

# Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964

By DAVID BENJAMIN OPPENHEIMER\*

ON APRIL 1, 1963, President John F. Kennedy stood firmly opposed to the introduction of a major civil rights bill. He believed that such a law would not pass, and that its debate by the Congress could divide and destroy the Democratic party.<sup>1</sup> Seven weeks later, on May 20, 1963, Kennedy announced to his cabinet that he was directing the Department of Justice to draft a civil rights bill. Its introduction was announced to the American public on June 11, 1963. On July 2, 1964, in the wake of the President's assassination, that bill, the Civil Rights Act of 1964 ("Civil Rights Act"),<sup>2</sup> was passed by Congress and signed into law by President Lyndon B. Johnson. The Act was probably the most important legislation enacted by the United States Congress in the twentieth century. What happened between

---

\* Associate Professor of Law, Golden Gate University School of Law. © 1995 by David Benjamin Oppenheimer. All rights reserved. Parts III, IV and V of this essay rely substantially on my earlier work on Birmingham: David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter From Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993). In my continuing study of the civil rights movement in Birmingham, I have received invaluable assistance and support from many of the courageous men and women who planned and participated in the 1963 desegregation campaign. My work was aided incalculably by the generosity of Rev. Frederick Lee Shuttlesworth and Rev. Dr. Wyatt Tee Walker, the primary organizers of the 1963 demonstrations and the first-named defendants in the two principal cases discussed herein; each took the time to meet with me and discuss the planning and execution of the campaign. I am also very grateful to the following people who took the time to speak with me about their experiences in Birmingham in 1963: Hon. U.W. Clemon, Deenie Drew, Ethelda Finch, Rev. Edward Gardner, Dr. J.S. Goodson, William Kunstler, Rev. Abraham Lincoln Woods and Hon. Rev. Andrew Young. I am also very grateful to the following current residents of Birmingham who helped direct my research: Angela Fisher Hall, Rev. Christopher M. Hamlin, Prof. Horace Huntley and Odessa Woolfolk. I am also grateful to Alan Richardson, who helped me understand the religious sources of the *Letter From Birmingham Jail*, and to Clayborne Carson for his insight into the work of King, Walker and Shuttlesworth. Any errors I have made are, of course, entirely my own responsibility.

1. See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63*, at 376-77, 414-15, 808-09, 883-85 (1988).

2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

April 1 and May 20, 1963 that so dramatically changed President Kennedy's assessment of the bill's chances? In a word—Birmingham.

On April 2, 1963, Dr. Martin Luther King, Jr. arrived in Birmingham, Alabama, to lead a massive desegregation campaign. His co-leader was Birmingham's leading civil rights activist, Rev. Frederick Lee Shuttlesworth. The chief architect of the campaign was Southern Christian Leadership Conference Executive Director, Dr. Wyatt Tee Walker. Rev. Shuttlesworth and Dr. Walker would lend their names to two important United States Supreme Court decisions on the right of dissent—*Shuttlesworth v. City of Birmingham*<sup>3</sup> and *Walker v. City of Birmingham*.<sup>4</sup> Both cases arose from their arrests in the Birmingham campaign.

Birmingham would prove to be the turning point in Dr. King's career. When he arrived in Birmingham his position as a leader was uncertain, as was the direction of the civil rights movement. In Birmingham, he faced the choice of obedience to immoral authority, or disobedience and jail; he chose jail. Behind bars over Easter weekend he wrote his great essay defending non-violent direct action, the *Letter From Birmingham Jail*.<sup>5</sup> After Birmingham, there would be no question about his authority.

What happened in Birmingham? Massive non-violent civil disobedience was met with equally intense violent police action. Much of the police violence was directed at children. As the nation watched on television, black children kneeling in prayer or singing spirituals as they walked down sidewalks were attacked by vicious police dogs and rolled down the streets by fire department water cannons.

The children's marches began on May 2, 1963; the police violence began the next day. Public reaction to the police attacks on the demonstrators was so great that by May 7, a special emissary from President Kennedy was in Birmingham trying to broker a settlement; by May 10, an agreement had been reached.

Dr. King's non-violent direct action campaign gave political legitimacy to the civil rights movement. The President of the United States intervened. The white authorities of Birmingham negotiated an end to *de jure* segregation. A national political consensus on segregation took shape.

---

3. 394 U.S. 147 (1969).

4. 388 U.S. 307 (1967).

5. The Letter was initially printed in mimeograph form. It was then republished in the *Atlantic Monthly* and as part of a book by King about the Birmingham Campaign. Martin Luther King, Jr., *The Negroe is Your Brother*, ATLANTIC MONTHLY, August, 1963, at 78; MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 76-95 (1964). It has been republished many times since, including a recent publication by the *U.C. Davis Law Review*. Martin Luther King, Jr., *Letter From Birmingham Jail*, reprinted in 26 U.C. DAVIS L. REV. 835 (1993).

Long after the streets of Birmingham were quiet again, and after the Civil Rights Act of 1964 had been signed, the legal legitimacy of the Birmingham campaign finally reached the United States Supreme Court. In the first of the Birmingham cases—the *Walker* case—the Court upheld the authority of the local segregationist courts. Dr. King, along with Dr. Walker and Rev. Shuttlesworth, were ordered to return to the Birmingham jail and to serve time there for contempt of court. In the second—the *Shuttlesworth* case—the Court rejected the authority of the local segregationist city commission. The convictions of fifteen hundred demonstrators were reversed, and the local ordinance requiring parade permits was rescinded. The Court was willing to support the right of dissent against the power of legislative and executive authority, but it held inviolate the authority of the judiciary.

## I. The Politics of The Civil Rights Movement

Twenty-five years after his assassination, Martin Luther King, Jr. has been deified by the American public. In the process, his radicalism has been cleansed. Dr. King is presented today as a great voice of moderation. His commitment to non-violence is used to undermine his militancy, while his eloquence on behalf of equality is misconstrued to support opponents of affirmative action.<sup>6</sup> Yet, in 1963, Dr. King was a radical, vilified by many whites and, although respected for his eloquence and courage, too militant for many blacks.

In 1963, the leading mainstream black civil rights organization, the National Association for the Advancement of Colored People (“NAACP”), was committed to furthering the goal of equality through both legal and political reform. Its legal arm, the NAACP Legal Defense & Education Fund,<sup>7</sup> had won a series of great victories in the courts, in particular *Brown v. Board of Education*,<sup>8</sup> the 1954 decision prohibiting school segregation.

The NAACP leadership was solidly middle class African Americans. It drew heavily from doctors, lawyers, dentists, teachers and morticians, as well as ministers. Many of its members were independent business people whose economic base was rooted in the black community. Although their numbers were small, increasingly their children were being admitted to pre-

---

6. See, e.g., Lawrence J. Siskind, *Approaching Appointments for a Civil Rights Agenda*, RECORDER, Apr. 13, 1993, at 8.

7. The Fund, also known as the “LDF” or the “Inc. Fund,” was a separate organization from the NAACP after 1956, but the two remained closely aligned. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 310-11 (1994).

8. 347 U.S. 483 (1954).

viously all-white colleges, graduate schools and professional schools. The black middle class was growing, and for its members the NAACP strategy seemed to be working.

If the NAACP strategy was working for the middle class, it was leaving the majority of blacks further behind. Despite the courtroom victories, victory in the field was more ephemeral. Enforcement of the *Brown* decision was difficult and painfully slow. A generation of black youth was growing up in inferior schools now known to be illegally segregated, but inferior and segregated all the same. While school segregation had been declared unconstitutional, and some facilities operated and regulated by the government were slowly being ordered desegregated, private segregation in housing and employment remained common throughout most of the United States—and fully legal. In the South, private and public segregation were the norm, and public accommodations were not simply privately segregated, they were segregated by law.<sup>9</sup>

In the wake of *Brown* a new civil rights leadership emerged, which was more militant and less dependent on the middle class. Its members were preachers; notable among them was a young minister from Atlanta, Georgia, the Rev. Dr. Martin Luther King, Jr.

Dr. King's public role as a civil rights leader began in 1955 in Montgomery, Alabama. On December 1 of that year, Ms. Rosa Parks refused an order to give up her seat on a bus to accommodate white passengers. When she was arrested, Dr. King, with the participation of virtually all of the black ministers of Montgomery, led a boycott of the buses.<sup>10</sup>

The Montgomery bus boycott initiated a profound change in the struggle for civil rights. Whereas the NAACP believed in legal reform through lobbying and litigation, the preachers used the weapon of direct confrontation. Dr. King believed that only by personally confronting the immorality of segregation, placing his own safety and liberty at risk, would the laws and customs of inequality be changed.

One immediate effect of the Montgomery bus boycott was the destruction of the NAACP in Alabama. The state's leaders, segregationists all, were convinced that the NAACP was behind the bus boycott. They responded on June 1, 1956, by successfully seeking an injunction barring the organization from operating anywhere within Alabama. When the NAACP

---

9. See, e.g., Birmingham Segregation Ordinances, BIRMINGHAM, ALA., GEN. CODE §§ 369 (separation of races), 597 (1944) (Negroes and white persons not to play together); BIRMINGHAM, ALA., BLDG. CODE § 2002.1 (1944) (toilet facilities), reprinted in Supreme Court Transcript of Record, Motion to Dissolve Injunction and/or Application for Stay of Execution Pending Hearing, Exhibit 4 at 69, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

10. MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 43-48 (1958).

sought to have the injunction dissolved, the State of Alabama asked the court to order disclosure of the organization's membership list and the court obliged. Rather than turn over the list, the NAACP appealed.<sup>11</sup> It was not until 1964 that the United States Supreme Court overturned the Alabama orders.<sup>12</sup> As a result, from 1956 through 1964 the NAACP had virtually no presence in Alabama.

With the NAACP presence in Alabama greatly diminished, the black ministers of the state formed two new organizations which were soon aligned. In Montgomery, Dr. King was selected as President of the Southern Christian Leadership Conference ("SCLC"). He retained the position for the rest of his life. Its leaders, all ministers, in time represented the major ministerial arm of the civil rights movement. In Birmingham, Rev. Shuttlesworth formed the Alabama Christian Movement for Human Rights ("ACMHR") and was elected its president. ACMHR soon became an affiliate of the SCLC, and Rev. Shuttlesworth was named to the SCLC Board.

The SCLC soon began a campaign of direct action aimed at desegregating public transportation and accommodations. Boycotts were organized. Marches and picketing were used to dramatize the struggle. Dr. King and the SCLC helped spawn a student auxiliary, which soon became a separate organization, the Student Non-Violent Coordinating Committee ("SNCC"). In 1960, student sit-ins began at segregated lunch counters. SCLC and SNCC organized swim-ins to desegregate swimming pools and public parks, read-ins to desegregate libraries, and pray-ins (or kneel-ins) to desegregate churches.

If the NAACP tools were newspapers, lobbyists and legal briefs, the weapons of the SCLC were picket signs, hunger strikes, passive resistance through non-violent response to police beatings and arrest, and most of all, the mass meeting. The SCLC ministers and SNCC college students reached their supporters through church meetings. Wherever protests were organized, they began and were fueled by evening mass meetings where speakers would educate, eloquate and agitate.

This difference in approach and style between Dr. King's SCLC and the NAACP leadership would continue for the twelve remaining years of his life, from Montgomery through Albany, Birmingham, Washington, Selma and Cicero to Memphis.<sup>13</sup> While the Legal Defense Fund regularly loaned its legal muscle to defend Dr. King and his supporters, the NAACP leaders questioned Dr. King's effectiveness and were worried by his mili-

---

11. TUSHNET, *supra* note 7, at 283-84.

12. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 310 (1964).

13. See, e.g., BRANCH, *supra* note 1, at 205, 829-30.

tancy. Thurgood Marshall, for example, "called King a 'first-rate rabble-rouser' and complained about always 'saving King's bacon.'"<sup>14</sup>

## II. Shuttlesworth and the Invitation to Birmingham

Frederick Lee Shuttlesworth, born March 18, 1922, grew up in the country near Birmingham.<sup>15</sup> After graduating from high school in Birmingham, he worked as a mechanic and a truck driver before being called to the ministry. He led small churches in Mobile and Selma, and at the age of thirty was named pastor of the Bethel Baptist Church in Birmingham. He immediately began a voter registration campaign among his congregants, and soon agreed to act as membership chair for the Birmingham branch of the NAACP.

When Alabama successfully enjoined the NAACP from operating on June 1, 1956, Rev. Shuttlesworth was among the leaders served with the injunction. Rev. Shuttlesworth relates that God spoke to him that night, telling him to call a mass meeting to organize a new organization to replace the NAACP.<sup>16</sup> The following day he called for a meeting, and on June 5 the ACMHR was formed, with Rev. Shuttlesworth as its president.

In conjunction with the 1955 Montgomery bus boycott, the Legal Defense Fund had brought a challenge to the Montgomery segregation ordinance in federal court. On June 5, 1956, the same day the ACMHR was founded, a three judge district court panel ruled that the Montgomery ordinance was invalid under *Brown*.<sup>17</sup> In November of 1956, the Supreme Court affirmed the district court order;<sup>18</sup> on December 20, 1956, the Court's order became final and Montgomery's buses were ordered desegregated.<sup>19</sup>

Rev. Shuttlesworth responded by organizing a campaign to desegregate Birmingham's buses. He announced to the press that on the day after Christmas, black riders would board the buses and sit in the front, in violation of Birmingham's segregation laws. On Christmas night his house was bombed; his bedroom, where he lay in bed, was completely destroyed.

---

14. TUSHNET, *supra* note 7, at 305 (quoting BRANCH, *supra* note 1, at 217).

15. Interview with Rev. Frederick Lee Shuttlesworth, in Cincinnati, Ohio (June 10-11, 1994). This paragraph and the paragraph that follows contains biographical information which comes from the author's interviews with Rev. Shuttlesworth.

16. *Id.* There was some controversy over whether the meeting would occur. One minister told Shuttlesworth that God had spoken to him too, after Shuttlesworth called the meeting, telling Shuttlesworth to call it off. Shuttlesworth refused, insisting that if God had further instructions for him, they should be communicated directly. The meeting was held.

17. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 353 U.S. 903 (1956); see KING, STRIDE TOWARD FREEDOM, *supra* note 10, at 159-60; TUSHNET, *supra* note 7, at 304.

18. *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*).

19. TUSHNET, *supra* note 7, at 304.

Although the flooring under his bed disintegrated, somehow he dropped to the ground unharmed. Reflecting on that experience, he explained "I was never afraid again. I knew that God had saved me so that I could do His work in fighting for our rights."<sup>20</sup>

The next day Rev. Shuttlesworth and scores of other demonstrators boarded the buses and sat in the white section. He and twenty others were arrested. He was convicted of violating the segregation ordinance and sentenced to eighty-two days of hard labor,<sup>21</sup> of which he actually served thirty days.<sup>22</sup>

In the summer of 1957, the ACMHR petitioned the Birmingham School Board to desegregate the public schools. On September 2, the Ku Klux Klan responded by kidnapping and castrating a local black man. The following week, Rev. Shuttlesworth appeared at a local white school to enroll his children. He was beaten and knifed by a white mob; his wife was beaten with a chain.<sup>23</sup> The schools were not ordered desegregated until 1964, and then at a rate of one elementary grade per year.<sup>24</sup>

In 1958, Rev. Shuttlesworth led a renewed campaign to desegregate the city buses. To comply with *Gayle v. Browder*,<sup>25</sup> the Birmingham bus segregation ordinance had been replaced with a law permitting the bus company to determine its own seating regulations. The new company rules retained the practice of segregation, requiring blacks to sit in the back of the bus. Rev. Shuttlesworth led a new campaign against the segregation of the

---

20. Interview with Rev. Shuttlesworth, *supra* note 15.

21. At trial, Shuttlesworth attempted to challenge the constitutionality of the segregation ordinance. The local court upheld the law, and the Alabama Court of Appeals affirmed. *Shuttlesworth v. City of Birmingham*, 130 So. 2d 236 (Ala. Ct. App.), *cert. denied*, 368 U.S. 959 (1962). The United States Supreme Court initially refused to hear his appeal. *Shuttlesworth v. City of Birmingham*, 368 U.S. 959 (1962).

22. He served no further time because his new lawyer, William Kunstler, filed a federal writ of habeas corpus, persuading the Supreme Court to revisit the case and direct that bail be set. *In re Shuttlesworth*, 369 U.S. 35 (1962). The District Court thereafter invalidated the bus segregation ordinance. *Shuttlesworth v. City of Birmingham Bd. of Educ.*, 162 F. Supp. 372, 373 (N.D. Ala. 1958); see also WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* 115-18 (1994). Kunstler's decision to file the federal habeas writ was part of a greater strategy of removing state prosecutions of civil rights activists from state court to federal court. Kunstler developed the strategy with Mississippi lawyer William Higgs. They used it with great success between 1961 and 1965. See Kunstler, *supra*, at 105-07; Interview with Dr. Wyatt Tee Walker, in New York, N.Y. (Mar. 10, 1994).

23. Rev. Shuttlesworth had also sued to overturn the Alabama School Placement Law, enacted to maintain school segregation after *Brown*. A segregationist district court judge upheld the law, and the Supreme Court affirmed. *Shuttlesworth v. City of Birmingham Bd. of Educ.*, 358 U.S. 101 (1958) (*per curiam*).

24. *Armstrong v. Board of Educ.*, 333 F.2d 47, 51 (5th Cir. 1964); see also *Bowman v. Birmingham Transit Co.*, 280 F.2d 531, 533 (5th Cir. 1960) (quoting BIRMINGHAM, ALA., CITY ORDINANCE NO. 1487-F).

25. 352 U.S. 903 (1956).

buses, and was again arrested and convicted.<sup>26</sup> That summer, his church was bombed.

In 1959, Rev. Shuttlesworth and the ACMHR sued the City of Birmingham in federal court to desegregate the city's parks. The district court judge agreed that the segregation of the parks was illegal, and ordered them desegregated or closed by January of 1962.<sup>27</sup> The City Commission responded by voting at the end of 1961 to close all sixty-eight parks, thirty-eight playgrounds, six swimming pools and four golf courses.<sup>28</sup>

When the lunch counter sit-ins began in Charleston, South Carolina in 1960, Rev. Shuttlesworth was there as an observer.<sup>29</sup> He called Dr. King to inform him of the strategy's potential, and then sped back to Birmingham to help organize sit-ins by Miles College student activists. On April 2, ten students were arrested for sitting in at five downtown department stores. Rev. Shuttlesworth was arrested for aiding and abetting their breach of the segregation ordinance, and sentenced to 180 days in jail.<sup>30</sup> Rev. Shuttlesworth was arrested again a few months later when he demanded service in a restaurant at the Birmingham airport.

On March 29, 1960, a few days before the first Birmingham lunch counter sit-in, a New York group raising funds to support Dr. King's work, had placed a full page advertisement in the *New York Times*.<sup>31</sup> The advertisement accused unnamed officials in several southern cities, including Montgomery, of repressing leaders and participants in the civil rights movement. The advertisement named a number of southern African American ministers as endorsers, including Rev. Shuttlesworth.<sup>32</sup> Montgomery City Commissioner L.B. Sullivan sued the *New York Times*, as well as Rev. Shuttlesworth and three other ministers, for defamation. In November of 1960, he won a five hundred thousand dollar verdict. Although the judg-

---

26. The new rules were overturned in *Bowman*, 280 F.2d at 533.

27. *Shuttlesworth v. Gaylord*, 202 F. Supp 59, 63 (N.D. Ala. 1961), *aff'd sub nom.* Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962) (per curiam).

28. CHARLES MORGAN JR., A TIME TO SPEAK 109 (1964).

29. Interview with Rev. Shuttlesworth, *supra* note 15.

30. The conviction was affirmed by the Alabama Court of Appeals. *Shuttlesworth v. City of Birmingham*, 134 So. 2d 213, 214 (Ala. Ct. App.), *cert. denied*, 134 So. 2d 214, 215 (Ala. 1961). The United States Supreme Court reversed the conviction, *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963), as well as the convictions of the Birmingham students, *Gober v. City of Birmingham*, 373 U.S. 374, 375 (1963) (per curiam), and the Greenville students, *Peterson v. City of Greenville*, 373 U.S. 244 (1963). The latter two cases were decided on May 20, 1963, the same day the settlement was announced in the Birmingham desegregation campaign.

31. The ad is reproduced in ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 2-3 (1991) (quoting *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25).

32. LEWIS, *supra* note 31, at 12. Shuttlesworth and the other ministers had never actually seen the text or approved the use of their names. *Id.*

ment was ultimately overturned by the United States Supreme Court,<sup>33</sup> Rev. Shuttlesworth was unable to post an appeal bond and thus stay execution of the judgment; his car was seized to help pay the claim.<sup>34</sup>

Soon after President John F. Kennedy's inauguration, the Interstate Commerce Commission ordered an end to segregation of federally regulated interstate transportation.<sup>35</sup> To test the new regulations, an interracial group of college students decided to ride together from Washington, D.C. to a Congress of Racial Equality ("CORE")<sup>36</sup> convention in New Orleans. They called themselves "freedom riders."

The freedom riders left Washington in two buses. The first bus got as far as Anniston, Alabama, north of Birmingham, where on Mother's Day, May 14, 1961, an angry white mob surrounded the bus and set it afire. As the freedom riders emerged from the burning bus they were beaten by the crowd.

The second bus arrived an hour later in Birmingham, where the local police had arranged to provide the Ku Klux Klan with a fifteen minute grace period to attack the freedom riders.<sup>37</sup> They were badly beaten, but those who were able resolved to continue their trip. Rev. Shuttlesworth offered to put them up in his home while arranging for them to press on. Throughout that night and the following day, he negotiated with Attorney General Robert Kennedy to provide the riders with safe passage. Robert Kennedy, in turn, negotiated with Birmingham Public Safety Commissioner Eugene "Bull" Connor<sup>38</sup> and Alabama Governor John Patterson. An agreement was reached to let the buses proceed, and a new group of riders arrived to replace the injured.

On Wednesday afternoon, Rev. Shuttlesworth accompanied the new freedom riders to the bus station. As the students prepared to board the bus, Connor ordered them arrested. When Rev. Shuttlesworth objected, Connor ordered him arrested as well. He was convicted of interfering with a police officer and sentenced to 180 days of hard labor.<sup>39</sup> When the arrested freedom riders went on a hunger strike, Connor snuck them out of town under cover of darkness and dropped them off at the Tennessee State line. De-

---

33. *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

34. LEWIS, *supra* note 31, at 162.

35. Regulations Governing Discrimination in Operations of Interstate Motor Common Carriers of Passengers, 26 Fed. Reg. 9166 (1961) (codified at 49 C.F.R. § 180(a) (1963)).

36. BRANCH, *supra* note 1, at 389.

37. *Id.* at 420-21.

38. *Id.* at 423. Connor was simultaneously threatening to arrest Shuttlesworth for harboring an interracial group in his home.

39. The Supreme Court reversed his conviction. *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (*per curiam*).

spite this tactic, they arranged for a ride and returned to Birmingham, while a new group of students rode into Birmingham to join them or take their places. The two groups reunited at Rev. Shuttlesworth's home, and proceeded to the bus station to catch the bus to Montgomery. After an all night sit-in in the waiting room, on Saturday morning the students were permitted onto the bus, but when Rev. Shuttlesworth attempted to join them, he was again arrested. The students, on their arrival in Montgomery, were again badly beaten.

In 1962, Rev. Shuttlesworth, working with local college students, began a boycott, or "selective buying campaign," against the downtown businesses. Their slogan was "Don't Shop Where You Can't Work."<sup>40</sup> They demanded that the merchants stop following the segregation ordinances and begin serving blacks at lunch counters, permit blacks to use dressing rooms and desegregate their water fountains and bathrooms. The city government responded by threatening to cut off food assistance to poor black families. Rev. Shuttlesworth was arrested for standing in front of a store urging others to join the boycott; he was sentenced to 241 days of hard labor.<sup>41</sup> At its height, the selective buying campaign was ninety percent effective.<sup>42</sup> Its strategy of focusing on the merchants instead of the government would be used again the following year by Dr. King and Rev. Shuttlesworth in the 1963 desegregation campaign.

In the summer of 1962, the selective buying campaign had a glimpse of victory. The SCLC had planned to hold their annual convention in Birmingham that summer, in part to help support the campaign. The downtown merchants were anxious to avoid the publicity the convention would bring to the boycott. In exchange for a promise to drop the campaign, a group of department store owners agreed to remove their signs prohibiting blacks from using the dressing rooms. The signs were down only a few days when "Bull" Connor threatened to close the stores for violating the segregation laws. The signs went back up.<sup>43</sup>

When the "Jim Crow" signs were re-erected by the downtown merchants, the scene was set for the great Birmingham campaign of 1963. Rev. Shuttlesworth turned to Dr. King and SCLC Executive Director Wyatt Tee Walker, inviting them to come to Birmingham to lead an all-out assault on segregation.

---

40. ANDREW YOUNG, *A WAY OUT OF NO WAY* 77 (1994).

41. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88-89 (1965). The conviction was overturned by the Supreme Court. *Id.* at 92, 95.

42. Joe D. BROWN, *Birmingham*, *SATURDAY EVENING POST*, Mar. 2, 1963, at 11, 18.

43. KING, *WHY WE CAN'T WAIT*, *supra* note 5, at 53-55.

### III. Walker and King Prepare for Birmingham

For Dr. King and Dr. Walker, Rev. Shuttlesworth's invitation could not have come at a better time. In December of 1961, Dr. King had been invited to help lead a desegregation campaign in Albany, Georgia. The campaign had been jointly organized by a coalition of activists and civil rights groups, including Dr. King's SCLC, SNCC, and local NAACP leaders.<sup>44</sup> The Albany campaign got off to a slow start, in part because of organizational problems arising between the various groups as they disagreed about tactics and leadership, and in part because of Dr. King's three arrests. By early summer, the momentum of the demonstrations was growing and a sense of optimism and promise prevailed.<sup>45</sup> Then, in late July, 1961, the United States District Court issued an injunction ordering Dr. King and the other movement leaders to cease all public demonstrations.<sup>46</sup>

The Albany injunction was issued by Judge J. Robert Elliot, an avowed segregationist recently appointed by President Kennedy.<sup>47</sup> The SNCC leaders and local activists viewed the injunction as illegitimate, and urged disobedience.<sup>48</sup> Dr. King's lawyer, William Kunstler, believed that the injunction improperly interfered with the demonstrators' First Amendment rights, and could be overturned on appeal.<sup>49</sup> However, an appeal would take time and the movement's momentum would be lost.

Dr. King felt divided.<sup>50</sup> He believed that the demonstrations were gaining force, and that it was important to press on. However, 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 with the Kennedy Administration's Department of Justice, which was beginning to take civil rights cases seriously. The Department of Justice was attempting to uphold the legitimacy of federal court injunctions,<sup>51</sup> and was

---

44. BRANCH, *supra* note 1, at 54; DAVID J. GARROW, *BEARING THE CROSS* 176 (1986).

45. ALAN F. WESTIN & BARRY MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* 44-45 (1974).

46. *See* *Congress of Racial Equality v. Clemmons*, 323 F.2d 54, 57 n.1 (5th Cir. 1963). The circuit court dissolved the injunction. *Id.* at 63; *see also* WESTIN & MAHONEY, *supra* note 45, at 45.

47. WESTIN & MAHONEY, *supra* note 45, at 45. Judge Elliot was one of a number of segregationists appointed by President Kennedy who was attacked in the press by liberal Republicans like New York's Nelson Rockefeller and John Lindsay for his accommodation of Southern Democrats. *See* BRANCH, *supra* note 1, at 699-700; Comment, *Judicial Performance in the Fifth Circuit*, 73 *YALE L.J.* 90, 106 (1963); *President Rejects Charge by Rockefeller on Judges*, *N.Y. TIMES*, Mar. 7, 1963, at 1.

48. BRANCH, *supra* note 1, at 610.

49. KUNSTLER, *supra* note 22, at 123; WESTIN & MAHONEY, *supra* note 45, at 45.

50. BRANCH, *supra* note 1, at 610-15.

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

prosecuting Mississippi Governor Ross Barnett for his disobedience of an injunction ordering him to admit James Meredith to the University of Mississippi.<sup>52</sup> Attorney General Robert Kennedy personally called Dr. King to urge compliance with the Albany injunction.<sup>53</sup>

Dr. King decided to obey, and appeal, the injunction.<sup>54</sup> Although he won the appeal,<sup>55</sup> his decision was nonetheless fatal to the Albany campaign. Absent the demonstrations, the movement fizzled.<sup>56</sup> In November of 1962, Dr. King left Albany, having achieved none of the campaign's goals.<sup>57</sup> He saw his decision to obey the injunction as critical to the campaign's failure.<sup>58</sup> As he reflected on his decision, he vowed not to let another court order keep him from demonstrating.<sup>59</sup> A month after leaving Albany, Rev. Shuttlesworth invited Dr. King to Birmingham.

To prepare for Birmingham, Dr. King called on Dr. Walker to make a series of trips there, and to develop a campaign strategy. Dr. Walker's basic plan was developed with Dr. King, SCLC Vice-President Ralph Abernathy, SCLC executive staff member Dorothy Cotton, fund raiser Jack O'Dell, advisor Stanley Levison and National Council of Churches liaison Andrew Young.<sup>60</sup> The plan was to train hundreds of black Birmingham citizens in the philosophy and tactics of non-violent confrontation.<sup>61</sup> Once trained, they would picket the downtown stores, sit-in at the lunch counters, march on segregated city facilities, and kneel-in at white churches.

Dr. Walker planned to focus the Birmingham campaign around an economic boycott of the downtown business district, beginning with small sit-ins at segregated lunch counters. The objective was to influence the white merchants, rather than city officials, by appealing to their economic self-interest. Each night the campaign would hold mass meetings in the

---

52. WESTIN & MAHONEY, *supra* note 45, 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.

53. BRANCH, *supra* note 1, at 610-11.

54. *Id.* at 611.

55. *Congress of Racial Equality v. Clemmons*, 323 F.2d 54, 63 (5th Cir. 1963).

56. WESTIN & MAHONEY, *supra* note 45, at 46. *But see* Wyatt T. Walker, *Albany: Failure Or First Step?*, NEW SOUTH, June, 1963, at 3. Dr. Walker maintains that the Albany campaign was a great success because a broad coalition of community groups and individuals joined in a wholesale attack on segregation, focusing on voting rights, school desegregation, employment discrimination and access to public accommodations. Interview with Dr. Walker, *supra* note 22.

57. WESTIN & MAHONEY, *supra* note 45, at 46.

58. KING, *WHY WE CAN'T WAIT*, *supra* note 5, at 70-71.

59. *Id.* at 70.

60. Interview with Dr. Walker, *supra* note 22. Young would succeed Walker as the SCLC's Executive Director before going on to serve as United States Ambassador to the United Nations and Mayor of Atlanta.

61. *See* YOUNG, *supra* note 40, 73-78.

churches to build support for the demonstrations. As the sit-ins grew, there would be larger demonstrations resulting in 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 blacks in non-custodial positions.<sup>62</sup> 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 the establishment of a bail fund so that arrestees could be quickly returned to the picket lines.<sup>63</sup>

The goal of the direct action campaign in Birmingham was confrontation. The demonstrators intended to confront segregation and force the world to behold its immorality. When Dr. Walker wrote up his plans for the campaign he named it for the confrontation to come; it was called "Project C."

#### IV. Project C

Although the planning of Project C began in December, 1962, the actual demonstrations were to begin on April 3, 1963, eleven days before Easter.<sup>64</sup> 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.<sup>65</sup> 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. The possibility of martyrdom close to Good Friday added to the drama. The plans for Easter Sunday called for kneel-ins at white churches: demonstrations in which black demonstrators would enter white churches and attempt to pray, until they were accepted, arrested or forcibly removed.<sup>66</sup>

---

62. Foster Hailey, *Dr. King Leaves Birmingham Jail*, N.Y. TIMES, Apr. 21, 1963, at 70.

63. GARROW, *supra* note 44, at 234.

64. 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. *Id.* at 231-34.

65. KING, *WHY WE CAN'T WAIT*, *supra* note 5, at 55.

66. Foster Hailey, *Negroes Defying Birmingham Writ*, N.Y. TIMES, Apr. 12, 1963, at 13; *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 1, at 738.

When Dr. King arrived in Birmingham on April 2, 1963, it was known as "the most segregated city in America."<sup>67</sup> Alabama's new Governor, George Wallace, had been inaugurated only two and a half months earlier, pledging in his inaugural address to fight for "segregation now, segregation tomorrow, segregation forever."<sup>68</sup>

By local ordinance, restaurants in Birmingham were not permitted to serve both blacks and whites.<sup>69</sup> As a result, blacks were excluded from all downtown eating places, including the lunch counters of downtown department stores.<sup>70</sup> The ordinance similarly prohibited integrated drinking fountains, bathrooms or dressing rooms. Blacks were not permitted to ride in taxi cabs used by whites.<sup>71</sup> Even ambulances, police paddy wagons and elevators were segregated.<sup>72</sup>

Local law required completely separate restroom facilities for blacks and whites,<sup>73</sup> segregation of theaters and ball parks,<sup>74</sup> racially divided jail cells,<sup>75</sup> white or black only hospitals<sup>76</sup> and cemeteries,<sup>77</sup> segregated hotels,<sup>78</sup> and an absolute ban, subject to criminal penalties, on blacks and

---

67. KING, *WHY WE CAN'T WAIT*, *supra* note 5, at 50.

68. PETER M. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 579 (1969); Brown, *supra* note 42, at 14.

69. BIRMINGHAM, ALA., GEN. CODE § 369 (1944), *reprinted in* Transcript of Record at 69, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249). 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 Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Gober v. City of Birmingham*, 373 U.S. 374 (1963) (reversing convictions for criminal trespass based on invalidated local segregation ordinance); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (holding local segregation ordinance in violation of Fourteenth Amendment); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963) (invalidating aiding and abetting statute when Court reversed convictions for criminal trespass). In April of 1963, however, the Birmingham ordinance was not only being enforced, but had recently been held valid by the Alabama Supreme Court. *Gober v. City of Birmingham*, 133 So. 2d 697 (Ala. 1961).

70. 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 5, at 54-55.

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

72. MORGAN, *supra* note 28, at 13-14 (ambulances), 119 (paddy wagons), 169 (elevators).

73. BIRMINGHAM, ALA., BLDG. CODE § 2002.1 (1944), *reprinted in* Transcript of Record at 69, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

74. Salisbury, *supra* note 71, at 28.

75. ALA. CODE §§ 4, 52, 121-123, 172, 183 (1958). These statutes were invalidated in *Washington v. Lee*, 263 F. Supp. 327, 332-33 (M.D. Ala. 1966); *see also* MORGAN, *supra* note 28, at 120.

76. KING, *Why We Can't Wait*, *supra* note 5, at 47.

77. MORGAN, *supra* note 28, at 14. In addition, it was the practice of the "white" newspapers not to print obituaries of blacks. *Id.*

78. *Id.* at 120.

whites together playing cards, checkers, or dice.<sup>79</sup> The city had given up its minor league baseball team rather than permit it to be integrated.<sup>80</sup> In 1960, a campaign had been waged to “forbid ‘Negro music’ on ‘white’ radio stations.”<sup>81</sup>

The rigid segregation of Birmingham was held together by both the power of the segregation laws and the power of racist violence. Bombings of black leaders’ homes and churches were so commonplace that Birmingham had earned the nickname “Bombingham.”<sup>82</sup> The city’s best black neighborhood was known as “Dynamite Hill.”<sup>83</sup> During the period between 1957 and 1962 there were between sixteen to twenty reported bombings in Birmingham of black churches and civil rights leaders’ homes.<sup>84</sup> In the immediate wake of the success of the Birmingham campaign, three more bomb attacks were carried out, aimed at Dr. King and his brother, Birmingham minister A.D. King.<sup>85</sup> The Kings escaped harm, but on September 15, 1963, the bombers murdered four black girls attending Sunday school at the Sixteenth Street Baptist Church—the church from which the desegregation campaign had been orchestrated.<sup>86</sup> In the demonstrations that followed the church bombing, two black teenage boys were killed, one by a police officer, the other by two white Eagle Scouts.<sup>87</sup>

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.<sup>88</sup> 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, to file the application. Connor denied the request, exclaiming: “You will not get a permit in Birmingham.

---

79. BIRMINGHAM, ALA., GEN. CODE § 597 (1944), *reprinted in* Transcript of Record at 69, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

80. Brown, *supra* note 42, at 17.

81. Salisbury, *supra* note 71, at 28.

82. A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING 347 (James M. Washington ed., 1986) (*Playboy* interview, Jan. 1965).

83. Michael Riley, *Let Me Out of Here!*, TIME, Feb. 3, 1962, at 24; Interview with Deenie Drew, Dynamite Hill resident, in Birmingham, Ala. (June 13, 1994).

84. MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 99 (1987) (20 bombings); Brown, *supra* note 42, at 13 (17 bombings); Jack Stillman, *Current of Compromise Flows Through Tension Here*, BIRMINGHAM NEWS, Apr. 14, 1963, at A2 (16 bombings).

85. BRANCH, *supra* note 1, at 793-94; GARROW, *supra* note 44, at 260.

86. The murdered girls, ages 11-14, were Addie Mae Collins, Denise McNair, Carol Robertson, and Cynthia Wesley. MORGAN, *supra* note 28, at 161-63.

87. BRANCH, *supra* note 1, at 890-91.

88. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-50 (1969) (citing BIRMINGHAM, ALA., GEN. CODE § 1159 (1944)).

ham, Alabama, to picket. I will picket you over to the City Jail."<sup>89</sup> Rev. Shuttlesworth then made a second attempt to apply for a permit from Connor; he too was refused.<sup>90</sup>

On Wednesday, April 3, the demonstrations began. Sixty-five demonstrators marched on five stores to sit-in at the lunch counters;<sup>91</sup> approximately two dozen were arrested.<sup>92</sup> On Thursday and Friday, between twenty and thirty more went to jail for sitting-in, while another thirty to forty-five, including Rev. Shuttlesworth, were arrested for a Friday march on City Hall.<sup>93</sup> It would be the first of three arrests for Shuttlesworth, who would again be arrested for attempting to pray at a white church on Easter Sunday, and later be arrested for criminal contempt.<sup>94</sup> Close to sixty more marchers were arrested on Saturday and Sunday.<sup>95</sup>

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, from \$300 to \$2,500.<sup>96</sup> Within days, the campaign's bail fund would be depleted. Dr. Walker and Rev. Shuttlesworth had been promising the volunteers that they would have to spend only a few days in jail before being bailed out. Now this promise could no longer be kept.<sup>97</sup>

On Wednesday, April 10, the city raised the stakes again. That evening, 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.<sup>98</sup> The application claimed that Dr. King and the other activists had, by their demonstrations and sit-ins, violated the parade permit laws and trespassing laws, and thus

89. Transcript of Record at 352-55, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

90. *Id.* Exs. A-B at 415-16 (telegrams between Shuttlesworth and Connor).

91. BRANCH, *supra* note 1, at 708.

92. *Id.* at 708-09; GARROW, *supra* note 44, at 236; James Spottswood, *Boutwell Warns "Outside Agitators,"* BIRMINGHAM NEWS, Apr. 4, 1963, at 7; *Negroes Get Stern Warning by Boutwell*, BIRMINGHAM NEWS, Apr. 3, 1963, at 40.

93. Foster Hailey, *10 More Negroes Seized in Birmingham Sit-ins*, N.Y. TIMES, Apr. 6, 1963, at 20.

94. Transcript of Record at 69, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

95. *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.

96. WESTIN & MAHONEY, *supra* note 45, at 68; *see also* BRANCH, *supra* note 1, at 726 (stating that white officials drafted bill to raise appeal bond).

97. Interview with Dr. Walker, *supra* note 22.

98. Transcript of Record at 25-26, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

endangered the city's peace and safety. It further alleged that without an injunction such activities would continue to disrupt the peace and safety of Birmingham.<sup>99</sup> 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.<sup>100</sup> At approximately 1:00 a.m. Thursday morning, notice of the injunction was served on Dr. King, Dr. Walker, Rev. Abernathy and Rev. Shuttlesworth.<sup>101</sup> Later that afternoon the news arrived that the bail funds had been exhausted.<sup>102</sup>

Dr. King had previously announced that on Good Friday, April 12, he would personally lead a march from the Sixteenth Street Baptist Church, and that he would go to jail. But now, given that there was no money left for bail, Dr. King worried about whether it would be responsible to go to jail. He was the only proven fund raiser among the leaders.

On Good Friday morning, Dr. King met with his closest advisors in Room 30 of the Gaston Motel to decide what action to take. The prudent course seemed clear: put off the march until more bail money could be raised, while moving to set aside the injunction as improperly granted.<sup>103</sup> Dr. King felt trapped because he did not want to go back on his pledge, but also did not want to lead people into jail without the ability to bail them out. His father recommended that he obey the injunction and delay the march. A number of local community leaders agreed.<sup>104</sup> Rev. Young and others said they would support whatever decision he made. After all was said by the various leaders, Dr. King 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."<sup>105</sup> His father again recommended putting off the march, but Dr. King would not be dissuaded, explaining, "If we obey this injunction, we are out of business."<sup>106</sup> Rev.

---

99. *Id.* at 31-37.

100. *Id.* at 37-38.

101. WESTIN & MAHONEY, *supra* note 45, at 72; Hailey, *supra* note 62, at 13; *More Racial Moves Set*, BIRMINGHAM NEWS, Apr. 11, 1963, at 8.

102. KING, WHY WE CAN'T WAIT, *supra* note 5, at 71.

103. I have previously described this discussion as being motivated by concern about the injunction as well as concern about the lack of bail money. See Oppenheimer, *supra* note \*, at 811. From my discussions with Dr. Walker on March 10, 1994, Rev. Shuttlesworth on June 10-11, 1994, and from my reading of additional eye-witness accounts, I have been persuaded that although compliance with the injunction was discussed, the more significant motivation for the discussion was the lack of bail money.

104. BRANCH, *supra* note 1, at 729; KING, WHY WE CAN'T WAIT, *supra* note 5, at 72-73; YOUNG, *supra* note 40, at 75-77.

105. KING, Why We Can't Wait, *supra* note 5, at 73.

106. BRANCH, *supra* note 1, at 728-30.

Young has pointed to this decision as the “beginning of [King’s] true leadership.”<sup>107</sup>

Dr. King, Dr. Walker, Rev. Abernathy, Rev. 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 Dr. King and Rev. Abernathy. As Rev. Shuttlesworth’s lawyers later described it to 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.<sup>108</sup>

Dr. King, in handcuffs, was dragged by his belt to a paddy wagon and taken to the Birmingham jail.<sup>109</sup>

## V. The Letter from Birmingham Jail

When Dr. King arrived at the jail, he was booked and immediately placed in solitary confinement. 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.<sup>110</sup> The clergymen criticized “outsiders” coming to Birmingham without cause and characterized the demonstrations as “extreme measures” which “incite hatred and violence.”<sup>111</sup> They called on the black community to engage in negotiations rather than demonstrations, and criticized the Birmingham campaign as “unwise and untimely.”<sup>112</sup>

Dr. King used the edges of the newspaper, and a later paper smuggled in by his attorney, to write a reply to the white ministers. That essay, the *Letter from Birmingham Jail*,<sup>113</sup> is widely regarded as Dr. King’s greatest written work, and the most important statement of principles of the civil

---

107. VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950s THROUGH THE 1980s, at 130 (Henry Hampton & Steve Fayer eds., 1990); see also YOUNG, *supra* note 40, at 78; Telephone interview with Andrew Young (Apr. 5, 1994).

108. Petition for Writ of Certiorari at 5-6, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (No. 69-42) (citations omitted).

109. Foster Hailey, *Dr. King Arrested at Birmingham*, N.Y. TIMES, Apr. 13, 1963, at 1; see WESTIN & MAHONEY, *supra* note 45, at 83-84.

110. *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.

111. *Id.*

112. *Id.*

113. King, *Letter From Birmingham Jail*, *supra* note 5.

rights era. The letter bears reading in its entirety; it will be only briefly summarized here.

Dr. 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 had invited him there. Turning to a religious justification, he invoked the Apostle Paul, explaining: "I am in Birmingham because injustice is here."<sup>114</sup>

The ministers had deplored the sit-ins and demonstrations; Dr. 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 in which the merchants had agreed to remove their "Jim Crow" signs from their stores but broke their promises. How then, could the white leadership be brought to the bargaining table to negotiate in good faith? Dr. 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."<sup>115</sup>

Turning to the question of timing, Dr. 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."<sup>116</sup>

Dr. King then turned to his own experiences, and those of his children, to passionately and personally describe the pain caused by racism and segregation, and explain why blacks could wait no longer.

Then, in the section of greatest interest to the study of law, Dr. King turned to a natural law justification for demonstrations that violate the law.<sup>117</sup> There are, he argued, two types of laws: just and unjust. He advo-

---

114. *Id.* at 836. For an analysis of the biblical allusions in *Letter From Birmingham Jail*, see David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2193-2201 (1989).

115. King, *Letter From Birmingham Jail*, *supra* note 5, at 838.

116. *Id.* at 838-39.

117. See Luban, *supra* note 114, at 2201-05 (analyzing King's natural law theories in light of the *Letter From Birmingham Jail*).

cated obedience of just laws, but as to unjust laws, he invoked St. Augustine for the principle that "an unjust law is no law at all."<sup>118</sup> How did Dr. 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.<sup>119</sup> 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.<sup>120</sup> 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."<sup>121</sup>

Dr. 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.<sup>122</sup>

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

---

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

119. King, *Letter From Birmingham Jail*, *supra* note 5, at 840.

120. *Id.*; see also *United States v. Carolene Prods. 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 have less legitimacy).

121. King, *Letter From Birmingham Jail*, *supra* note 5, at 840.

122. *Id.* at 841.

## VI. The Children's Crusade

At the time of his arrest, Dr. King had been charged with marching without a permit in violation of the parade ordinance. Then, on the Monday following his arrest, Dr. King, Rev. Shuttlesworth, Dr. Walker, Rev. Young and Rev. Abernathy, as well as eight local ministers and one lay activist, were indicted for contempt of court, based upon their violation of the injunction.<sup>123</sup> That same day, Dr. King's lawyers from the NAACP Legal Defense Fund moved to dissolve the temporary injunction; the court determined it would first consider the matter of whether the defendants had committed contempt of court by breaching the order. Their trial was set to begin the following Monday, April 22, 1963. In order to prepare for trial, Dr. King accepted bail funds raised by Harry Belafonte and posted bond on Saturday, April 20, 1963.<sup>124</sup>

The trial began in a segregated courtroom on April 22; it was over by April 26. As expected, Dr. King and ten of the other ministers were convicted of criminal contempt and sentenced to five days in jail.<sup>125</sup> Hanging over 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, Dr. King knew that a dramatic new step was needed. Rev. Shuttlesworth announced that on the following Thursday, May 2, there would be a massive march on City Hall. However, 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 and executive staff member Dorothy Cotton offered a solution. They 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. Virtually all of the local leaders opposed permitting children younger than

---

123. The other defendants were A.D. King, Ed Gardner, Calvin Woods, Abraham Woods, Jr., Johnny Louis Palmer, J.W. Hayes, N.H. Smith, Jr., John Thomas Porter, T.L. Fisher and James Bevel. *Reprinted in* Transcript of Record at 1, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249). The charges against Ed Gardner, Calvin Woods, Abraham Woods, Jr. and Johnny Louis Palmer were later dismissed upon finding that they did not receive proper notice of the injunction. *Id.* at 20.

124. BRANCH, *supra* note 1, at 735; KING, *WHY WE CAN'T WAIT*, *supra* note 5, at 75.

125. *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. 1965).

college-age from participating,<sup>126</sup> but with few adults available for arrest, Dr. King saw that here alone were the troops needed to fill the streets and the jail. Their parents could not make the sacrifice required to march; the children, without employment or family responsibilities, could. Dr. King turned to the black children of Birmingham to save the campaign.

On Tuesday, April 30, the city denied the permit application for Thursday's march. Anyone marching would be subject to arrest, and Dr. 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 minors if the children marched.<sup>127</sup> That night Rev. Bevel addressed the mass meeting to announce that the march would nevertheless go forward as a "children's march."<sup>128</sup>

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."<sup>129</sup> 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 group of fifty singing students marched from the church, and then another, and another. In wave after wave, the young marchers overwhelmed the police.<sup>130</sup> 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.<sup>131</sup> Almost one thousand children were arrested.<sup>132</sup> They submitted to arrest peacefully, singing and praying as they were taken off to jail.<sup>133</sup>

The following day one thousand more children volunteered to march and be jailed. But Birmingham's jails were filled far past their capacity. Dr. King, Dr. Walker and Rev. Shuttlesworth'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. As the students emerged from the

---

126. BRANCH, *supra* note 1, at 752-53; Interview with Deenie Drew, *supra* note 83. Dr. Walker has a different recollection; he believes that there was no significant opposition to the children's participation. Interview with Dr. Walker, *supra* note 22.

127. BRANCH, *supra* note 1, at 753. Bevel already had 80 such charges pending in Jackson, Mississippi. *Id.*

128. *Id.* at 754.

129. *Id.* at 756.

130. *Id.* at 756-67.

131. See Foster Hailey, *500 Are Arrested in Negro Protest at Birmingham*, N.Y. TIMES, May 3, 1963, at 1 [hereinafter Hailey, *500 Are Arrested*].

132. Although the New York Times estimated the number arrested at 500, Wyatt Walker determined from his jail registry that 958 children were arrested. BRANCH, *supra* note 1, at 758.

133. Hailey, *500 Are Arrested*, *supra* note 131, at 1.

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, creating a stream of water with the power to strip bark from a tree at one hundred feet.<sup>134</sup> 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.<sup>135</sup> Others had their clothes torn from their backs by the pressure.<sup>136</sup> 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 more children were arrested. However, the arrests only exacerbated the authorities' problems; two hundred and fifty children were arrested that day,<sup>137</sup> but there was no room for more prisoners. In consultation with Connor, police canine units were brought in and unleashed on the crowd. Three young demonstrators suffered serious bites which required hospitalization.<sup>138</sup> 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 Dr. King locally for his "poor timing."<sup>139</sup> But that night's television news and the following morning's newspapers graphically told the rest of the country of the young marchers' bravery and the police violence.<sup>140</sup> 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

---

134. BRANCH, *supra* note 1, 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 [hereinafter Sitton, *Rioting Negroes*].

135. BRANCH, *supra* note 1, at 759.

136. GARROW, *supra* note 44, at 249.

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

138. *Id.*

139. See *End Demonstrations, Foley Urges King*, BIRMINGHAM NEWS, May 4, 1963, at 2. Rev. Albert S. Foley, S.J., chairman of the Alabama Advisory Committee to the 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 beseeched 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.*

140. See, e.g., Hailey, *Dogs and Hoses*, *supra* note 137, at 1; see generally BRANCH, *supra* note 1, at 760-64 (describing media attention to events in Birmingham); GARROW, *supra* note 44, at 250-51.

eye from impatient zealots to peaceable martyrs. In response to the police violence, President Kennedy stated that the newspaper photographs had made him "sick."<sup>141</sup> Burke Marshall, head of the Department of Justice Civil Rights Division, was dispatched to Birmingham to attempt to mediate a resolution,<sup>142</sup> and Attorney General Kennedy called on both sides to negotiate.<sup>143</sup>

The fire hoses were used again on Saturday and a few hundred more students were arrested.<sup>144</sup> Sunday was spent in planning prayer meetings and kneel-ins at twenty-one white churches; an adult "prayer march" was permitted on the condition it be limited to the black portion of town.<sup>145</sup>

On Monday morning Burke Marshall tried to persuade Dr. King to call off the demonstrations until the newly elected city government could attempt reforms.<sup>146</sup> Dr. King argued that all of the demands were aimed at the merchants and could be met without government involvement. The demonstrations would continue.

By that afternoon, Connor knew that the publicity caused by the police violence was a bigger problem for him than the jail overcrowding. With the jail packed far beyond its capacity, the town's fairgrounds were opened as a temporary concentration camp; the police pledged to peacefully arrest those marchers who submitted non-violently.<sup>147</sup> Hundreds more children marched from the church to be carried away in 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.<sup>148</sup> Over one thousand were arrested in a few hours' time, including some two hundred picketers arrested in the downtown business district.<sup>149</sup> Over two thousand five hundred were now in jail, many in open-air pens at the fairgrounds;<sup>150</sup> a hard rain would fall that

---

141. GARROW, *supra* note 44, at 250.

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

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

144. Hailey, *U.S. Seeking Truce*, *supra* note 142, at 1.

145. 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.

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

147. BRANCH, *supra* note 1, at 770.

148. *Id.*

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

150. *See id.*; GARROW, *supra* note 44, at 252. A non-bylined 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

evening.<sup>151</sup> Rev. Bevel announced that the following day he would have six thousand more volunteers ready to march to jail.<sup>152</sup>

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 black neighborhood adjoining the church, informing them that they could march without arrest within the ghetto because there was no more room in the jails. But 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.<sup>153</sup>

With hundreds of demonstrators now behind police lines, many police units turned and headed for downtown.<sup>154</sup> As soon as they left, thousands of demonstrators emerged from the church and surged past the remaining police, heading for downtown.<sup>155</sup> By early afternoon, over three thousand protesters had gathered in the business district.<sup>156</sup> Unable to arrest them, the police again brought out the water cannons, as well as a tank-like armored car. Among those blasted by the hoses was Rev. Shuttlesworth, who was slammed into and then pinned against a brick wall, breaking his ribs. Learning that he had been taken to the hospital by ambulance, Connor commented: "I wish they'd carried him away in a hearse."<sup>157</sup> For most of the day, all commerce was paralyzed. The boycott was now a complete success; not only were Birmingham's black residents boycotting the downtown stores, but by circumstance, so were the whites.

Throughout 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 Dr. King and talk.<sup>158</sup> Late on the night of May 7, the leaders agreed to begin negotiations and selected a negotiating committee. At midnight, they sought out Dr. King. By 4:00 a.m., they had drawn the blueprint for a settlement.<sup>159</sup>

---

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.

151. BRANCH, *supra* note 1, at 772; GARROW, *supra* note 44, at 252.

152. BRANCH, *supra* note 1, at 771.

153. *Id.* at 775; GARROW, *supra* note 44, at 254.

154. BRANCH, *supra* note 1, at 776.

155. *Id.*

156. *Id.* at 777.

157. Sitton, *Rioting Negroes*, *supra* note 134, at 28.

158. BRANCH, *supra* note 1, at 780.

159. *Id.* at 781.

From Tuesday night through Friday afternoon the three-way negotiations continued, with Marshall and Attorney General Robert Kennedy working feverishly to keep the civil rights leaders and the white business community together. The negotiations almost fell apart twice on Wednesday. First, Kennedy had hoped to announce a moratorium on all demonstrations until the talks were completed, but Rev. Shuttlesworth objected, and threatened to put five thousand demonstrators in the streets in response to the announcement; a less dramatic statement was issued, announcing a brief pause in the demonstrations to give the white merchants an opportunity to settle.<sup>160</sup> Then, Dr. King and Rev. Abernathy were taken from a strategy meeting at the Gaston Motel and arrested for failing to post an appeal bond on their earlier convictions. Rev. Shuttlesworth immediately began planning another march, but Dr. King was bailed out and the demonstration was delayed.<sup>161</sup>

Discussions continued throughout the day on Thursday, and on Friday, May 10, a settlement was announced. The fitting rooms at the stores would be integrated by Monday. A biracial committee would be appointed within fifteen days to discuss desegregation of the schools, reopening of the parks and hiring of black city employees. All public restrooms and water fountains would be integrated within thirty days. The lunch counters would be integrated and blacks would be hired as salesclerks within sixty days.<sup>162</sup> With the aid of the Kennedy administration and several major labor unions, bail for the two thousand demonstrators still in jail had been raised and all would be released immediately.<sup>163</sup>

## VII. President Kennedy's Decision to Introduce a Civil Rights Act

On May 20 and 21, 1963, President Kennedy met with his cabinet to determine how he should respond to change in public consciousness stemming from Birmingham. As they met, direct action campaigns were beginning all over the country. Dr. King was asked to speak everywhere, and huge crowds attended rallies everywhere he spoke. Ten thousand appeared in Cleveland, fifty thousand in Los Angeles, and thousands more in Chi-

---

160. Claude Sitton, *Peace Talks Gain at Birmingham in A Day of Truce*, N.Y. TIMES, May 9, 1963 at 1 [hereinafter Sitton, *Peace Talks Gain*]; Interview with Rev. Shuttlesworth, *supra* note 15.

161. Interview with Rev. Shuttlesworth, *supra* note 15.

162. GARROW, *supra* note 44, at 258-59.

163. *Id.* at 258; Sitton, *Peace Talks Gain*, *supra* note 160, at 1, 17 (explaining purpose of biracial committee); *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).

cago, Louisville and San Francisco.<sup>164</sup> President 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.<sup>165</sup> 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

.....

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. . . .

This situation changed suddenly and dramatically in May, 1963, when trouble erupted in Birmingham, Alabama. 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 indiscriminating 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.<sup>166</sup>

On June 11, 1963, President Kennedy announced to the nation that he would be sending Congress a major civil rights bill; he directly attributed it to the events of Birmingham.<sup>167</sup> On June 19, 1963, he sent to Congress the bill which was passed the following year as the Civil Rights Act of 1964.<sup>168</sup> 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, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."<sup>169</sup> Title VII broadly prohibits discrimination in employ-

---

164. BRANCH, *supra* note 1, at 803-06.

165. *Id.* at 807-08. Kennedy initially considered proposing a federal law barring civil rights demonstrations. *Id.* at 884-85.

166. Norbert A. Schlei, *Foreward* to BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* at vii-viii (1976).

167. *Transcript of the President's Address*, N.Y. TIMES, June 12, 1963, at 20.

168. Schlei, *supra* note 166, at viii-ix.

169. 42 U.S.C. § 2000a (1988).

ment, based on race, color, sex, religion, or national origin.<sup>170</sup> In tandem, the two sections meet all of the express goals of the Birmingham desegregation campaign.

The bill was passed by Congress in the wake of John F. Kennedy's assassination. On July 2, 1964, the Civil Rights Act of 1964 was signed into law by President Lyndon Johnson.

### VIII. The *Walker* Case

There may be no better illustration of the contrast between the fast moving, direct action ministerial campaigns and the slow moving, law reform campaigns than the resolution of Dr. King, Dr. Walker and Rev. Shuttlesworth's convictions. Each was convicted of two separate crimes—violation of the Birmingham parade ordinance and contempt of court. Sentencing for the fifteen hundred parade ordinance convictions was stayed while one conviction, that of Rev. Shuttlesworth, was appealed as a test case to the Alabama Court of Appeals. The far smaller number of contempt convictions were appealed directly to the Alabama Supreme Court, with Dr. Walker the first-named appellant. As the civil rights movement pressed forward, through the passage of the Civil Rights Act of 1964, to the 1964 Democratic Convention and the seating of the Mississippi Freedom Democrats, through Selma and the passage of the Voting Rights Act, the contempt convictions of Dr. King, Dr. Walker and Rev. Shuttlesworth sat quietly in the Alabama Supreme Court. On December 9, 1965, the court issued its decision in *Walker v. City of Birmingham*.<sup>171</sup> Written by avowed segregationist Justice James Coleman,<sup>172</sup> the decision held that before violating the injunction the civil rights leaders should have sought a hearing before the judge who issued the injunction, or brought an appeal to a higher court. Until the issuing court's decision was reviewed, it was presumptively valid. By failing to seek review before violating the court order, they had waived their opportunity to challenge the injunction's legitimacy. The convictions and sentences of Dr. King, Rev. Abernathy, Dr. Walker and Rev. Shuttlesworth were affirmed.<sup>173</sup>

Represented by the NAACP Legal Defense & Education Fund, Dr. King and the other *Walker* defendants sought review in the United States Supreme Court. Their argument was two-fold. First, the injunction relied on a parade ordinance which was patently unconstitutional under the First

---

170. *Id.* §§ 2000e to 2000h-6 (1988).

171. 181 So. 2d 493 (Ala. 1965).

172. See WESTIN & MAHONEY, *supra* note 45, at 178-80 ("I would rather close every school from the highest to the lowest before I would go to school with colored people.").

173. 181 So. 2d at 493.

Amendment, and the injunction's broad prohibition of any public picketing, marching or prayer was a further violation of their free speech rights. Second, the validity of the injunction was reviewable in the contempt hearing because there was no earlier time for a contested review of its legitimacy, since the order had been granted *ex parte*. The contempt hearing was the defendants' first opportunity to persuade a judge that the order should not have been granted.<sup>174</sup> The city's response, urging the Court to deny the writ of certiorari, relied on the collateral bar rule.<sup>175</sup> This rule requires a party objecting to the terms of an injunction to challenge it directly, through reconsideration in the issuing court or appeal to a higher court, rather than mounting a collateral challenge in the contempt hearing. The rule was well established both as a rule of Alabama law,<sup>176</sup> and as the rule followed by the federal courts on both review of state court injunctions in those states that followed the rule,<sup>177</sup> and on review of federal court injunctions.<sup>178</sup>

The Court granted the writ of certiorari, and the case was set to be argued on March 13, 1967.<sup>179</sup> Jack Greenberg of the NAACP Legal Defense Fund addressed the Court first. He was peppered with questions focusing on the collateral bar rule; if application of the rule was a valid exercise of Alabama law, the Court would not permit an examination of the validity of the injunction, nor of the statute upon which the injunction relied. Thurgood Marshall had by this time left the Defense Fund, having been named United States Solicitor General. He authored a brief on behalf of the United States supporting Dr. Walker, Dr. King and the other civil rights leaders. His deputy, Louis Claiborne, argued at the oral argument that the collateral bar rule should not be applied to the Birmingham case. To do so would trample the protesters' First Amendment rights.

Responding for the city, City Attorney John Breckenridge quoted from a press release issued by Dr. King and Rev. Shuttlesworth which mirrored the arguments of the *Letter From Birmingham Jail*; Breckenridge used it to establish Dr. King's "lawlessness," stating: "Before this Court for the first time is a clear-cut statement of a theory that we do not obey a law which we believe unnecessary. . . . Just as in good conscience we cannot obey unjust

---

174. Petition for Writ of Certiorari, in Transcript of Record at 29, *Shuttlesworth v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

175. City's opposition to Writ of Certiorari, in Transcript of Record at 13, *Shuttlesworth v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

176. *Fields v. City of Fairfield*, 143 So. 2d 177 (Ala. 1962).

177. *Howat v. Kansas*, 258 U.S. 181 (1922).

178. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 289-95 (1947); *In re Debs*, 158 U.S. 564, 572-73 (1895).

179. The description of the argument relies on WESTIN & MAHONEY, *supra* note 45, at 224-37.

laws, neither can we respect the unjust use of the courts."<sup>180</sup> Pressed by Chief Justice Warren on the illegitimacy of "Bull" Connor's refusal to grant a march permit, Breckenridge moved the argument back to the collateral bar rule:

Mr. Chief Justice, I would say that you are correct if this is a prosecution for violation of an ordinance.<sup>181</sup> But not if it goes to the higher prosecution for contempt for violating a court order. A court order commands greater respect and must under our system of government command greater respect than an ordinance. If this order is wrong, come in and tell the judge.<sup>182</sup>

Through March, April and May of 1967, as the Court deliberated and drafted the *Walker* decision, the events of Birmingham in 1963 must have seemed far removed. While President Johnson had succeeded in passing civil rights acts in 1964 and 1965, the Civil Rights Act of 1967 had failed to overcome a Senate filibuster. Dr. King had announced on March 24 that he was making his opposition to the Vietnam war a major priority, and had led a huge anti-war march to the United Nations building in New York on April 15.<sup>183</sup> Among those who criticized Dr. King for his anti-war protests was Solicitor General Thurgood Marshall and NAACP President Roy Wilkins.<sup>184</sup>

On June 12 the Court issued its decision, upholding the convictions.<sup>185</sup> The Court refused to reach the issue of the legitimacy of the injunction, holding that under the collateral bar rule, the defendants were required to assert a direct attack on the court's order.<sup>186</sup> 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 marches, although it refers to the use of sit-ins and kneel-ins,<sup>187</sup> 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,"<sup>188</sup> 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 order was easily restored by the marchers' arrests, and that they

---

180. The argument is excerpted in WESTIN & MAHONEY, *supra* note 45, at 219-37.

181. This argument suggests the outcome of Shuttlesworth's appeal of his conviction for parading without a permit. See *infra* text accompanying notes 200-09.

182. WESTIN & MAHONEY, *supra* note 45, at 237.

183. The author participated in this march.

184. WESTIN & MAHONEY, *supra* note 45, at 242.

185. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

186. *Id.* at 316-17.

187. *Id.* at 309.

188. *Id.*

were separately convicted for violating the parade ordinance.<sup>189</sup> The descriptions of the issuance of the injunction, and the decision to disobey it, are presented absolutely bereft of political or social context.

Justice Stewart's majority opinion tells the story of Birmingham entirely from the point of view of the city's white officials.<sup>190</sup> With the demonstrators' voices silenced, an uninformed reader could conclude that Dr. King and his associates were the leaders of 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. 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.

The Court reasoned that to permit them to violate the injunction and then litigate the constitutionality of the parade ordinance would promote anarchy. As if criticizing the title of Dr. King's book about Birmingham, *Why We Can't Wait*, while suggesting that the laws of Birmingham were civilized, the majority ironically 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."<sup>191</sup>

Chief Justice Warren,<sup>192</sup> Justice Douglas<sup>193</sup> and Justice Brennan<sup>194</sup> each filed a dissent. Each dissent rejected the majority's characterization of the facts and adoption of the collateral bar rule. Each joined the others' dissents,<sup>195</sup> and Justice Fortas joined in all three. The Chief Justice began his dissent by stating:

Petitioners in this case contend that they were convicted under an ordinance that is unconstitutional on its face because it submits their First and Fourteenth Amendment rights to free speech and peaceful assembly to the unfettered discretion of local officials. They further contend that the

---

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

190. See Luban, *supra* note 114, at 2165-67 (discussing Court's point of view in its factual narrative in *Walker*).

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

192. *Id.* at 324-27 (Warren, C.J., dissenting).

193. *Id.* at 334-38 (Douglas, J., dissenting).

194. *Id.* at 338-42 (Brennan, J., dissenting).

195. See *id.* at 324 (Justice Douglas, not joining in Chief Justice Warren's dissent).

ordinance was unconstitutionally applied to them because the local officials used their discretion to prohibit peaceful demonstrations by a group whose political viewpoint the officials opposed. The Court does not dispute these contentions, but holds that petitioners may nonetheless be convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction—issued *ex parte* without prior notice or hearing on the request of the Commissioner of Public Safety—prohibiting all persons having notice of the injunction to violate the ordinance without any limitation of time. I dissent because I do not believe that the fundamental protections of the Constitution were meant to be so easily evaded, or that ‘the civilizing hand of law’ would be hampered in the slightest by enforcing the First Amendment in this case.<sup>196</sup>

Chief Justice Warren then explained the facts of the non-violent political protests of Birmingham and the lawless response of the City of Birmingham. He convincingly demonstrated how the collateral bar rule, if it had any legitimacy at all, should not have been applied to the Birmingham case, concluding:

[T]here is only one apparent reason why the city sought this injunction and why the court issued it; to make it possible to punish petitioners for contempt rather than for violating the ordinance, and thus to immunize the unconstitutional statute and its unconstitutional application from any attack. I regret that this strategy has been so successful.<sup>197</sup>

In a similar vein, Justice Brennan complained:

Under cover of exhortation that the Negro exercise ‘respect for judicial process’ the Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution. And the Court does so by letting loose a devastatingly destructive weapon for suppression of cherished freedoms heretofore believed indispensable to maintenance of our free society.<sup>198</sup>

On October 30, 1967, Dr. King, Dr. Walker and Rev. Abernathy returned to Birmingham to serve their sentences. As they prepared to board the plane to Birmingham, a reporter asked Dr. King how he felt about the Supreme Court requiring him to go back to Birmingham to serve the sentence. Dr. King explained that he had been in jail many times and that he preferred not to go. But then, mocking the Court, he conceded that given the success of the Birmingham campaign with the passage of the Civil Rights Act, his jail sentence was “a small price to pay.”<sup>199</sup> Less than six months later, Dr. King would be dead.

---

196. *Id.* at 324 (Warren, C.J., dissenting).

197. *Id.* at 334 (Douglas, J., dissenting).

198. *Id.* at 338 (Brennan, J., dissenting).

199. WESTIN & MAHONEY, *supra* note 45, at 2.

## IX. The *Shuttlesworth* Case

On March 7, 1968, a few weeks before Dr. King's assassination, the legality of the other Birmingham convictions, for violation of the parade ordinance, came before the Court.<sup>200</sup> Over fifteen hundred protesters had been convicted of marching without a permit during the six weeks of Project C, but their sentences were stayed pending the outcome of an appeal of Rev. Shuttlesworth's conviction. The appeal was first heard in the Alabama Court of Appeals, which, overturned his conviction and sentence of ninety days hard labor.<sup>201</sup> The appellate court found that the ordinance gave city officials impermissibly broad discretion to regulate speech and that it was discriminatorily enforced by Birmingham's officials.<sup>202</sup>

In *Walker*, Justice Stewart had pointed to this decision to support his position that the protesters should have moved to dissolve the Birmingham injunction before marching; it suggested that the Alabama courts were not deaf to their arguments. However, one month after the *Walker* decision became final, and less than a week after the *Walker* sentences were served, the Alabama Supreme Court reversed the Court of Appeals and reinstated Rev. Shuttlesworth's sentence.<sup>203</sup> Despite the inapplicability of the collateral bar rule to a prosecution for violating an ordinance, as opposed to violating an injunction, the Alabama Supreme Court relied on *Walker*. Misapplying *Walker*, the court stated that the majority in *Walker* rejected the challenge to the parade ordinance as void on its face or discriminatorily enforced, and that *Walker* thus supported the conclusion that the ordinance was validly applied.<sup>204</sup> The Court concluded that it "may have misinterpreted the opinions in [*Walker* and *Cox v. New Hampshire*]. If so, we will no doubt be set straight."<sup>205</sup>

A few weeks after Dr. King's assassination, the Supreme Court granted the writ of certiorari, agreeing to hear Rev. Shuttlesworth's appeal.<sup>206</sup> It would be the last, so far, of Rev. Shuttlesworth's many cases before the Court. The case was argued on November 18, 1968, with Jack Greenberg of the NAACP Legal Defense Fund again arguing for Rev. Shuttlesworth, and City Attorneys Earl McBee and John Breckenridge again appearing for the City of Birmingham. The opinion was again written by

---

200. Petition for Writ of Certiorari, in Transcript of Record at 69, *Shuttlesworth v. City of Birmingham*, 388 U.S. 307 (1967) (No. 67-249).

201. *Shuttlesworth v. City of Birmingham*, 180 So. 2d 114 (Ala. Ct. App. 1965), *rev'd*, 281 Ala. 542 (1967), *rev'd*, 394 U.S. 147 (1969).

202. *Id.*

203. *Shuttlesworth v. City of Birmingham*, 206 So. 2d 348 (Ala. 1967), *rev'd*, 394 U.S. 147.

204. *Id.* at 352-53.

205. *Id.* at 354.

206. *Shuttlesworth v. City of Birmingham*, 390 U.S. 1023 (1968) (granting writ).

Justice Stewart, but this time on behalf of eight justices.<sup>207</sup> The ninth did not participate, presumably because of his close association with the Legal Defense Fund. He was the newly appointed replacement for retired Justice Tom C. Clark, the Fund's first chief counsel, Thurgood Marshall.

Justice Stewart's opinion begins with a description of the Good Friday march that reads like the *Walker* dissenters' depiction rather than his own. Gone is the acerbic tone directed at the marchers' tactics and the solicitous concerns about the need of the city officials to maintain order in the face of unruly crowds.<sup>208</sup> Moving to the legal considerations, the opinion quickly concludes that the Birmingham ordinance gave city officials the kind of overly broad discretion which was constitutionally impermissible.

'It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' [citation omitted] And our decisions have made it clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.<sup>209</sup>

Rev. Shuttlesworth's conviction was reversed, requiring the reversal of the convictions of the other fifteen hundred protesters whose sentences had been stayed pending the outcome of his case. The last of the 1963 Birmingham cases had been resolved.

## Conclusion

The story of Birmingham is a story of moral and physical courage—courage by leaders like Dr. King, Rev. Shuttlesworth and Dr. Walker, courage by the children of Birmingham who faced the police dogs and fire hoses, and courage by their parents, who resisted the immorality of segregation. In the end, that courage made possible a dramatic change in public opinion, which in turn made possible the change in the law.

As the story of the Birmingham desegregation campaign fades from memory, so too do its lessons. To most of today's generation of law professors, 1963 is the recent past. But to most of our current students, and an increasing majority of the population, it is nearly ancient history. As a result, our country is losing the sense of connection between the enforcement of the Civil Rights Act, and the utter deprivation of human rights that gave

---

207. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

208. *Id.* at 148-49.

209. *Id.* at 151.

rise to the great struggle for freedom and dignity which led to its enactment. As I write this, the voters of California are being asked to repeal parts of this State's civil rights laws and to prohibit all affirmative action by State and local government. If the memory of Birmingham were fresh, the possibility of such a prohibition would be unthinkable. Only if we commit ourselves to the preservation of our civil rights history, can we hope to commit ourselves to a civil rights future.

