t]he men went back to work, and the ranks were broken, and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts . . . .

Id. at 597-98 (quoting testimony given by defendant before United States Strike Commission).

[118] *Id.* at 600.

procedure would be to challenge the order by appeal rather than by contempt.[119]

The *Debs* dicta was relied on to extend the doctrine in reviewing another strike-breaking injunction in *Howat v. Kansas*.[120] Howat was a union organizer organizing coal workers in Crawford County, Kansas. A Kansas law was invoked to enjoin him from calling a strike. Viewing the statute as unconstitutional, he called the strike anyway, and was charged with contempt. The Supreme Court let stand his one-year prison sentence.[121] Declining to consider the constitutionality of the Kansas statute, the Court explained:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[122]

Howat had been reaffirmed by the Court in *United States v. United Mine Workers of America*,[123] in which the Court affirmed the criminal contempt convictions of John L. Lewis and the United Mine Workers for striking in violation of an injunction, after President Truman had taken over the coal mines to avert a strike.

Informed of the collateral bar rule, King understood that, like Debs, Howat, and Lewis, he could not violate the injunction and then challenge its validity, despite its apparent illegitimacy. But while recognizing the dangers posed by violating an injunction, King was cognizant that in the civil rights struggle, as in the labor movement before it, the timely use of an injunction could be devastating to a movement gaining momentum. He publicly pledged

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119 *Id.* at 599-600.
120 258 U.S. 181 (1922).
121 *Id.* at 190.
122 *Id.* at 189-90 (citations omitted).
123 330 U.S. 258, 289-95 (1947).

to avoid another Albany; he would violate the injunction, and personally lead a march on City Hall on Good Friday.[124]

On Thursday afternoon the question of whether to violate the injunction was thrown open again, when the movement's bail bondsman informed Walker that his resources had been declared exhausted by the city authorities, and his authority to post further bonds had been lifted.[125] If King and the other leaders were to be arrested on Friday, they and their followers would not be bailed out until additional money had been raised, and the only proven fund raiser among them was King himself.[126]

On Good Friday morning, King met with his closest advisors in his hotel room to decide what action to take. The prudent course seemed clear, to put off the march until more bail money could be raised, while moving to set aside the injunction as improperly granted. NAACP Legal Defense Fund lawyer Norman Amaker warned King that although the injunction was probably unconstitutional, anyone who violated it would probably be punished. King felt trapped, not wanting to go back on his pledge, but not wanting to lead people into jail without the ability to bail them out. His father recommended that he obey the injunction and put off the march; another advisor agreed. Andrew Young and others said they would support whatever decision he made. When all had had their say he left the room and, alone, prayed for guidance. In a few minutes he returned, having changed into clothing more suitable for jail. "I don't know what will happen," he said, "I don't know where the money will come from. But I have to make a faith act." His father again recommended putting off the march, but King would not be dissuaded, explaining, "If we obey this injunction, we are out of business."[127] It was this decision that Andrew Young later pointed to as the "beginning of [King's] true leadership."[128]

King, Walker, Abernathy, Young, and several other aides then proceeded to the Sixteenth Street Baptist Church, where a crowd of supporters had gathered. Fifty volunteers were selected to march from the church with King and Abernathy. As Shuttles-

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124 *See* BRANCH, *supra* note 4, at 727; KING, WHY WE CAN'T WAIT, *supra* note 4, at 70.

125 KING, WHY WE CAN'T WAIT, *supra* note 4, at 71.

126 BRANCH, *supra* note 4, at 728.

127 *Id.* at 728-30.

128 VOICES OF FREEDOM, *supra* note 4, at 130.

worth's lawyers described it in seeking review of his conviction in the Supreme Court:

> At about 2:15 p.m., 52 persons emerged from the church. They formed up in pairs on the sidewalk and began to walk in a peaceful, orderly, and non-obstructive way toward City Hall. They walked about forty inches apart, carried no signs or placards and observed all traffic lights. At times they sang. . . . The walk proceeded about four blocks—to the 1700 block of Fifth Avenue—where all the participants were arrested.[129]

King, in handcuffs, was dragged by his belt to a paddy wagon and taken to the Birmingham jail.[130]

IV. Martin Luther King in Birmingham Jail

When King arrived at the jail, he was booked and immediately placed in solitary confinement. His cell had no artificial light and little natural light. It was furnished with only a metal slat bed, without mattress or linens.[131] Permitted no phone call or other communication with his family or counsel, he worried about his fate, and that of the movement.[132] It would be Easter Sunday before he would be permitted to speak with a lawyer, and Monday before he could speak with his wife.[133]

His time in jail was not spent idly. On the day following his arrest, the *Birmingham News* reprinted a statement from eight local white clergy, calling for the demonstrations to end.[134] The clergymen criticized "outsiders" coming to Birmingham without cause, and characterized the demonstrations as "extreme meas-

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[129] Petition for writ of certiorari in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), at 5-6 (internal citations to record omitted).

[130] Foster Hailey, *Dr. King Arrested at Birmingham*, N.Y. Times, Apr. 13, 1963, at 1; *see* Westin & Mahoney, *supra* note 4, at 83-84.

[131] Branch, *supra* note 4, at 731.

[132] King, Why We Can't Wait, *supra* note 4, at 74.

[133] *See* Garrow, *supra* note 4, at 244. On Monday, after Mrs. Coretta Scott King had been unable to contact her husband since Friday, she attempted to phone President Kennedy to seek his assistance. Within minutes of attempting her call she spoke with Attorney General Robert Kennedy, and a few hours later with the President himself. Soon thereafter Dr. King was allowed by his jailers to phone her. *Id.*; King, Why We Can't Wait, *supra* note 4, at 74-75; *Moore Says Kennedy Didn't Arrange Call*, Birmingham News, Apr. 16, 1963, at 2.

[134] *White Clergymen Urge Local Negroes to Withdraw from Demonstrations*, Birmingham News, Apr. 13, 1963, at 2. The eight clergy included seven Christian ministers and a Jewish rabbi.

ures" which "incite hatred and violence."[135] They called on the African American community to engage in negotiations rather than demonstrations, and criticized the Birmingham campaign as "unwise and untimely."[136]

King used the edges of the newspaper, and later paper smuggled in by his attorney, to write a reply to the white ministers. That document, the *Letter from Birmingham Jail*,[137] is widely regarded as the most important statement of principles of the civil rights era. The letter bears reading in its entirety. It will be only briefly summarized here.

King began by answering the ministers' charge that he had no business coming to Birmingham. At a social level, he described the invitation he received from the ACMHR to come to Birmingham to assist them. Thus, he was in Birmingham because Birminghamians invited him there. Turning to a religious justification, he invoked the Apostle Paul, explaining: "I am in Birmingham because injustice is here."[138]

The ministers had deplored the sit-ins and demonstrations; King took them to task for failing to deplore the conditions which required the demonstrations—the racial violence and segregation of Birmingham, and the unwillingness of the white power structure to desegregate. He reviewed the factual background of Birmingham's racial injustice, the historical unwillingness of the white community leaders to negotiate, and the failed negotiations of the prior summer, when the merchants had agreed to remove their "Jim Crow"[139] signs from their stores but had broken their promises. How then, could the white leadership be brought to the bargaining table to negotiate in good faith? King explained that non-violent direct action is intended to have just that result, "to create a situation so crisis-packed that it will inevitably open the door to negotiation."[140]

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135 *Id.*

136 *Id.*

137 King, *Letter from Birmingham Jail*, *supra* note 61 (reprinted immediately following this Article at 835-51).

138 *Id.* at 836. For an analysis of the biblical allusions in the *Letter from Birmingham Jail*, see Luban, *supra* note 4, at 2193-2201.

139 "Jim Crow" was the slang term used to describe segregation. The Jim Crow signs were the "whites" and "colored" signs used to indicate the exclusive use of various facilities, such as bathrooms, water fountains, and dressing rooms.

140 King, *Letter from Birmingham Jail*, *supra* note 61, at 838.

Turning to the question of timing, King explained that the timing of civil rights demonstrations is always seen as wrong by the white community:

> We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never."[141]

King then passionately described the personal pain of racism and segregation, and explained why African Americans could wait no longer.

Then, in the section of greatest interest to the study of law, King turned to a natural law justification for demonstrations that violate the law.[142] There are, he argued, two types of laws, just and unjust. He advocated obedience of just laws, but as to unjust, he invoked St. Augustine for the principle that " 'an unjust law is no law at all.' "[143] How did King determine whether a law is just? By reference to "moral law." Citing St. Thomas Aquinas, he explained that laws which degrade human personality are unjust.[144] Relying on Martin Buber, he explained that laws which objectify people, treating them as things, are unjust. A law by which the majority compels a minority to obey, without imposing the same obligation on the majority, is "*difference* made legal," and thus per se unjust.[145] By contrast, a just law is one which those imposing it will subject themselves as well as all others to obey; this is "*sameness* made legal":[146]

> Sometimes a law is just on its face and unjust in its application.

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141 *Id.* at 838-39.

142 *See* Luban, *supra* note 4, at 2201-05 (analyzing King's natural law theories).

143 King, *Letter from Birmingham Jail*, *supra* note 61, at 840; *see* SAINT AUGUSTINE, ON FREE CHOICE OF THE WILL, Book I pt. 5, 11 (Anna S. Benjamin & L.H. Hackstaff trans., 1964) ("[F]or I think that a law that is not just is not a law.").

144 *Id.*

145 *Id.*; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (stating that laws imposed by majority on discrete and insular minority are less likely to be repealed by democratic political processes, and thus hold less inherent legitimacy).

146 King, *Letter from Birmingham Jail*, *supra* note 61, at 840.

> For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.
>
> I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.[147]

King concluded his discussion of just and unjust laws with a compelling analogy for the ministers and rabbi who issued the statement:

> We should never forget that everything that Adolph Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers.[148]

The letter then turned to the role that white moderates have taken in suppressing civil rights by calling for patience and moderation in the face of evil, and eloquently called upon white

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[147] *Id.* at 841. King stated that he had been arrested on a charge of parading without a permit. *Id.* On Monday, April 15, he was further charged with violation of the injunction. *City Asks Court to Punish Negroes*, BIRMINGHAM NEWS, Apr. 16, 1963, at 2. It was this latter charge that led to the conviction affirmed in *Walker*. King was also convicted, on May 9, 1963, of parading without a permit. *Demonstrations Off Pending More Talks*, BIRMINGHAM NEWS, May 9, 1963, at 2. On this charge he was one of 1500 adults convicted and sentenced to jail during the Birmingham campaign. Had King merely been charged with violating the permit ordinance, the collateral bar rule would not have applied; he would have been able to challenge the constitutionality of the ordinance. The distinction is significant. The 1500 convictions for parading without a permit were stayed while Rev. Shuttlesworth's appeal was heard by the Supreme Court. The Court ruled that the ordinance was unconstitutionally vague, overturning the convictions. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). As to Dr. King, the ruling was by then moot. He had been assassinated the prior spring.

[148] King, *Letter from Birmingham Jail*, *supra* note 61, at 841.

moderates, and particularly the church and its clergy, to become activists in support of the civil rights struggle.

In the thirty years since Dr. King wrote the *Letter from Birmingham Jail*, it has come to be widely recognized as the most important single document of the civil rights era. It is now considered to be among those literary and historical works with which any well-educated American should be familiar. As a call for liberty, it stands with, or above, the works of Jefferson, Paine, and Mill. As a defense of civil disobedience, it stands with the works of Gandhi and Thoreau. King's *I Have a Dream* speech, delivered at the March on Washington, is better known, but the *Letter from Birmingham Jail* is his most distinguished statement of the principles of the civil rights movement.

V. THE CHILDREN'S CAMPAIGN

In the days following King's arrest, it appeared on the surface that the campaign had stalled, with arrests returning to the feeble numbers of the first week. As he sat in jail, King was criticized as an outsider, and the demonstrations were condemned as ill-timed not only in the South, but in the North as well. Critical editorials appeared in *Time*[149] and the *New York Times*.[150] The Kennedy administration remained silent.[151] By mid-week, even the optimistic Wyatt Walker began to despair. He concluded that as a desegregation campaign the operation was failing. Redefining the project's objectives, he announced that the focus would shift from segregation to voter registration.[152] But like an iceberg, much of the campaign's growing force lay beneath the surface. Its strength would soon be felt.

At the time of his arrest, King had been charged with marching without a permit in violation of the parade ordinance. Then, on

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149 *Poorly Timed Protest*, TIME, Apr. 19, 1963, at 30-31.

150 Editorial, *Racial Peace in Birmingham?*, N.Y. TIMES, Apr. 17, 1963, at 40.

151 BRANCH, *supra* note 4, at 744.

152 *See id.* at 744-45. Garrow reports that Walker made the announcement to provide jurisdiction for the Justice Department to intervene. GARROW, *supra* note 4, at 245. As the demonstrations continued the focus did not shift entirely to voter registration, but it did expand to include the issue. *Id.* When the Justice Department ultimately intervened in the role of mediator, it was without reference to voter registration. The ultimate settlement focused entirely on segregation and employment discrimination.

the Monday following his arrest, King, twelve other ministers, and one layman were indicted for contempt of court.[153] Their trial was set to begin the following Monday, April 22. In order to prepare for trial, King accepted bail funds raised by Harry Belafonte and posted bond on Saturday, April 20.[154] In the eight days he had spent in jail, just over one hundred demonstrators had been arrested.[155]

The trial began in a segregated courtroom on April 22; it was over by Friday the 26th. Pursuant to the collateral bar rule, Judge Jenkins permitted no evidence on the constitutionality of the parade ordinance. The only issues were whether the court had jurisdiction to issue the injunction and whether the defendants had received proper notice.[156] King and ten of the other ministers were convicted of criminal contempt, and sentenced to five days in jail.[157] Hanging above them remained the threat of a civil contempt finding, which would permit the city to hold them in jail until they agreed to obey the injunction.

With the close of the trial, King knew that a dramatic new step was needed. Shuttlesworth announced that on the following

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153 The other defendants were Wyatt Tee Walker, Ralph Abernathy, A.D. King, Ed Gardner, Calvin Woods, Aberham Woods, Jr., Andrew Young, Johnny Louis Palmer, J.W. Hayes, N.H. Smith, Jr., John Thomas Porter, T.L. Fisher, James Bevels, and F.L. Shuttlesworth. Supreme Court Record, *supra* note 15, at 1. The charges against Ed Gardner, Calvin Woods, Aberham Woods, Jr., and Johnny Louis Palmer were dismissed upon a finding that they did not receive proper notice of the injunction. *Id.* at 20.

154 BRANCH, *supra* note 4, at 735; KING, WHY WE CAN'T WAIT, *supra* note 4, at 75.

155 *City Asks Court to Punish Negroes*, *supra* note 147, at 2 (nine arrested April 15; seven arrested April 16); *City Seeks to Hold Mixers in Contempt*, BIRMINGHAM NEWS, Apr. 13, 1963, at 2 (six arrested April 13); *Dr. King Is Visited in Prison by Wife*, N.Y. TIMES, Apr. 19, 1963, at 9 (no arrests April 18); *King, Abernathy Post Bonds, Leave*, BIRMINGHAM NEWS, Apr. 21, 1963, at 4 (29 arrested April 20); *Negroes Attend Two White Churches*, *supra* note 76, at 2 (32 arrested April 14); *Negroes Stage New Sit-Ins; Group Plans to Visit Jail*, BIRMINGHAM NEWS, Apr. 18, 1963, at 4 (35 arrested April 17; none April 18).

156 Supreme Court Record, *supra* note 15, at 140; WESTIN & MAHONEY, *supra* note 4, at 97; *Court Postpones 40 Cases, Overrules Shores Motions*, BIRMINGHAM NEWS, Apr. 22, 1963, at 2.

157 *Dr. King Convicted; Gets Mild Sentence*, N.Y. TIMES, Apr. 26, 1963, at 9. The convictions of three of the eleven were reversed by the Alabama Supreme Court because of insufficient proof of notice or of acts in violation of the order. Walker v. City of Birmingham, 181 So. 2d 493, 503 (Ala. 1963).

Thursday, May 2, there would be a massive march on City Hall. But with an injunction prohibiting marches, and all marchers facing the threat of arrest, where would the large number of needed demonstrators come from? With the bail coffers bare, and lengthy sentences a growing likelihood, few adults could afford the financial sacrifice now required of the protesters.

Field organizer Rev. James Bevel offered a solution. He had been running non-violence workshops for weeks with high school students. The meetings were growing day by day, and increasingly younger students were appearing, asking to take part. At the mass rallies each evening, King was turning down more and more of these young volunteers as they stood and announced they were ready to go to jail.[158] Virtually all of the movement leaders opposed permitting children younger than college-age from participating.[159] But with so few adults being arrested,[160] King saw that here alone were the troops needed to fill the streets and fill the jail. Their parents could not make the sacrifice required to march; the children, without employment or family responsibilities, could. King turned to the African American children of Birmingham to save the campaign.

On Tuesday, April 30th, the city denied the permit application for Thursday's march. Anyone marching would be subject to arrest, and King and the other leaders would be subject to further prosecution for contempt. They knew they might also be charged with contributing to the delinquency of a minor if the children marched.[161] As the age of the volunteers dropped, King wrestled with the question of what age the cut-off should be. The leafletting and organizing had been occurring among high school students. But privately King and Bevel agreed that any child old enough under Southern Baptist doctrine to join the church was old enough to "bear witness." Children as young as six would be permitted to participate, many over the objection of their parents.

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158 *See* BRANCH, *supra* note 4, at 750-51.

159 *Id.* at 752-53.

160 The Birmingham News reported only 15 arrests on April 23 and 24, and none thereafter until May 2. *See Negroes' Cases Remanded; Motions Against City Denied*, BIRMINGHAM NEWS, Apr. 23, 1963, at 5 (five juveniles arrested); *10 More Jailed in Demonstrations*, BIRMINGHAM NEWS, Apr. 24, 1963, at 2.

161 BRANCH, *supra* note 4, at 753. Bevel already had 80 such charges pending in Jackson, Mississippi. *Id.*

That night Rev. Bevel addressed the mass meeting, to announce that the march would go forward as a "children's march."[162]

Shortly after 1:00 p.m. on Thursday, May 2, a group of fifty teenagers stepped out of the Sixteenth Street Baptist Church, singing "We Shall Overcome."[163] As had occurred with their adult counterparts on many days over the past month, the Birmingham police warned them of the injunction, and then began to arrest them and place them in paddy wagons. But before the arrests could be completed, another fifty students marched singing from the church, and then another, and another. In wave after wave, the young marchers overwhelmed the police.[164] Some were able to evade the police and almost complete their planned march on City Hall; others succeeded in marching to the downtown business district.[165] Almost a thousand were arrested.[166] They submitted to arrest peacefully, singing and praying as they were taken off to jail.[167]

The following day a thousand more children volunteered to march and be jailed. But Birmingham's jails were filled far past their capacity. King and Walker's strategy of filling the jails had succeeded in a single day, and Connor knew he had to respond to the march with a new strategy of his own. He turned to the answer the South had historically used in conjunction with the power of law to suppress African Americans—the power of violence. As much of America watched that power unleashed on national television and the front pages of many newspapers, the civil rights movement entered a new era.

As the students emerged from the church on Friday afternoon they faced a new weapon in "crowd control"—the water cannon. Designed to fight high intensity fires at a distance, the water cannon, sitting on a tripod, combined the pressure of two fire hoses through a single nozzle, giving the stream of water the power to

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162 *Id.* at 754.

163 *Id.* at 756.

164 *Id.* at 756-67.

165 *See* Foster Hailey, *500 Are Arrested in Negro Protest at Birmingham*, N.Y. TIMES, May 3, 1963, at 1 [hereafter Hailey, *500 Are Arrested*] (describing protesters' march through Birmingham).

166 *Id.* The New York Times estimated the number arrested at 500, but Wyatt Walker determined from his jail registry that 958 children were arrested. *See* BRANCH, *supra* note 4, at 758.

167 Hailey, *500 Are Arrested*, *supra* note 165, at 1.

strip bark from a tree at one hundred feet.[168] The young marchers were warned that they were violating the injunction and ordered to disperse. When they responded with song and prayer, the cannons were turned on them. Some were literally rolled down the street by the force of the water.[169] Others had their clothes torn from their backs by the pressure.[170] As the children were dispersed, more and more marched singing from the church, again overwhelming the police. To prevent the marchers from breaking through to City Hall and downtown, more were arrested. But arrests only exacerbated the authorities' problems; two hundred and fifty were to be arrested that day,[171] but there was no room for more prisoners. In consultation with Bull Connor, police canine units were brought in and unleashed at the crowd. Three young demonstrators suffered serious bites, requiring hospitalization.[172] The combination of the fire hoses and the dogs largely kept the students out of the white part of town.

Birmingham's white ministerial community was still condemning King locally for his "poor timing."[173] But that night's television news and the following morning's newspapers graphically told the rest of the country of the bravery of the young marchers and the violence of the police.[174] A mood swing began, which in a few days' time would fundamentally shift national opinion. By the following week, the demonstrators would change in the public

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168 BRANCH, *supra* note 4, at 759. When one of the cannons slipped from its tripod the following week, its pressure was sufficient to break the ribs of the police officer attempting to control it. Claude Sitton, *Rioting Negroes Routed by Police at Birmingham*, N.Y. TIMES, May 8, 1963, at 1, 28 [hereafter Sitton, *Rioting Negroes Routed*].

169 BRANCH, *supra* note 4, at 759.

170 GARROW, *supra* note 4, at 249.

171 Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, N.Y. TIMES, May 4, 1963, at 1 [hereafter Hailey, *Dogs and Hoses Repulse Negroes*].

172 *Id.*

173 *See End Demonstrations, Foley Urges King*, BIRMINGHAM NEWS, May 4, 1963, at 2. Reverend Albert S. Foley, S.J., chairman of Alabama Advisory Committee to U.S. Civil Rights Commission, urged King to end the demonstrations, in order to "demonstrate that the Negro race deserves the responsibility that it has demanded." *Id.* Foley asked King, "[i]n the name of Christian teachings to do unto others as you would have them render unto you," and argued that the white community had shown its respect for law while King had acted lawlessly. *Id.*

174 *See, e.g.*, Hailey, *Dogs and Hoses Repulse Negroes*, *supra* note 171, at 1; *see generally* BRANCH, *supra* note 4, at 760-64 (describing media attention to events in Birmingham); GARROW, *supra* note 4, at 250-51.

eye from impatient zealots to peaceable martyrs. In response to the police violence, President Kennedy stated he was "sickened."[175] Burke Marshall, head of the Justice Department's Civil Rights Division, was dispatched to Birmingham to attempt to mediate a resolution,[176] and Attorney General Kennedy called on both sides to negotiate.[177]

The fire hoses were used again on Saturday, and a few hundred more students were arrested, but most were prevented from marching when the police simply barred the doors of the Sixteenth Street Baptist Church, trapping the demonstrators inside.[178] Those demonstrators who did reach the business district provided a spectacle for hundreds of white onlookers, who cheered as the fire hoses were turned on the young marchers.[179] Sunday was spent in planning, prayer meetings, and pray-ins at twenty-one white churches; an adult "prayer march" was permitted on the condition it be limited to the African American portion of town.[180]

On Monday morning Burke Marshall tried to persuade Dr. King to call off the demonstrations until the new city government could attempt reforms.[181] King argued that all of the demands were aimed at the merchants, and could be met without government involvement. Citing the power of the law as an arm of segregation, Marshall pointed out that if the white merchants agreed to desegregate they would probably be prosecuted for violating the local segregation ordinances.[182] The Justice Department was powerless to prevent such prosecutions. The demonstrations would continue.

By that afternoon, Bull Connor knew that the publicity caused

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175 GARROW, *supra* note 4, at 250.

176 Foster Hailey, *U.S. Seeking a Truce in Birmingham; Hoses Again Drive Off Demonstrators*, N.Y. TIMES, May 5, 1963, at 1 [hereafter Hailey, *U.S. Seeking Truce*].

177 *Robert Kennedy Warns of 'Increasing Turmoil,'* N.Y. TIMES, May 4, 1963, at 8.

178 Hailey, *U.S. Seeking Truce*, *supra* note 176, at 1.

179 *City Firemen Again Hose Down Rock-Throwing Demonstrators*, BIRMINGHAM NEWS, May 4, 1963, at 2.

180 Foster Hailey, *Birmingham Talks Pushed; Negroes March Peacefully*, N.Y. TIMES, May 6, 1963, at 1; *Hundreds of Hookey-Playing Demonstrators Arrested Here Along with Negro Comedian*, BIRMINGHAM NEWS, May 6, 1963, at 2.

181 Robert J. Donovan, *U.S. Working to Head Off Bloodbath*, BIRMINGHAM NEWS, May 7, 1963, at 2.

182 BRANCH, *supra* note 4, at 769.

by the police violence was a bigger problem for him than the overcrowding of the jail. With the jail packed far beyond its capacity, the town's fairgrounds were opened as a temporary jail; the police pledged to peacefully arrest those marchers who submitted non-violently.[183] Hundreds more children marched from the church to be carried away in the paddy wagons. For the first time in a week, many adults joined the marches again; parents went to jail arm in arm with their children.[184] Over a thousand were arrested in a few hours' time, including some two hundred picketers arrested in the downtown business district.[185] Over 2,500 were now in jail, many in open-air pens at the fairgrounds;[186] a hard rain would fall that evening.[187] Rev. Bevel announced that the following day he would have six thousand more volunteers ready to march to jail.[188]

Tuesday, May 7, would be the final day of demonstrations in the Birmingham campaign. Thousands of demonstrators again gathered at the Sixteenth Street Baptist Church. A few small groups began to march from the church. The police turned them back into the African American neighborhood adjoining the church, informing them that they could march without arrest within the ghetto; there was no more room in the jails. These marchers were a diversion. As the police gathered at the church, approximately six hundred teenagers, traveling surreptitiously in small groups, converged in the downtown business section, where they picked up picket signs hidden earlier and began picketing at the segregated stores.[189]

With hundreds of African American demonstrators now behind the police lines, many police units turned and headed for downtown.[190] As soon as they left, thousands of demonstrators

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183 *Id.* at 770.

184 *Id.*

185 Claude Sitton, *Birmingham Jails 1,000 More Negroes*, N.Y. TIMES, May 7, 1963, at 1, 33.

186 *See id.*; GARROW, *supra* note 4, at 252. A nonbylined article on the following day, however, reported that the facilities at the fairgrounds were covered and enclosed, and that the Birmingham authorities claimed that the arrested demonstrators who were left uncovered in the rain at the jail had "refused to come in out of the rain." *Birmingham Jail Is So Crowded Breakfast Takes Four Hours*, N.Y. TIMES, May 8, 1963, at 29.

187 *See* BRANCH, *supra* note 4, at 772; GARROW, *supra* note 4, at 252.

188 *See* BRANCH, *supra* note 4, at 771.

189 *Id.* at 775; GARROW, *supra* note 4, at 254.

190 BRANCH, *supra* note 4, at 776.

emerged from the church and surged past the remaining police, heading for downtown.[191] By early afternoon, over three thousand demonstrators had gathered in the business district.[192] Unable to arrest the demonstrators, the police again brought out the water cannons, as well as a tank-like armored car. Among those felled by the hoses was Rev. Shuttlesworth, who was slammed into and then pinned against a brick wall. Learning that he had been taken to the hospital by ambulance, Connor commented: "I wish they'd carried him away in a hearse."[193] For most of the day, all commerce was paralyzed. The boycott was now a complete success; not only were Birmingham's African American residents boycotting the downtown stores—by circumstance, so were the whites.

All through the day, Burke Marshall leaned on the white community leaders to negotiate. President Kennedy, the Attorney General, and several other cabinet members made calls to key community leaders urging them to sit down with King and talk.[194] Late on the night of May 7, the leaders agreed to begin negotiations and selected a negotiating committee. At midnight, they sought King out. By 4:00 a.m., they had drawn the blueprint for a settlement.[195]

From Tuesday night through Friday afternoon the three-way negotiations continued, with Marshall and Robert Kennedy working feverishly to bring the civil rights leaders and the white business community together. On Friday, May 10, a settlement was announced. The fitting rooms at the stores would be integrated by Monday.[196] A bi-racial committee would be appointed within fifteen days to discuss desegregation of the schools, reopening of the parks, and hiring African American city employees.[197] All public rest rooms and water fountains would be integrated within thirty days.[198] The lunch counters would be integrated and African Americans would be hired as salesclerks within sixty days.[199] With the aid of the Kennedy administration and several major

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191 *Id.*
192 *Id.* at 777.
193 Sitton, *Rioting Negroes Routed*, *supra* note 168, at 28.
194 BRANCH, *supra* note 4, at 780.
195 *Id.* at 781.
196 GARROW, *supra* note 4, at 258.
197 *Id.* at 259.
198 *Id.*
199 *Id.*

labor unions, bail for the two thousand demonstrators still in jail had been raised, and all would be released immediately.[200] All of the objectives of the Birmingham desegregation campaign had been met. On May 20, the Supreme Court iced the cake, ruling that the segregation ordinances in Birmingham and several other Southern cities violated the Fourteenth Amendment.[201]

VI. Beyond Birmingham—The 1964 Civil Rights Act

On Wednesday, May 9, as the negotiations began in Birmingham, a subcommittee of the House Judiciary Committee met to consider the need for federal civil rights legislation. Their eyes were on Birmingham. Committee Chairman Emanuel Celler (D-NY) pointed to Birmingham in calling for quick passage of a civil rights act, referring to the police conduct in Birmingham as "barbaric."[202] Committee member John V. Lindsay (R-NY) echoed the call.[203] At that point, all the committee had before it was a narrowly drafted voting rights act. But in the aftermath of the Birmingham settlement, hundreds of direct action campaigns began throughout the country, and President Kennedy was mindful of their swell. King was wanted everywhere as a speaker, and everywhere he spoke huge crowds attended his rallies. Ten thousand appeared in Cleveland, fifty thousand in Los Angeles, and thousands more in Chicago, Louisville, and San Francisco.[204] A great victory had been won in Birmingham, and now the spirit of Birmingham was spreading.

On May 20 and 21, President Kennedy met with the cabinet to determine how he should respond to the growing movement;

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200 *Id.* at 258; *Negroes End Desegregation Campaign*, Birmingham News, May 10, 1963, at 2; *300 Negroes Still Held in Jails Here as Truce Declared*, Birmingham News, May 11, 1963, at 2 (describing general terms of agreement); Claude Sitton, *Peace Talks Gain at Birmingham in a Day of Truce — Hurdles Remain*, N.Y. Times, May 9, 1963, at 1, 17 (explaining purpose of biracial committee).

201 Gober v. City of Birmingham, 373 U.S. 374 (1963) (companion case to Peterson v. City of Greenville, 373 U.S. 244 (1963)); *see also* Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) (setting aside conviction for aiding and abetting "criminal trespass" by supporting student sit-in, and sentence of six months hard labor, holding unconstitutional trespass ordinance prohibiting integrated food service).

202 John D. Pomfret, *Peace Talks Gain at Birmingham in a Day of Truce — Kennedy Reacts*, N.Y. Times, May 9, 1963, at 1, 17.

203 *Id.*

204 Branch, *supra* note 4, at 803-06.

Kennedy's own recommendation, although still tentative, was to quell the growing string of "Birminghams" with an all-out push for a civil rights act.[205] He asked the Attorney General to begin drafting a civil rights bill. Norbert Schlei, then Assistant Attorney General for the Office of Legal Counsel, was asked to form a drafting group to produce a bill. Reflecting thirteen years later on the events leading to the bill, Schlei wrote:

> [T]here was no important legislation in prospect in the spring of 1963, the Administration's only legislative proposal being a rather feeble measure . . . .
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> . . . .
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> President Kennedy was, however, strongly opposed in early 1963 to the sponsorship by the Administration of major civil-rights legislation. It was clear to him that the temper of the country and of the Congress was such that significant civil-rights legislation was sure to be defeated. . . .
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> This situation changed suddenly and dramatically in May, 1963, when trouble erupted in Birmingham, Ala. In the course of the interminable crisis in Birmingham, the people of the United States saw on their television screens night after night an unapologetic Eugene "Bull" Connor . . . and the seemingly senseless use by forces under his command of police dogs, firehoses and other undiscriminating weapons against apparently well-behaved demonstrators, many of them children, protesting discrimination. . . .
>
> The people of the United States went through a sea-change as a result of the events in Birmingham. . . . Suddenly, literally overnight, the time had come for consideration by the country and by Congress of major civil-rights legislation.[206]

On June 11, 1963, President Kennedy announced to the nation that he would be sending the Congress a major civil rights bill; he directly attributed it to the events of Birmingham.[207] On June 19, 1963, he sent to the Congress the bill which was passed the following year as the Civil Rights Act of 1964.[208] Title II of that Act broadly prohibits segregation or discrimination in places of public accommodation, providing that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities,

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205 *Id.* at 807-08.

206 Norbert A. Schlei, *Forward* to BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vii-viii (1976) [hereafter Schlei].

207 *Transcript of the President's Address*, *supra* note 11, at 20; *cf.* GARROW, *supra* note 4, at 269.

208 Schlei, *supra* note 206, at viii-ix.

privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[209] Title VII broadly prohibits discrimination in employment, based on race, color, sex, religion, or national origin.[210] In tandem, the two sections meet all of the express goals of the Birmingham desegregation campaign.

When President Kennedy announced on June 11 that he would be sending the Congress a major civil rights bill, King and other civil rights leaders were in the process of planning a summer march on Washington, centered on a demand for greater employment opportunities for African Americans. The day after Kennedy's announcement, King suggested that the march be refocussed as a call for the Congress to pass the Civil Rights Act.[211] On August 28, 1963, Dr. King stood before a crowd of almost a half million demonstrators and, in his best known public speech, called on Congress to pass the bill. Departing from his prepared text,[212] he spoke of his dream, "deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal."[213] In the wake of John F. Kennedy's assassination the bill was passed by the Congress. On July 2, 1964, the Civil Rights Act of 1964 was signed into law by President Lyndon Johnson.

VII. *WALKER V. CITY OF BIRMINGHAM* AND THE LAW SCHOOL CURRICULUM

The *Walker* case is well-established as a basic case in the law school curriculum, appearing as a principal case in most remedies casebooks, and either as a principal or note case in many civil procedure and constitutional law casebooks. The events surrounding the case, however, are usually missing. Even the fact that Martin Luther King was a defendant is omitted from most of the texts.

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209 42 U.S.C. § 2000a (1988).

210 *Id.* at § 2000e *et seq.* (1988 & Supp. III 1991).

211 GARROW, *supra* note 4, at 269.

212 *See id.* at 283.

213 ESSENTIAL WRITINGS, *supra* note 4, at 217-19 (reprinting *I Have a Dream*, delivered August 28, 1963, at Lincoln Memorial, Washington, D.C.).

In the area of remedies, there are seven major casebooks.[214] Five of the seven discuss the *Walker* decision, treating it as a principal case.[215] Yet only two of the five texts even mention Dr. King, and both do so briefly.[216] None of the texts provide sufficient information about the Birmingham campaign to place the case in an historical context; none makes any mention of the *Letter from Birmingham Jail.*

In the area of civil procedure, there are eleven major

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[214] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, CASES AND MATERIALS (1st ed. 1985) [hereafter LAYCOCK]; ROBERT N. LEAVELL, JEAN C. LOVE & GRANT S. NELSON, CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES (4th ed. 1986) [hereafter LEAVELL ET AL.]; EDWARD D. RE & STANTON D. KRAUSS, CASES AND MATERIALS ON REMEDIES (3d ed. 1992) [hereafter RE & KRAUSS]; ELAINE W. SHOBEN & W. MURRAY TABB, CASES AND PROBLEMS ON REMEDIES (1989) [hereafter SHOBEN & TABB]; DAVID SCHOENBROD, ANGUS MACBETH, DAVID I. LEVINE & DAVID J. JUNG, REMEDIES: PUBLIC AND PRIVATE (1990) [hereafter SCHOENBROD ET AL.]; ROBERT S. THOMPSON & JOHN A. SEBERT, JR., REMEDIES: DAMAGES, EQUITY AND RESTITUTION (2d ed. 1989) [hereafter THOMPSON & SEBERT]; KENNETH H. YORK, JOHN A. BAUMAN & DOUG RENDLEMAN, CASES AND MATERIALS ON REMEDIES (5th ed. 1992). These texts, and the others identified as major casebooks herein, constitute all casebooks listed in the current catalogs of Foundation Press, Little, Brown and Co., Matthew Bender, The Michie Company, and West Publishing Co.

[215] LAYCOCK, *supra* note 214, at 656-67; LEAVELL ET AL., *supra* note 214, at 529-35; RE & KRAUSS, *supra* note 214, at 96-105; SHOBEN & TABB, *supra* note 214, at 196-201; THOMPSON & SEBERT, *supra* note 214, at 314-23.

[216] The Laycock casebook includes a one-paragraph note following *Walker* that discusses Bull Connor, Dr. King, and the link between the Birmingham campaign and the 1964 Civil Rights Act. LAYCOCK, *supra* note 214, at 667. Laycock also cites *Walker* elsewhere in the casebook. *See id.* at 418-19, 667-72, 681, 684, 1149. The reference at page 1237 again refers to King. *Id.* at 1237. Authors Re and Krauss identify Dr. King and Shuttlesworth as defendants and briefly describe the circumstances of their arrests. RE & KRAUSS, *supra* note 214, at 105. The Schoenbrod et al. casebook uses *In re* Providence Journal, 820 F.2d 1342 (1st Cir. 1986), 820 F.2d 1354 (1st Cir. 1987) as its principal case to illustrate the collateral bar rule. SCHOENBROD ET AL., *supra* note 214, at 286. The casebook includes the portion of *In re* Providence Journal that discusses *Walker* and identifies Dr. King as one of the defendants. *Id.* at 288-89. The *Walker* decision is also discussed in a note following the principal case. *Id.* at 293-94.

casebooks.[217] Two use *Walker* as a principal case;[218] one provides an extensive discussion of the context in which the case arose,[219] while the other neither identifies King as a defendant nor discusses the background of the case. Four casebooks either cite *Walker* or discuss it textually.[220] The two that discuss the case identify King and provide some background information. None of the texts refers to the *Letter from Birmingham Jail* or the role of the Birmingham campaign in the passage of the 1964 Civil Rights Act.

In the area of constitutional law, there are eleven major casebooks.[221] One casebook uses *Walker* as a principal

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217 PAUL D. CARRINGTON & BARBARA A. BABCOCK, CIVIL PROCEDURE, CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION (3d ed. 1983) [hereafter CARRINGTON & BABCOCK]; ROBERT C. CASAD, HOWARD P. FINK & PETER N. SIMON, CIVIL PROCEDURE: CASES AND MATERIALS (2d ed. 1989); JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER & JOHN E. SEXTON, CIVIL PROCEDURE, CASES AND MATERIALS (5th ed. 1989); ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE (1988) [hereafter COVER ET AL.]; DAVID CRUMP, WILLIAM V. DORSANEO, III, OSCAR G. CHASE & REX R. PERSCHBACHER, CASES AND MATERIALS ON CIVIL PROCEDURE (2d ed. 1992) [hereafter CRUMP ET AL.]; RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (6th ed. 1990) [hereafter FIELD ET AL.]; A. LEO LEVIN, PHILIP SHUCHMAN & CHARLES M. YABLON, CASES AND MATERIALS ON CIVIL PROCEDURE (1992); DAVID W. LOUISELL, GEOFFREY C. HAZARD, JR. & COLIN C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL (6th ed. 1989); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH, (1989) [hereafter MARCUS ET AL.]; MAURICE ROSENBERG, HANS SMIT & ROCHELLE C. DREYFUSS, ELEMENTS OF CIVIL PROCEDURE, CASES AND MATERIALS (5th ed. 1990) [hereafter ROSENBERG ET AL.]; STEPHEN C. YEAZELL, JONATHAN M. LANDERS & JAMES A. MARTIN, CIVIL PROCEDURE (3d ed. 1992).

218 CARRINGTON & BABCOCK, *supra* note 217, at 52-62; FIELD ET AL., *supra* note 217, at 876-81.

219 FIELD ET AL., *supra* note 217, at 876-77, 882.

220 COVER ET AL., *supra* note 217, at 1620 (cited); CRUMP ET AL., *supra* note 217, at 1074 (cited); MARCUS ET AL., *supra* note 217, at 77-80, 896-97 (discussed); ROSENBERG ET AL., *supra* note 217, at 145-46 (discussed).

221 EDWARD L. BARRETT, JR., WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS (8th ed. 1989) [hereafter BARRETT ET AL.]; JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS (4th ed. 1992) [hereafter BARRON ET AL.]; DAAN BRAVEMAN, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM (2d ed. 1991); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS (3d ed. 1992) [hereafter BREST &

case,[222] seven discuss it in textual notes.[223] Yet only two mention Dr. King;[224] here again, none refers to the *Letter from Birmingham Jail* or the role of the Birmingham campaign in the passage of the 1964 Civil Rights Act.

Why are Dr. King and the story of Birmingham missing from the curriculum, when the affirmance of his conviction is studied? Certainly one reason is the remarkable fact that they are missing from the majority opinion. The majority opinion, by Justice Stewart, never mentions Dr. King or any of the other defendants by name or profession. It never explains the purpose of the demonstrations, although it refers to the use of sit-ins and kneel-ins,[225] suggesting that these were civil rights demonstrations. It explains that the injunction was sought because the defendants were allegedly violating "numerous ordinances and statutes of the City of Birmingham"[226] without noting that among these were the segregation ordinances. The opinion briefly describes the Good Friday march, and the disruption of public order it caused, but fails to mention that the marchers were arrested.[227] The descriptions of

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LEVINSON]; WILLIAM COHEN & JOHN KAPLAN, CONSTITUTIONAL LAW, CIVIL LIBERTY AND INDIVIDUAL RIGHTS (2d ed. 1982); DAVID CRUMP, EUGENE GRESSMANN & STEVEN A. REISS, CASES AND MATERIALS ON CONSTITUTIONAL LAW (1989); GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991) [hereafter GUNTHER]; PAUL G. KAUPER & FRANCIS X. BEYTAGH, CONSTITUTIONAL LAW, CASES AND MATERIALS (5th ed. 1980) [hereafter KAUPER & BEYTAGH]; WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS (7th ed. 1991) [hereafter LOCKHART ET AL.]; NORMAN REDLICH, BERNARD SCHWARTZ & JOHN ATTANASIO, CONSTITUTIONAL LAW (2d ed. 1989) [hereafter REDLICH ET AL.]; GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW (2d ed. 1991) [hereafter STONE ET AL.].

222 BARRON ET AL., *supra* note 221, at 914-17.

223 BARRETT ET AL., *supra* note 221, at 1265-66; BARRON ET AL., *supra* note 221, at 819; BREST & LEVINSON, *supra* note 221, at 593; GUNTHER, *supra* note 221, at 1290-92; KAUPER & BEYTAGH, *supra* note 221, at 1217-19; LOCKHART ET AL., *supra* note 221, at 874-75; STONE ET AL., *supra* note 221, at 1141-42. The case is cited, but not discussed in REDLICH ET AL., *supra* note 221, at 1233-34.

224 BARRON ET AL., *supra* note 221, at 914-17; GUNTHER, *supra* note 221, at 1290-92. Each supplies a brief historical background to the decision.

225 Walker v. City of Birmingham, 388 U.S. 307, 309 (1967).

226 *Id.*

227 *Id.* at 310. The fact that there were arrests at some point during the campaign can be discerned from a footnote referring to the *Shuttlesworth*

the issuance of the injunction, and the decision to disobey it, are presented absolutely bereft of political or social context.

To read the *Walker* decision knowing something of its history is an exercise in cognitive dissonance. Justice Stewart's majority opinion tells the story of Birmingham entirely from the point of view of the city's white officials.[228] A permit was required for marching. No permit was issued. The marchers marched anyway. They were asked to cease. They refused. An injunction was sought because "mob" violence was feared, and because the defendants were allegedly violating "numerous ordinances and statutes of the City of Birmingham."[229] The injunction was issued. The marchers marched anyway. As feared, violence did occur, proving the city officials' fears were justified.

With the voices of the demonstrators silenced, an uninformed reader could conclude that King and his associates were a violent mob, gratuitously intent on disturbing the peace and quiet of the law abiding people of Birmingham. By omitting any reference to the arrests, Justice Stewart's decision creates the false impression that it was only through the contempt charge that the marchers were restrained. By combining the activities of the demonstrators and "on-lookers," the orderly marchers are described as part of a mob. By citing the violence, without explaining that it followed the arrests, and was not committed by the demonstrators, the Court confirms the white officials' view that the injunction was necessary. Exaggerating the time between the injunction being issued and the Good Friday march, the Court concludes that the marchers could have put off the march and appealed the injunction; thus, their attempt to claim at trial that the parade ordinance was unconstitutional was properly barred by the collateral bar rule. To permit them to violate the injunction and then litigate the constitutionality of the parade ordinance would, the Court exclaims, promote anarchy.

The Court thus refused to consider in King's appeal the question of whether the Birmingham parade ordinance was unconstitutional.[230] King and the other ministers' convictions were

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case, challenging the validity of the injunction, which was then pending before the Alabama Supreme Court. *Id.* at 319 n.13.

228 *See* Luban, *supra* note 4, at 2165-67 (discussing Court's point of view in its factual narrative in *Walker*).

229 *Walker*, 388 U.S. at 309.

230 *Id.* at 316-17. The statute was invalidated the following year. *See supra* note 147.

affirmed, and they were ordered to return to Birmingham, to serve their sentences.

From the majority's perspective, *Walker* was not a case about Martin Luther King's arrest on Good Friday in the midst of an enormously important desegregation campaign, it was a case about the collateral bar rule; we judge it, or study it, as such, and nothing more. But the majority's decision to ignore the identity and purpose of King and the other ministers cannot alone explain their omission from the law school curriculum. Chief Justice Warren's dissent explained the purpose of the demonstrations and the events leading to the injunction,[231] as did Justice Douglas'.[232] Justice Brennan, too, explained in detail the background of the case,[233] and specifically identified King, Abernathy, and Shuttlesworth.[234]

Martin Luther King faced a choice in Birmingham—to obey a court order and sacrifice a movement, or to recognize a higher authority, and judge the order invalid as a matter of moral choice. Recognition of that moral choice is simply absent from the majority's decision. The majority took the position that any court order which is not facially invalid is, until appealed, necessarily valid. There is no room provided for moral choice; its price is too high. The majority concluded that "[o]ne may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[235]

It is quite incredible that the Court, in 1967, could complain that King and his colleagues in Birmingham were "impatient." It mirrors the complaints of the eight Birmingham clergymen, and undermines the Court's claim of sympathy for the cause. It is even more incredible that the Court, in such a context, could describe the "hand of law" in Birmingham as "civilized." It was the hand of law in Birmingham that rigidly segregated the races, and punished all African American transgressors. It was the hand of law in Birmingham that cooperated with white mobs committed to racist terrorism, and itself turned to attack dogs and fire

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231 *Walker*, 388 U.S. at 324-27 (Warren, C.J., dissenting).
232 *Id.* at 334-38 (Douglas, J., dissenting).
233 *Id.* at 338-42 (Brennan, J., dissenting).
234 *Id.* at 341.
235 *Id.* at 321.

hoses to silence dissent. It was the hand of law in Birmingham that oversaw the oppression of African Americans through inferior schools and facilities, and disenfranchisement. But putting aside the Court's complaint that King and the other civil rights leaders were unduly impatient, and that they failed to find the hand of law to be civilizing, we need only focus on the price sought for compliance to take wonder at the Court's conclusion. Was respect for judicial process a small price to pay in Albany, Georgia? Had the Good Friday march been canceled, would it have been a small price to pay in Birmingham, or throughout the nation?

If the Court's failure to consider the context of Birmingham is deplorable, our failure as legal educators is doubly so. The failure to supply any context for the study of *Walker* in the casebooks both reflects the mistreatment of King and Birmingham by the Court, and compounds it. Just as the Court viewed the case out of its context, our casebooks present it in the same isolated manner. It illustrates the collateral bar rule, to be studied as a rather insignificant rule of procedure, a trap for the unwary—simply a neat little problem.

CONCLUSION—"A SMALL PRICE TO PAY"

In the *Letter from Birmingham Jail*, Martin Luther King argued that one has "a moral responsibility to disobey unjust laws."[236] In affirming Dr. King's conviction, the *Walker* court rejected King's argument, concluding that such obedience, pending legal action, "is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[237]

On October 30, 1967, King, Walker, and Abernathy flew from Atlanta to Birmingham, to serve their sentences in the Birmingham jail. As they prepared to board the plane to Birmingham, a reporter asked King how he felt about the Supreme Court requiring him to go back to Birmingham to serve the sentence. King explained that he had been in jail many times, and that he preferred not to go. Then, mocking the Court, he conceded that given the success of the Birmingham campaign in the passage of the 1964 Civil Rights Act, his jail sentence was "a small price to pay."[238]

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236 King, *Letter from Birmingham Jail*, *supra* note 61, at 840.

237 *Walker*, 388 U.S. at 321.

238 WESTIN & MAHONEY, *supra* note 4, at 2.

We pay a high price for making so little of *Walker*. A generation of lawyers is coming of age with great and growing resentment of affirmative action and the civil rights movement. As law schools and the legal profession grow more diverse, it is, perversely, whites, in particular white men, who increasingly view themselves as the leading targets of discrimination. My students, most of whom were born in the mid-to-late 1960s, are shocked to learn how pervasively, and recently, segregation defined the legal relationships of African Americans and whites. The apartheid under which we lived until so very recently is thought of by them as a part of the distant past, a phenomenon of a different age which carries no present legacy. The *Walker* story challenges these false assumptions upon which at least a part of today's racism rests, and helps lay them waste. For those of us who teach and study American law, it is our story to tell.