

Northwestern Journal of Law & Social Policy

Volume 10

Issue 3 *Special Symposium Issue: Martin Luther King's
Lawyers: From Montgomery to the March on
Washington to Memphis*

Article 1

Fall 2016

A "Notorious Litigant" and "Frequenter of Jails": Martin Luther King, Jr., His Lawyers, and the Legal System

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Recommended Citation

Leonard S. Rubinowitz, Michelle Shaw, and Michal Crowder, *A "Notorious Litigant" and "Frequenter of Jails": Martin Luther King, Jr., His Lawyers, and the Legal System*, 10 Nw. J. L. & Soc. POL'Y. 494 (2016).
<http://scholarlycommons.law.northwestern.edu/njlsj/vol10/iss3/1>

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**Symposium: Martin Luther King’s Lawyers: From Montgomery
to the March on Washington to Memphis—A Symposium
Commemorating the Contributions of Dr. Martin Luther King’s
Lawyers**

**A “NOTORIOUS LITIGANT” AND
“FREQUENTER OF JAILS”:
MARTIN LUTHER KING, JR., HIS
LAWYERS, AND THE LEGAL SYSTEM**

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with

Michelle Shaw[†] & Michal Crowder[‡]

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* Professor of Law, Northwestern University Pritzker School of Law. The authors acknowledge the generous support from the Northwestern University Pritzker School of Law Faculty Research Program. The authors wish to express their appreciation to research assistants Sandra Abrevaya, Samuel Aintablian, Allyson Bain, Evan Bianchi, Margarita Botero, Sylvia Baraniewski, Connor Burke, Alan Campbell, Nathan Cao, Nicholas Carson, Micah Chavin, Patrick Cordova, Paige Cunningham, Emily Damrau, Tal Druyan, Adanne Ebo, Robert Garsson, Leesa Haspel, Kathryn Hogg, Katherine Klein, Jeff Kolemey, Michael Lowes, Caitlin Martini, Lilly Mitelman, Brian O’Connell, Christina Otero, Laura Pone, Iulia Padeanu, Richard Scinteie, Reena Sikdar, Julie Silverstein, Joline Smith, Jamie Sommer, Ryan Sugg, Corey Walker, and Jordan Woods. A special thanks to Josh Hutton for his exceptional work in bringing this project to fruition. Thanks also to *Northwestern Journal of Law and Social Policy* editors Shirin Savliwala, Emma Olson, Leesa Haspel, and Noah Brozinsky; Kimberly Clair Seymour, for her extraordinary job chairing the symposium: Martin Luther King’s Lawyers: From Montgomery to the March on Washington to Memphis—A Symposium Commemorating the Contributions of Dr. Martin Luther King’s Lawyers, Oct. 31, 2014, Northwestern University Pritzker School of Law, Chicago, Illinois; librarians Pegeen Bassett and Marcia Lehr; Tim Jacobs, for logistical assistance; and Shari Dunn, for helpful comments.

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“I have a deep and abiding admiration for the legal profession and the tremendous role it has played in the service of the cause with which I have been identified. The road to freedom is now a highway because lawyers throughout the land, yesterday and today, have helped clear the obstructions, have helped eliminate roadblocks, by their selfless, courageous espousal of difficult and unpopular causes.”—*Martin Luther King, Jr.*¹

INTRODUCTION

When Martin Luther King, Jr. started college, he considered becoming a lawyer.² When he abandoned that idea in favor of the ministry, he could not have imagined the central role that lawyers would play in his life.

A decade into his career, Dr. King observed: “It is common knowledge that I have had a little something to do with lawyers since the 1955 Montgomery bus boycott.”³ He then described himself as a “notorious litigant” and a “frequenter of jails.”⁴ Notwithstanding his core philosophical, moral, and strategic commitment to nonviolent direct action, Dr. King had an extraordinary amount of interaction with lawyers and with the legal system, though often not by choice.

Dr. King's activism began and ended with lawyers and the courts. From the 1955 arrest and prosecution of Rosa Parks in Montgomery that jump-started his career,⁵ to the 1968 court victory in the Memphis Sanitation Workers Strike on the day of his death,⁶ lawyers served as a nearly constant companion—a fact of his activist life. The lawyers' roles depended on the activists' and their opponents' strategies and tactics, as well as on the lawyers' own creativity and innovation.

¹ Martin Luther King, Jr., *Foreword* to WILLIAM M. KUNSTLER, *DEEP IN MY HEART*, at xxi (1966).

² DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 37 (1st Perennial Classics ed. 2004). The intellectual challenge, the chance to serve, and the opportunity to get out from under his father's large shadow drew Dr. King to the law. *See id.* When asked what he would have done if he had not entered the ministry, Dr. King said, “I started out as a pre-law student. I was interested in going into law At one time I thought about medicine . . . but then after entering college I felt that I wanted to go into law.” Interview by Eleanor Fischer with Dr. Martin Luther King, Jr., in Atlanta, Ga. (Nov. 22, 1961), <http://www.wnyc.org/story/261384-previously-unreleased-interviews-reverend-dr-martin-luther-king-jr/>.

³ King, *supra* note 1, at xxi.

⁴ *See id.*

⁵ *See* discussion *infra* Section II.A.1.i.

⁶ *See* discussion *infra* Section III.B.3.v.

The lawyers remained largely behind the scenes. Nonetheless, they were almost always present and contributed in many important ways. Here, in this Article, the lawyers take center stage. This Article examines Dr. King's and his colleagues' processes, criteria, and decisions in enlisting and deploying lawyers during the Civil Rights Movement.⁷

The literature by and about Dr. King pays little attention to legal proceedings. In light of the gap between the literature and Dr. King's recognition of lawyers' importance to the Civil Rights Movement,⁸ the lawyers warrant an in-depth examination.

More than seventy lawyers, and several legal organizations, represented Dr. King, his colleagues, and the thousands of protesters involved in the movements with which he was associated.⁹

The lawyers' roles fell into two broad categories. First, they provided support to enable the civil rights activists to carry out their core strategy of nonviolent direct action—referred to within the Article as the “support” role. Dr. King's nonviolent direct action encompassed both direct action, such as boycotts, marches, and demonstrations, and a philosophy of nonviolence, a “willingness to accept suffering without retaliation, to accept blows from the opponent without striking back.”¹⁰ Since public officials often used the law and the courts to prevent protest activities and resist change, much of the lawyers' support work was reactive. It included

⁷ For ease of expression, this Article will refer to Dr. King's choices even when others were involved in the decision-making process. The Article will also try to clarify whether it was “he” or “they,” when relevant. This approach stems from Dr. King's caveat in *Stride Toward Freedom*, his book about the Montgomery Bus Boycott, where he writes that he sometimes means “we” when he says “I.” MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY*, at ix (1st Perennial Library ed. 1964). Others involved include those within his organizations—the Montgomery Improvement Association (MIA) and the Southern Christian Leadership Conference (SCLC)—and activists with whom they worked. At the same time, Dr. King had the final say much of the time, even when his colleagues or lawyers disagreed with him. *See, e.g.*, LERONE BENNETT, JR., *WHAT MANNER OF MAN: A BIOGRAPHY OF MARTIN LUTHER KING, JR.* 186 (8th rev. ed. 1992) (“Although King's decision-making methods have proved apt to his purposes, they have not contributed to the peace of mind of associates who live in a somewhat more distant relation to divinity.”); FRED D. GRAY, *BUS RIDE TO JUSTICE* 65 (rev. ed. 2013) (“There were times when Dr. King said, ‘Fred, I understand what you say the law is, but our conscience says that the law is unjust and we cannot obey it. However, there is a higher law. So, if we are arrested we will be calling on you to defend us.’”).

⁸ John Lewis, fellow civil rights activist and later long-term congressman from Atlanta, held a similar view about the importance of lawyers to the Civil Rights Movement. *See, e.g.*, JOHN LEWIS WITH MICHAEL D'ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 256 (Harcourt Brace & Co. 1999) (1998) (“[W]e knew we would have many arrests and trials ahead of us, and we would need all the legal representation we could get.”); *id.* at 494–95 (“Without the years of struggle of the civil rights movement, without people like Dr. King, without the unsung heroes of the movement, without the people who came before them and the people who came after, we would not be where we are today.”).

⁹ This figure is not limited to the lawyers who literally represented Dr. King. Rather, it encompasses those who worked on matters related to movements, events, and litigation in which Dr. King, his colleagues, or fellow protesters were involved. Thus, it is a quite inclusive definition of the relevant lawyers. For a complete list of the lawyers, including their characteristics, affiliations, and participation, see *infra* Appendix.

At the same time, more than seventy is likely a conservative estimate. It comes from accounts and court documents. Other lawyers volunteered for less visible roles, such as defending the thousands of protesters arrested in the various campaigns, which makes identifying them difficult.

¹⁰ KING, *supra* note 7, at 85.

defending against criminal prosecutions and civil suits, and challenging injunctions designed to prevent marches and demonstrations.¹¹ But some support work was proactive, such as seeking permissions or injunctions that would allow planned direct action to proceed legally.¹²

The second major role of the lawyers was to rely on the strategy of constitutional challenges to segregation laws and policies. That strategy was not new. For example, in the first half of the twentieth century, a small cadre of lawyers, led by Charles Houston and his protégé Thurgood Marshall, used the courts to attack segregation laws.¹³ They proceeded independently of any broader social movement.¹⁴ The paradigm example is the school desegregation litigation campaign that culminated in 1954 with *Brown v. Board of Education*.¹⁵

Starting with the Montgomery Bus Boycott, the lawyers played both roles.¹⁶ Movement leaders turned to litigation—referred to here as “complementary desegregation litigation”—in conjunction with direct action, seeking synergy between the two strategies.¹⁷ In these movements, however, the choice of whether to pursue desegregation through the courts rested with Martin Luther King, Jr. and other protest leaders, rather than with the lawyers.¹⁸

Timing is also important in this analysis. In the early years, from 1955 to 1962, Dr. King’s overall strategy included both nonviolent direct action and complementary desegregation litigation.¹⁹ It was partly a period of “persuasive nonviolence,” based on the assumption that protests could enlighten and change minds and policies and practices.²⁰

The 1963 Birmingham Movement marked a strategic turning point. Starting with that movement, Dr. King and his organization, the Southern Christian Leadership Conference (SCLC),²¹ turned to more aggressive forms of nonviolent direct action—moving entirely from persuasion to coercion.²² In his “Letter from a Birmingham Jail,” Dr. King wrote that the goal was “to create such a crisis and

¹¹ See discussion *infra* Section II.A.

¹² See discussion *infra* Section II.A.2.i.

¹³ See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 62–68, 148 (1998); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–61*, at 6, 10–12, 70–72 (1996). See generally MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 162–67, 239–42 (2004) (discussing litigation strategy); RICHARD KLUGER, *SIMPLE JUSTICE* 185–98 (1st Vintage Books ed. 2004) (discussing Marshall’s early work with NAACP’s legal efforts).

¹⁴ See sources cited *supra* note 13.

¹⁵ 347 U.S. 483 (1954).

¹⁶ See discussion *infra* Sections II.A.1.i.a, II.A.2.i, II.B.1.

¹⁷ See discussion *infra* Section II.B.

¹⁸ See *infra* notes 574–578, 616 and accompanying text.

¹⁹ See discussion *infra* Section II.B.

²⁰ See generally KING, *supra* note 7, at 83–88 (discussing nonviolence philosophy).

²¹ SCLC was a faith-based organization formed by a group of southern Black ministers and other supporters to challenge segregation and racial discrimination throughout the South. See ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 13 (1987).

²² See DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 221 (1978); MOTLEY, *supra* note 13, at 156–57. SCLC leaders gave the Birmingham movement the name “Project C,” for “confrontation,” to symbolize the new level of aggressiveness. See MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 47 (1964).

foster such a tension that a community which has consistently refused to negotiate is forced to confront the issue.”²³ “Nonviolent direct action,” Dr. King explained, “seeks so to dramatize the issue that it can no longer be ignored.”²⁴

This shift meant an increase in the number, size, and length of marches and demonstrations. On one occasion, it even meant violating a federal court’s injunction.²⁵ Every movement and event from 1963 to 1968 reflected some aspect of the escalation. Ratcheting up the level of direct action elicited mass arrests, as well as violence by local police (Birmingham), state troopers (Selma), and private citizens (Chicago).²⁶

A second major strategic change also marked the later years. Activists eliminated complementary desegregation litigation from their arsenal.²⁷ With the evolution of the movement’s strategies, the lawyers’ responsibilities and challenges similarly changed.²⁸ While some tasks continued throughout Dr. King’s career, new ones also emerged, and others disappeared. Just as the activists had no instruction manual to follow, the lawyers had to adjust and come up with creative approaches to support the activists in carrying out their continually evolving direct action tactics.²⁹

Noting the changing roles of lawyers in the Civil Rights Movement generally, activist lawyer Arthur Kinoy captured the shift from the early years to the later years of Dr. King’s career:

In a fundamental way, the traditional role of the lawyer in the civil rights movement was changing in order to meet the new need. It was shifting away from the older, relatively independent role of seeking to attain the goals of the movement through developing key test cases, to a role of a very different character, that of defending the ability of the people themselves to attain the goals of their movement through their own strength and power.³⁰

²³ KING, *supra* note 22, at 81.

²⁴ *Id.* See generally *infra* note 659 (discussing Dr. King’s “Letter from a Birmingham Jail”).

²⁵ See discussion *infra* Section III.B.3.i.

²⁶ See *infra* Sections III.B.1.i, III.B.3.iii, III.B.3.iv.

²⁷ See, e.g., J. MILLS THORNTON III, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* 282 (2002) (“[Dr. King] was eager to find a venue in which he could prove that direct action could produce real results”); *id.* at 299 (“King found himself opposed . . . by black activists previously associated with the NAACP, who emphasized legal attacks on segregation’s statutory and constitutional foundations.”). At the same time, the activists shifted from using the federal courts proactively to aggressively pursuing federal legislation. See *id.* at 371; see also CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S* 91–92 (1981).

²⁸ See *infra* Section III.B.

²⁹ See discussion *infra* Section III.B.

³⁰ ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* 158 (1983). Kinoy emphasized that the shift in the movement “would have sweeping implications for the functioning of people’s lawyers but which at the time very few of us outside the movement understood.” *Id.* at 156; accord KLARMAN, *supra* note 13, at 467 (explaining that litigation competed with direct action for scarce resources, and that civil rights leaders eventually came to realize its limited capacity for producing social change). Professor Klarman observed:

MOVEMENT AND EVENT DESCRIPTIONS

This Article focuses on the movements and events in Dr. King's career where lawyers played a significant role. The following is a brief description of each of them to provide context for discussions later in the Article.³¹

The Montgomery Bus Boycott (1955)

When Rosa Parks refused to give up her seat on a segregated Montgomery, Alabama bus on December 1, 1955, it triggered a yearlong boycott of the city's buses by the Black community.³² Local leaders formed the Montgomery Improvement Association (MIA) to coordinate the movement, and they elected Martin Luther King, Jr. president.³³ Due to a synergy of the bus boycott and complementary desegregation litigation by the MIA, Montgomery eventually desegregated the bus system.³⁴ When Blacks returned to the buses in December 1956, the bus company ceased the long-standing enforced segregation and humiliating treatment that had brought about the movement.³⁵

In the aftermath of the bus boycott, the Southern Christian Leadership Conference was formed to continue fighting segregation in the South.³⁶ The organizers selected Martin Luther King, Jr. as president, an office he occupied until his death in 1968.³⁷

Though litigation had performed valuable service in mobilizing racial protest and securing Court victories, . . . it could not fulfill all of the functions of direct action. Sit-ins, Freedom Rides, and street demonstrations fostered black agency much better than did litigation, which encouraged blacks to place faith in elite black lawyers and white judges rather than in themselves. . . . In addition, direct-action protest more reliably created conflict and incited opponents' violence, which ultimately proved critical to transforming national opinion on race.

Id. at 467.

³¹ The Article does not purport to cover every campaign or movement in which Dr. King participated, but only those where attorneys played an important role.

³² Useful overviews of the Montgomery Bus Boycott include TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 131–207 (1988); DAYBREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT (Stewart Burns ed., 1997); FAIRCLOUGH, *supra* note 21, at 15–18, 23–35, 53–54 (1987); GARROW, *supra* note 2, at 11–32, 57–89; KING, *supra* note 7; THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 50–99 (Clayborne Carson ed., 1998) [hereinafter MLK AUTOBIOGRAPHY]; THORNTON, *supra* note 27, at 20–140.

“Black” is capitalized wherever it refers to Black people, to indicate that Blacks, or African Americans, are a specific cultural group with its own history, traditions, experience, and identity—not just people of a particular color. Using the uppercase letter signifies recognition of the culture, as it does with Latinos, Asian Americans, or Native Americans. *See generally* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

³³ KING, *supra* note 7, at 41–42; *see also* FAIRCLOUGH, *supra* note 21, at 16–17.

³⁴ Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 684 (2005).

³⁵ *See* KING, *supra* note 7, at 150–51, 157; Coleman, Nee & Rubinowitz, *supra* note 34, at 697–98.

³⁶ *See* FAIRCLOUGH, *supra* note 21, at 12–13, 23, 29.

³⁷ *See id.* at 37.

Dr. King's Alabama Perjury Trial (1960)

In 1960, the State of Alabama tried Dr. King for perjury, alleging that he falsified his 1956 and 1958 state income tax returns.³⁸ The prosecutors accused Dr. King of under-reporting his income in those years.³⁹ An all-white jury acquitted Martin Luther King, Jr. of the charges, enabling him to avoid a potentially lengthy prison sentence.⁴⁰

Dr. King's Incarceration in Georgia (1960)

In early 1960, Dr. King moved back to Atlanta from Montgomery.⁴¹ A police officer ticketed him for not having obtained a Georgia driver's license within ninety days, as was required of new residents under Georgia law.⁴² He received a fine and a suspended sentence, with a year's probation.⁴³ The local judge revoked his probation when he was arrested during a demonstration in an Atlanta department store.⁴⁴ He was sent to a maximum-security prison.⁴⁵ His lawyers secured his release and persuaded the appellate court that the original sentence was beyond the trial judge's authority.⁴⁶

The Albany (Georgia) Movement (1961–1962)

In 1961, the Student Non-Violent Coordinating Committee (SNCC) and local activists initiated the Albany Movement to challenge all forms of segregation and discrimination in the city.⁴⁷ Local leaders invited Dr. King and SCLC to the city to help revitalize the stalled movement.⁴⁸ The movement failed on many levels, providing important lessons for later campaigns.⁴⁹

³⁸ See BRANCH, *supra* note 32, at 276–311; GARROW, *supra* note 2, at 129–37; Edgar Dyer, *A "Triumph of Justice" in Alabama: The 1960 Perjury Trial of Martin Luther King, Jr.*, 88 J. AFR. AM. HIST. 245, 248 (2003).

³⁹ See Dyer, *supra* note 38, at 254.

⁴⁰ See *id.* at 258.

⁴¹ MAURICE C. DANIELS, *SAVING THE SOUL OF GEORGIA: DONALD L. HOLLOWELL AND THE STRUGGLE FOR CIVIL RIGHTS* 114 (2013).

⁴² GARROW, *supra* note 2, at 135–36.

⁴³ DANIELS, *supra* note 41, at 114–15; GARROW, *supra* note 2, at 143.

⁴⁴ DANIELS, *supra* note 41, at 114–15.

⁴⁵ *Id.* at 116.

⁴⁶ See discussion *infra* Section II.A.1.i.c.

⁴⁷ BRANCH, *supra* note 32, at 529; CARSON, *supra* note 27, at 58. See generally BRANCH, *supra* note 32, at 529–58, 602–39; GARROW, *supra* note 2, at 173–230; DAVID L. LEWIS, *KING: A BIOGRAPHY* 143–45 (Univ. of Ill. Press 2d ed. 1978) (1970).

⁴⁸ GARROW, *supra* note 2, at 180–81. This was the first of a number of occasions in which local leaders requested SCLC's involvement to bolster a locally initiated movement. See, e.g., KING, *supra* note 22, at 65 (discussing Fred Shuttlesworth's request for SCLC to "come to Birmingham" to help the Alabama Christian Movement for Human Rights); see also discussion *infra* Sections III.B.1.i–ii, III.B.2, III.B.3.i–v.

⁴⁹ See GARROW, *supra* note 2, at 217–19, 225–29, 235, 290, 326, 456; KING, *supra* note 22, at 34–35.

The Birmingham Movement (1963)

In April 1963, SCLC joined a local Birmingham movement in a mass direct action campaign largely targeting the local business community.⁵⁰ Local police used fire hoses and police dogs to disrupt the marches, bringing national attention to the movement and building momentum for the passage of federal civil rights legislation.⁵¹ Dr. King violated an injunction, was jailed for contempt, and wrote his “Letter from a Birmingham Jail.”⁵²

The March on Washington for Jobs and Freedom (1963)

On August 28, 1963, more than 200,000 people assembled in a mass protest at the Lincoln Memorial in Washington, D.C.⁵³ The purpose of the event was to lobby Congress for the passage of civil rights legislation and the creation of jobs programs for the unemployed.⁵⁴ The signature moment was Dr. King’s “I Have a Dream” speech.⁵⁵

St. Augustine, Florida (1964)

In May 1964, Dr. King and SCLC joined the St. Augustine movement with hopes of ending the city’s segregation and winning support for the stalled Civil Rights Act of 1964.⁵⁶ They engaged in a series of night marches in the town square where slaves were once bought and sold.⁵⁷ The marches were plagued with violence from Ku Klux Klan members, and while the police were not the source of the violence, they did not provide sufficient protection from the Klansmen.⁵⁸

⁵⁰ Biographical and scholarly accounts of the Birmingham Movement include THORNTON, *supra* note 27, at 141–379; BRANCH, *supra* note 32, at 688–810; TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65, at 76–89 (1998); GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE (1997); GARROW, *supra* note 2, at 220–74; KING, *supra* note 22, at 43–57; DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS EVOLUTION (1st Touchstone ed. 2002); MLK AUTOBIOGRAPHY, *supra* note 32, at 170–217.

⁵¹ See JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 360 (Twelve Tables Press, Anniversary ed. 2004) (1994); see also sources cited *supra* note 50.

⁵² *Birmingham Campaign (1963)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_birmingham_campaign/ (last visited Sept. 29, 2015).

⁵³ *March on Washington for Jobs and Freedom*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_march_on_washington_for_jobs_and_freedom/ (last visited Sept. 23, 2015); see also CLARENCE B. JONES & STUART CONNELLY, BEHIND THE DREAM: THE MAKING OF THE SPEECH THAT TRANSFORMED A NATION 95–96 (2011). See generally BRANCH, *supra* note 32, at 833–87; GARROW, *supra* note 2, at 265–88.

⁵⁴ See CARSON, *supra* note 27, at 91–95; GARROW, *supra* note 2, at 266–67.

⁵⁵ See JONES & CONNELLY, *supra* note 53, at xiii–xiv. For an illuminating discussion of events surrounding the March on Washington and Dr. King’s “I Have a Dream” speech, see GARY YOUNGE, THE SPEECH: THE STORY BEHIND DR. MARTIN LUTHER KING JR.’S DREAM (2013).

⁵⁶ See generally FAIRCLOUGH, *supra* note 21, at 180–91; GARROW, *supra* note 2, at 316–44.

⁵⁷ See FAIRCLOUGH, *supra* note 21, at 182–83; GARROW, *supra* note 2, at 325–26; *St. Augustine Movement*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_st_augustine_movement/index.html (last visited Oct. 4, 2015).

⁵⁸ See FAIRCLOUGH, *supra* note 21, at 183–86; see also Findings of Fact & Conclusions of Law at 12–13, *Young v. Davis*, No. 64-133-Civ-J (M.D. Fla. June 9, 1964) [hereinafter *Young Findings & Conclusions*], <http://civilrights.flagler.edu/cdm/singleitem/collection/p16000coll4/id/1174/rec/9>.

The Selma, Alabama Voting Rights Movement (1965)

In early 1965, SCLC joined voting rights activists protesting the exclusion of Blacks from the electoral process in Alabama and seeking massive registration of Black voters.⁵⁹ State troopers attacked marchers with clubs and tear gas as they left Selma on their way to the state capitol in Montgomery, fifty miles away.⁶⁰ Ultimately, a five-day march to Montgomery culminated in a demonstration on the steps of the state capitol building.⁶¹

The Chicago Freedom Movement (1965–1966)

Later in 1965, Martin Luther King, Jr. and SCLC began planning their first foray into a northern city, and in January 1966 joined forces with a local coalition to form the Chicago Freedom Movement.⁶² The movement focused primarily on housing practices and problems, with two strands: (1) open housing marches through all-white neighborhoods to address the city's extreme segregation; and (2) a movement to end the slums by challenging landlords who owned extremely substandard housing in low-income Black neighborhoods.⁶³ The movement resulted in a quite general "Summit Agreement" to address housing discrimination in the city.⁶⁴

The Memphis Sanitation Workers Strike (1968)

In March 1968, Dr. King accepted an invitation to lead a march in support of Memphis's sanitation workers' strike for better wages and working conditions.⁶⁵

⁵⁹ *Selma to Montgomery March (1965)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_selma_to_montgomery_march/index.html (last visited Sept. 23, 2015). See generally TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68*, at 137–85 (2006); GARROW, *supra* note 22, at 39–48 (1978); THORNTON, *supra* note 27, at 380–499.

⁶⁰ See GARROW, *supra* note 22, at 73–77, 96; THORNTON, *supra* note 27, at 488; *Selma to Montgomery March (1965)*, *supra* note 59.

⁶¹ See GARROW, *supra* note 22, at 115–17; *Selma to Montgomery March (1965)*, *supra* note 59.

⁶² See *Chicago Campaign (1966)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_chicago_campaign/ (last visited Sept. 17, 2015). See generally ALAN B. ANDERSON & GEORGE W. PICKERING, *CONFRONTING THE COLOR LINE: THE BROKEN PROMISE OF THE CIVIL RIGHTS MOVEMENT IN CHICAGO* 153, 160–64, 172–78, 188–94 (1986); BRANCH, *supra* note 59, at 501–22; JAMES R. RALPH, JR., *NORTHERN PROTEST: MARTIN LUTHER KING, JR., CHICAGO, AND THE CIVIL RIGHTS MOVEMENT* 1, 7, 28–91 (1993); David J. Garrow, *Preface* to *CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET*, at ix–x (David J. Garrow ed., 1989); Alvin Pitcher, *The Chicago Freedom Movement: What Is It?* (Nov. 1966), in *CHICAGO 1966*, *supra*, at 155, 155–57; Program of the Chicago Freedom Movement (July 1966), in *CHICAGO 1966*, *supra*, at 97, 100.

⁶³ See RALPH, *supra* note 62, at 58–65, 92–130.

⁶⁴ See generally THOMAS G. AYERS, *SUBCOMM. TO THE CONF. ON FAIR HOUS. CONVENED BY THE CHI. CONF. ON RELIGION & RACE, THE 'SUMMIT AGREEMENT'* (Aug. 26, 1966), *reprinted in CHICAGO 1966*, *supra* note 62, at 147, 147–54.

⁶⁵ See JOAN TURNER BEIFUSS, *AT THE RIVER I STAND: MEMPHIS, THE 1968 STRIKE, AND MARTIN LUTHER KING* 156, 190–91 (Carlson Publ'g 1989) (1985); *Memphis Sanitation Workers Strike (1968)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_memphis_sanitation_workers_strike_1968/index.html (last visited Sept. 23, 2015) [hereinafter *Memphis Strike*]. See generally BRANCH, *supra* note 59, at 683–766; GARROW, *supra* note 2, at 604–24; MICHAEL K. HONEY, *GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING'S LAST CAMPAIGN* (2007).

An assassin took Dr. King's life on April 4, 1968, just four days before he was planning to lead another march in downtown Memphis.⁶⁶

The Poor People's Campaign for Jobs and Income (1968)

At the time of Dr. King's death, he was in the midst of planning a demonstration in Washington, D.C. to press Congress to address the problem of poverty.⁶⁷ The campaign involved constructing a tent city on the Washington Mall.⁶⁸ After Dr. King's death, poor people came from all over the country to set up "Resurrection City" and seek legislative relief.⁶⁹

* * *

This Article highlights how Dr. King and other leaders selected and deployed lawyers. It also examines how those lawyers' roles changed as strategies shifted between the early years and the later years.

Part I, "Choosing the Lawyers," introduces the many lawyers who represented Dr. King, his colleagues, and fellow protesters. Section A examines the processes of selecting the lawyers and legal organizations. Dr. King made some of those choices himself, while delegating others to decision-makers he trusted.⁷⁰ Both enlisted specific lawyers on a largely ad hoc basis in the early years, but then began to rely increasingly on a set group of lawyers by the early 1960s.⁷¹

Section B examines the factors that did and did not seem to matter in enlisting individual lawyers and legal organizations. These factors include: (1) location (both local and northern lawyers participated in significant numbers); (2) identity factors (race, gender, religion, and age); (3) strategic commitments (consistent or not with the movements); (4) the types of organizations involved; and (5) the lawyers who became members of Dr. King's inner circle.

After discussing the lawyers' selection, the rest of the Article examines their roles in the various movements and events. As suggested earlier, both continuity and important changes in the lawyers' tasks occurred during Dr. King's career.

In Part II, "Deploying the Lawyers: The Early Years (1955–1962)," Section A examines the lawyers' support efforts, including (1) defense work, both criminal and civil; (2) efforts to secure permissions and to challenge injunctions; and (3) initiatives to secure funding to facilitate chosen strategies. Section B analyzes the use of complementary desegregation litigation. It explains the decisions to initiate desegregation litigation designed to complement and supplement the

⁶⁶ See BEIFUSS, *supra* note 65, at 283–85, 292–93, 299; *Memphis Strike*, *supra* note 65.

⁶⁷ See *Poor People's Campaign*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_poor_peoples_campaign/index.html (last visited Sept. 23, 2015). See generally BRANCH, *supra* note 59, at 670–91, 754–65; GARROW, *supra* note 2, at 575–624; GERALD D. MCKNIGHT, *THE LAST CRUSADE: MARTIN LUTHER KING, JR., THE FBI, AND THE POOR PEOPLE'S CAMPAIGN* (1998); MLK AUTOBIOGRAPHY, *supra* note 32, at 346–55.

⁶⁸ See BEIFUSS, *supra* note 65, at 15; *Poor People's Campaign*, *supra* note 67.

⁶⁹ See John Kelly, *Before Occupy D.C., There Was Resurrection City*, WASH. POST, Dec. 4, 2011, at C3; *Poor People's Campaign*, *supra* note 67.

⁷⁰ See discussion *infra* Section I.A.

⁷¹ See discussion *infra* Section I.B.4.i.

nonviolent direct action, and provides context by recounting the history of desegregation litigation campaigns and Dr. King's views about such litigation. The Section examines the federal desegregation lawsuits in Montgomery, Alabama and Albany, Georgia, including the reasons Dr. King and his colleagues pursued a multi-pronged strategy in each instance.

Part III, "Deploying the Lawyers: The Later Years (1963–1968)," explores the changes, as well as the continuity, in the lawyers' roles as the movements escalated their nonviolent direct action and abandoned complementary desegregation litigation. Section A examines the abandonment of the use of complementary desegregation litigation following the Albany, Georgia campaign and why the leaders turned, instead, to more aggressive nonviolent direct action strategies and tactics. Section B discusses lawyers' efforts to support activists who were using more coercive and expansive nonviolent direct action strategies. A conclusion follows.

I. CHOOSING THE LAWYERS

As his self-description suggests, Martin Luther King, Jr. turned to lawyers on a regular basis.⁷² As previously discussed, more than seventy lawyers represented Dr. King, his colleagues, his organizations, and the thousands of protesters in the campaigns and events in which he was involved.⁷³ They drew from three sources: (1) the small number of civil rights lawyers practicing at mid-century; (2) other established lawyers who began to take up the civil rights cause; and (3) newcomers to the profession who shared the commitment.⁷⁴ Their numbers grew with the emergence of the modern Civil Rights Movement in the 1950s and 1960s.⁷⁵

Martin Luther King, Jr. sometimes selected the lawyers himself, though he often delegated that task.⁷⁶ Some of the lawyers provided representation only once, while others played recurring roles.⁷⁷ Dr. King also developed long-term, close professional and personal relationships with several lawyers who became part of his inner circle.⁷⁸

Dr. King and his organizations relied almost entirely on outside counsel, rather than assembling their own legal staff for the many occasions when they needed

⁷² See *supra* notes 3–4 and accompanying text.

⁷³ See *supra* note 9 and accompanying text.

⁷⁴ See discussion *infra* Section I.B.2.iv. Constance Baker Motley, a leading civil rights lawyer, recalls that no one was talking about civil rights law in the late 1940s, when she was in law school. See MOTLEY, *supra* note 13, at 59. Jack Greenberg, another leading civil rights lawyer, said there were very few civil rights lawyers at mid-century. He identified half a dozen organizations, none of which had more than three lawyers on staff. Beyond that, there were some individual lawyers who handled civil rights cases as part of their private practice. *Jewish Lawyers in the Civil Rights Movement*, CTR. FOR JEWISH HIST. (Sept. 19, 2007), <http://www.cjh.org/videoplayer.php?vfile=091907JEWSANDJUSTICE.flv>.

⁷⁵ See MOTLEY, *supra* note 13, at 153–55; Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 216–17 (1976).

⁷⁶ See discussion *infra* Section I.A.

⁷⁷ See, e.g., discussion *infra* Section II.B (discussing Fred Gray's extensive involvement in the Civil Rights Movement).

⁷⁸ They ranged from mentor (Stanley Levison) to "disciple" (Clarence Jones). See discussion *infra* Section I.B.5.

representation.⁷⁹ With any selection process, the lawyers' competence and commitment to the cause mattered. And in light of the ongoing financial challenges Dr. King's organizations faced, their cost mattered, too.

A. *The Process of Enlisting Lawyers*

Lawyers entered Martin Luther King, Jr.'s orbit in a number of different ways.⁸⁰ When Dr. King enlisted lawyers himself, it was usually a matter of a simple request to join the struggle.⁸¹ For example, Fred Gray's representation of Rosa Parks led to Dr. King and other leaders tapping him as counsel for the MIA.⁸² In 1961, Dr. King issued another invitation when he met William Kunstler.⁸³ Based on Kunstler's reputation as a civil rights lawyer, Dr. King asked him to serve as SCLC "special trial counsel," which meant being available when needed.⁸⁴ That request began a relationship spanning several years and movements.⁸⁵

⁷⁹ Fred Gray became an exception as MIA's counsel. See discussion *infra* Section I.A.

⁸⁰ As Dr. King's reputation grew, many lawyers sought to represent him or his movement. See *infra* note 154 and accompanying text.

⁸¹ See, e.g., Kunstler, *William Moses (1919–1995)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_kunstler_william_moses_1919_1995/ (last visited Sept. 11, 2015) (explaining how Dr. King met William Kunstler "during the 1961 Freedom Rides . . . [and] asked Kunstler to take on several cases throughout the 1960s").

⁸² See GRAY, *supra* note 7, at 50–54; KING, *supra* note 7, at 41. See generally *supra* notes 32–33 and accompanying text. The only other Black lawyer in Montgomery at the time, Charles Langford, later assisted Gray in working with the MIA. GRAY, *supra* note 7, at 26, 28. Dr. King emphasized that Gray was his choice by referring to him as "my attorney." See *id.* at 65.

⁸³ See KUNSTLER, *supra* note 1, at 74–76.

⁸⁴ See WILLIAM M. KUNSTLER WITH SHEILA ISENBERG, *MY LIFE AS A RADICAL LAWYER* 109–12 (1994); DAVID J. LANGUM, *WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA* 62–63 (1999) (conveying Kunstler's account of meeting Dr. King in late September 1961 and Dr. King asking him "to serve as his special counsel on matters unsuited for his regular attorneys" at LDF, and stating that Kunstler subsequently "undert[ook] specifically commissioned assignments from the SCLC and King, representing specific clients in specific situations"); Kunstler, *William Moses (1919–1995)*, *supra* note 81 ("King asked Kunstler to take on several cases throughout the 1960s and praised him for the 'magnificent job' he had done as a civil rights attorney.").

⁸⁵ See LANGUM, *supra* note 84, at 65–66 ("Kunstler participated in the campaigns in Albany, Georgia (1962–63), Danville, Virginia (1963), Birmingham, Alabama (1963), and St. Augustine, Florida (1964)."). Kunstler describes his work in these campaigns in his 1966 memoir *Deep in My Heart*, though the nature and scope of his involvement is a matter of some dispute. Compare, e.g., KUNSTLER, *supra* note 1, at 173–200, 211–32, 271–304 (recounting the work Kunstler did for SCLC in Birmingham, Danville, and St. Augustine), and LANGUM, *supra* note 84, at 65–66 (discussing how Dr. King occasionally "called upon Kunstler" as "an outside attorney" to help with his major campaigns and pointing out other matters Kunstler worked on "[a]t King's request"), with MOTLEY, *supra* note 13, at 139–40 (rejecting Kunstler's assertion that "he was Martin Luther King's lawyer"). Motley says she "never saw Kunstler . . . representing King or anybody else," and that he simply "flew to whatever spot appeared in newspaper headlines." *Id.* at 140.

Over time, Kunstler's relationship with SCLC suffered, and his role declined, ending by 1964. See FAIRCLOUGH, *supra* note 21, at 98, 178. There were claims that Kunstler alienated colleagues with his "penchant for self-advertisement, [his] manner of exploiting his relationship with King, and [his] habit of making commitments in SCLC's name on his own initiative." *Id.* at 178. Also, financial tensions arose when the Gandhi Society failed to raise enough money to cover Kunstler's fees. *Id.* Though Kunstler sometimes claimed that his civil rights work was all pro bono, he often received fees for his work. Compare LANGUM, *supra* note 84, at 67 (quoting from an interview in which Kunstler stated he had never taken fees), and KUNSTLER WITH ISENBERG, *supra* note 84, at 110 (saying he never expected

But it was not always so easy to sign up lawyers for the cause. For example, Dr. King had to carry out an aggressive recruiting effort to secure Black lawyer Clarence Jones's services for his 1960 perjury trial defense team. At the time, Jones was just getting settled into his private practice in Los Angeles.⁸⁶ He resisted Dr. King's entreaties mightily until the minister shamed him, without naming him, in a sermon he attended (at Dr. King's request) on the obligations of Black professionals to serve the Civil Rights Movement.⁸⁷ After the perjury trial, their relationship flourished, and Jones soon became a highly valued member of Dr. King's inner circle.⁸⁸

fees from civil rights cases), with LANGUM, *supra* note 84, at 67–68 (listing fees Kunstler accepted from CORE and SCLC).

Further, SCLC turned increasingly to the NAACP Legal Defense and Education Fund (LDF) for its representation, making continued participation of individual lawyers like Kunstler less important. See FAIRCLOUGH, *supra* note 21, at 98, 178; see also discussion *infra* Section I.B.4.i.

Kunstler also engaged in extensive civil rights representation unrelated to Dr. King or the SCLC, as a member of NLG, CORE, and the ACLU. See LANGUM, *supra* note 84, at 64, 67–68. After working on civil rights issues, Kunstler made a career out of representing unpopular clients and causes. See *generally id.* at 77–128.

⁸⁶ See JONES & CONNELLY, *supra* note 53, at 37; CLARENCE B. JONES & JOEL ENGEL, WHAT WOULD MARTIN SAY? 2 (2008).

⁸⁷ Dr. King's efforts to persuade Clarence Jones to join him in the Civil Rights Movement had something of the sense of a prophet seeking to enlist a disciple. See JONES & CONNELLY, *supra* note 53, at 37–38. As Jones tells the story, Dr. King first had Hubert Delany, co-lead counsel in the perjury case, contact him in Los Angeles to ask him, on Dr. King's behalf, to join them in Alabama. *Id.* at 37. Delany had been a mentor to the young lawyer while he was in law school. See Clarence B. Jones, First Diversity Visiting Professor, Univ. of S.F.; Scholar Writer in Residence, the Martin Luther King, Jr., Research & Educ. Inst., Stanford Univ.; Political Advisor, Counsel & Draft Speechwriter for Dr. Martin Luther King, Jr., Keynote Address at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL'Y 688, 691 (2016). Jones had just recently graduated from Boston University Law School in 1959, and he was settling into his new career as an entertainment lawyer in Los Angeles. See JONES & ENGEL, *supra* note 86, at 2, 5. He had little sense of the importance of the perjury trial and no plans to be a civil rights lawyer. See *id.* at 3–4, 6. He declined Delany's invitation. *Id.* at 3. Dr. King then had his secretary arrange a personal meeting at Jones's home in Los Angeles when Dr. King was in town for a speech. *Id.* at 4.

That visit led to another polite rejection. *Id.* at 7. But Dr. King invited Jones to attend his sermon in the affluent Black Baldwin Hills section of Los Angeles, and Jones obliged. *Id.* at 10–11. Dr. King spoke in his sermon, as he had done during the visit at Jones's home, about the need for Black professionals to join the Civil Rights Movement, and he then referred to a "highly gifted [unnamed Black] attorney" who had resisted his overtures. *Id.* at 7, 12–13. After a pause, that elicited a "for shame" kind of response from the congregation. See *id.* at 13.

Dr. King greeted Jones after the service and said, "I hope that you didn't mind me using you to make a point in my sermon. There were a lot of people here in this church I needed to reach today, and I always use whatever I think is going to be most effective. No offense, Mr. Jones." *Id.* at 16. In response, Jones said, "Dr. King, the only thing I need to know is when you and Judge Delaney want me to leave [for Alabama]." *Id.*

Jones later recalled, "And from that point on, I was a Martin Luther King, Jr. disciple." JONES & CONNELLY, *supra* note 53, at 44.

⁸⁸ See *infra* Section I.B.5. Colleagues Bayard Rustin and Ella Baker introduced Dr. King to Stanley Levison, a lawyer who became one of his closest confidants. See David J. Garrow, *The FBI and Martin Luther King*, ATLANTIC MONTHLY, July-Aug. 2002, at 80, 85. Levison in turn encouraged Harry Wachtel, a well-connected, tax-savvy New York lawyer, to contribute to SCLC. See FAIRCLOUGH, *supra* note 21, at 97. In early 1963, Clarence Jones introduced Dr. King to Wachtel, who offered to assist SCLC in an advisory role and later joined the inner circle as well. See JONES & CONNELLY, *supra* note 53, at 194 n.1. Dr. King's decision to add Levison and Wachtel to his inner circle was based on his

When Dr. King delegated the lawyers' selection, the lawyers he selected sometimes enlisted other lawyers because of a need for additional legal manpower, or to join forces with lawyers with greater experience and expertise.⁸⁹ For example, when Fred Gray became the attorney for the MIA, he brought in Charles Langford, the only other Black lawyer in Montgomery, to share the workload.⁹⁰ Gray relied on experienced local lawyer Clifford Durr as a mentor, as well.⁹¹ He also turned to Robert Carter of the NAACP and Thurgood Marshall of the NAACP Legal Defense and Education Fund (LDF), the leading civil rights lawyers of the day, for the expertise and experience needed to challenge bus segregation in court.⁹²

Similarly, working with an organization like LDF meant that its head made the decisions about assigning staff and volunteer lawyers to particular matters.⁹³ As Dr. King turned increasingly to LDF for assistance in the 1960s, Director-Counsel Jack Greenberg (Thurgood Marshall's successor) assigned the lawyers to the tasks at hand.⁹⁴

Also, a selection committee of Dr. King's trusted advisors assembled a defense team for his Alabama perjury trial.⁹⁵ A conviction could have resulted in a lengthy prison sentence, as well as a devastating impact on his stature and

extensive interaction with them. *See generally* BRANCH, *supra* note 32, at 225–27, 581–82; FAIRCLOUGH, *supra* note 21, at 98; Garrow, *supra*.

⁸⁹ Even when he was not directly involved, his priorities and his past experience typically carried the day. *See* FAIRCLOUGH, *supra* note 21, at 171. *See generally* Mary Lou Finley, The Open Housing Marches: Chicago, Summer '66, in CHICAGO 1966, *supra* note 62, at 1, 36–37.

⁹⁰ *See* GRAY, *supra* note 7, at 26, 28, 72, 88.

⁹¹ *Id.* at 17, 43–44.

⁹² *See* BRANCH, *supra* note 32, at 158; Coleman, Nee & Rubinowitz, *supra* note 34, at 682. LDF was more commonly known as the “Inc. Fund.” LANGUM, *supra* note 84, at 62; *see also* Gilbert A. Cornfield, Cornfield & Feldman, LLP, Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL'Y 667, 674 (2016) [hereinafter Cornfield Remarks].

⁹³ *See* discussion *infra* Section I.B.4.i. The leaders of some ongoing movements or efforts that were floundering called on Martin Luther King to join forces with them. *See infra* Sections II.A.1.i.d (Albany, Georgia), III.B.3.iv–v (Chicago & Memphis). Dr. King sometimes referred to himself as a “fireman” in those situations. *See* BRANCH, *supra* note 32, at 632. Even when a movement was well underway, with its lawyers in place, Dr. King sometimes brought additional lawyers into the fray as the movement expanded in scale, scope, or its strategies, once he had allied himself with local activists. *See, e.g., infra* Sections II.A.1.i.d (Constance Baker Motley in Albany, Georgia Movement), III.B.3.iv (LDF in Chicago), III.B.3.v (Chauncey Eskridge in Memphis).

⁹⁴ *See* discussion *infra* Section I.B.4.i; *see also, e.g.,* GARROW, *supra* note 2, at 386 (“[King] instructed [SCLC staff member Andrew] Young to call Jack Greenberg of the NAACP Legal Defense Fund, which had been coordinating the Selma movement's courtroom efforts”); GREENBERG, *supra* note 51, at 465 (stating Greenberg dispatched several LDF staff lawyers to Washington, D.C. to meet with the city's attorneys and lawyers who had offered to help with legal matters in the Poor People's Campaign). *See generally* MOTLEY, *supra* note 13, at 152, 154–55 (assessing Greenberg's appointment as Marshall's successor). That included LDF staff, consultants, and local LDF cooperating lawyers in the South. *See generally* GREENBERG, *supra* note 51, *passim*. For more on the development of LDF's “extensive network of cooperating attorneys,” *see* Rabin, *supra* note 75, at 216–18.

⁹⁵ GRAY, *supra* note 7, at 148–49; Dyer, *supra* note 38, at 251.

reputation.⁹⁶ With such high stakes, Dr. King's advisors went through a systematic vetting process to assemble a high-powered defense team.⁹⁷

It is understandable that Dr. King left most of the choices of individual lawyers to others. He faced extraordinary demands on his time, energy, and emotions. Leadership required that Dr. King carry the burden of continually making difficult strategic decisions. Dr. King's legal team was also in a better position to evaluate the fit of individual lawyers with the specific needs of the occasion.⁹⁸ Whether Dr. King or others made the selection, many similar factors were considered in making the decisions.

B. Selection Factors

The choice of lawyers and legal organizations was based on a mix of principle, pragmatism, and personal considerations. As far as the lawyers' locations were concerned, Dr. King found advantages in having both local and northern lawyers.⁹⁹ Identity factors—including race, gender, religion, and age—also played a part in Dr. King's choices.¹⁰⁰ He very much wanted to involve Black lawyers.¹⁰¹ But Dr. King did not seem focused on including women lawyers.¹⁰² While SCLC was faith-based and Christian, the lawyers' religion did not seem to matter.¹⁰³ Age similarly did not seem to be part of the selection criteria; a number of very young lawyers served the movements alongside older and more experienced ones.¹⁰⁴

In light of his core strategic commitment to nonviolent direct action, Dr. King might have insisted that the lawyers share that commitment. And while many of them did, some viewed the courts as the primary venue for seeking social change and expressed great skepticism about direct action.¹⁰⁵ That strategic disconnect did not seem to matter to Dr. King.

In the 1960s, Dr. King also relied heavily on an inner circle of advisors, which included several lawyers who served as counselors and confidants.¹⁰⁶

⁹⁶ GRAY, *supra* note 7, at 147–48; Dyer, *supra* note 38, at 246, 249.

⁹⁷ See GRAY, *supra* note 7, at 149; Dyer, *supra* note 38, at 251. See also discussion *infra* Section II.A.1.i.b. At the same time, Dr. King played a direct role in enlisting Clarence Jones for the defense team, after the committee had assembled the rest of the team. See *supra* note 87.

⁹⁸ For the perjury trial, the needs included criminal defense experience, tax expertise, knowledge of Alabama criminal procedure, and an understanding of how Black lawyers could navigate a white-dominated state judicial system. See Dyer, *supra* note 38, at 245–61.

⁹⁹ See discussion *infra* Section I.B.1.

¹⁰⁰ The intersectionality of aspects of identity, such as race and gender, complicated those selections. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989).

¹⁰¹ See JONES & ENGEL, *supra* note 86, at 12.

¹⁰² See discussion *infra* Section I.B.2.ii.

¹⁰³ See discussion *infra* Section I.B.2.iii.

¹⁰⁴ See discussion *infra* Section I.B.2.iv.

¹⁰⁵ See discussion *infra* Section I.B.3.

¹⁰⁶ See discussion *infra* Section I.B.5.

1. The Lawyers' Locations: Local and Northern Lawyers

Martin Luther King, Jr.'s legal representation began with local lawyers in Montgomery in 1955 and ended with local lawyers in Memphis in 1968. In-between, he relied on an ever-changing mix of local and northern counsel.¹⁰⁷ Those lawyers often worked together in teams that drew upon their complementary knowledge and experience.

i. Local Lawyers

Enlisting local lawyers took advantage of their knowledge of state and local law and procedure, as well as the local courts.¹⁰⁸ Also, movement leaders often knew and trusted them.¹⁰⁹ Their continuing presence on-site mattered, especially at a time of limited technology and mobility. Using local lawyers also had political benefits. For example, it helped to blunt opponents' claims that the protests were the work of "outside agitators," a potentially powerful rallying cry.¹¹⁰ Moreover, it avoided the risk of trial judges excluding or restricting the participation of a lawyer because he was not licensed to practice in the state.¹¹¹

While the advantages of using local lawyers seemed apparent, the question of their availability and willingness to serve remained. Most lawyers in the South were white, and most white lawyers were segregationists with little sympathy for civil rights.¹¹² Even the few white lawyers who shared the movements' views were rarely willing to risk the severe professional and personal consequences likely to

¹⁰⁷ See *infra* Parts II, III. Of course, lawyers in the Chicago Freedom Movement of the mid-1960s were both local and northern. See *infra* Sections III.B.2, III.B.3.iv.

¹⁰⁸ LDF litigated in many states and had long recognized the value of local counsel. See GREENBERG, *supra* note 51, at 375. LDF had assembled a network of local cooperating attorneys, especially in the South. See *id.*; see also discussion *infra* Section I.B.4.i.

¹⁰⁹ See *infra* notes 130–132 and accompanying text.

¹¹⁰ See GARROW, *supra* note 2, at 67.

¹¹¹ See, e.g., KUNSTLER, *supra* note 1, at 216–17 (describing a contempt trial for a demonstrator in Danville, Virginia, where Kunstler was not allowed to participate because the judge would not take his word that he was an attorney); THORNTON, *supra* note 27, at 223 ("Federal court rules in Birmingham forbade an out-of-town lawyer to file suit unless he associated a local attorney with him."). Federal judges in Mississippi required out-of-state lawyers to appear with local counsel, which required cooperation that white Mississippi lawyers would not give. See GREENBERG, *supra* note 51, at 375. Out-of-state lawyers largely relied on the three Black lawyers in the state, to the extent their time permitted. *Id.*

¹¹² See, e.g., KING, *supra* note 7, at 92 (calling the white lawyer for the bus company in Montgomery "our most stubborn opponent"); KINOY, *supra* note 30, at 166 ("Only a tiny handful of Black lawyers were practicing in the South, because Black people had been almost totally excluded from the profession Therefore, Black people were almost always represented by white lawyers."); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1009 (1989) (noting that Montgomery, Alabama had 189 white lawyers and judges in 1950 but only two Black lawyers, while its population was forty percent Black); J. Mills Thornton III, *Challenge and Response in the Montgomery Bus Boycott of 1955–1956*, 33 ALA. REV. 163, 226 (1980) ("[T]he most inflexible of the whites were lawyers.").

result from assisting activists like Dr. King.¹¹³ Threats of violence made matters even worse.¹¹⁴

Among the few participating local white lawyers was Clifford Durr, an experienced Montgomery attorney from a prominent, upper middle-class Alabama family.¹¹⁵ Durr served as a mentor and colleague for the inexperienced Fred Gray even before the bus boycott.¹¹⁶

By the mid-1960s, some white local lawyers outside the Deep South were willing to represent Dr. King and his supporters. For example, Gilbert Cornfield and Gilbert Feldman, among others, represented activists in the Chicago Freedom Movement pro bono.¹¹⁷

In 1968, several white lawyers in two mainstream Memphis law firms provided pro bono representation related to a planned march during the sanitation workers' strike.¹¹⁸ Dr. King persuaded them of the importance of the demonstration

¹¹³ See, e.g., KINOY, *supra* note 30, at 165–66 (“No white lawyer could survive in the South who, in the defense of a Black client, raised any . . . controversy-laden constitutional questions which went to the heart of the legitimacy of a segregated society.”). See generally VIRGINIA FOSTER DURR, *OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR* 269–70, 276–77, 288 (Hollinger F. Barnard ed., 1985). White Mississippi lawyer William Higgs accepted racial cases. See KINOY, *supra* note 30, at 191. As a result, he was falsely accused of sexual misconduct with a minor and run out of town. See KUNSTLER, *supra* note 1, at 167–69. Higgs was convicted in absentia and disbarred, though it was clear that the police and the accuser had created the story. *Id.* at 168. Edward Lynch, a white Tennessee lawyer, similarly lost his practice and was forced to leave town after defending members of an interracial group charged with petty crimes. *Id.* at 242.

¹¹⁴ Len Rosenthal, a Mississippi attorney associated with the National Lawyers Guild, was evicted from his office building and chased with a shotgun by a relative after taking civil rights cases in 1964. SARAH HART BROWN, *STANDING AGAINST DRAGONS: THREE SOUTHERN LAWYERS IN AN ERA OF FEAR* 232, 236 (1998). Charles Morgan Jr., a white lawyer in Birmingham, was forced to leave Alabama after speaking out against the 1963 bombing of a Baptist church that killed four young girls. See KUNSTLER, *supra* note 1, at 242–43.

¹¹⁵ See GRAY, *supra* note 7, at 43–44; JOHN A. SALMOND, *THE CONSCIENCE OF A LAWYER: CLIFFORD J. DURR AND AMERICAN CIVIL LIBERTIES, 1899–1975*, at 2 (1990); *Clifford Durr*, MONTGOMERY BUS BOYCOTT, <http://www.montgomeryboycott.com/clifford-durr/> (last visited Apr. 6, 2016). See generally THORNTON, *supra* note 27, at 54–55, 60–61, 71 (discussing Durr’s background and legal work in Montgomery). By accepting Gray’s 1955 request to help represent the family of a Black boy against a white man who killed their son while driving 100 miles per hour, Durr became alienated from his family, friends, and the white community. See SALMOND, *supra*, at 171. In the same year, Durr and Gray represented Black teenager Claudette Colvin for refusing to give up her seat on a bus. *Id.* at 172. Durr assisted Gray in defending her at trial and on appeal. *Id.* at 173.

¹¹⁶ See GRAY, *supra* note 7, at 17, 24; SALMOND, *supra* note 115, at 171.

¹¹⁷ See discussion *infra* Section III.B.2 (discussing Cornfield’s and Feldman’s work in Chicago); see also BILL AYERS & BERNARDINE DOHRN, *RACE COURSE: AGAINST WHITE SUPREMACY* 25 (2009). See generally Leonard S. Rubinowitz, *The Chicago Freedom Movement and the Federal Fair Housing Act*, in *THE CHICAGO FREEDOM MOVEMENT: MARTIN LUTHER KING JR. AND CIVIL RIGHTS ACTIVISM IN THE NORTH* 115 (Mary Lou Finley et al. eds., 2016).

In Chicago, some Black lawyers were beholden to Mayor Richard J. Daley and the Democratic machine, so they were not in a position to assist the Chicago Freedom Movement. See *infra* Section III.A (discussing the interaction between Dr. King and William Ming, who had been Dr. King’s defense counsel in Alabama in 1960 but was aligned with Mayor Daley in Chicago six years later). See generally RALPH, *supra* note 62, at 230–31 (observing decline in “the machine’s stranglehold on Chicago’s Negro population”).

¹¹⁸ See *infra* Section III.B.3.v (discussing the lifting of the injunction against marching). See generally W.J. Michael Cody, *King at the Mountain Top: The Representation of Dr. Martin Luther King, Jr., Memphis, April 3–4 1968*, 41 U. MEM. L. REV. 701 (2011). All but one of the half-dozen Memphis lawyers involved from the Burch, Porter & Johnson and Ratner, Sugarmon firms were white.

to show that they could have a nonviolent march and that nonviolence remained a viable strategy.¹¹⁹ As a result, they joined as counsel even though they were well aware that their “representation would not be popular in Memphis and that the firm might expect to lose substantial business if the engagement was undertaken.”¹²⁰

Most of the participating local lawyers were Black.¹²¹ They faced greater risks than local white lawyers, especially the risk of becoming victims of physical violence.¹²² They were not exempt from the bombings that so often struck Black churches, and ministers’ and other activists’ homes during this period.¹²³ For example, Birmingham lawyer Arthur Shores endured repeated bombings of his home during the 1950s and 1960s.¹²⁴ Racists in North Carolina burned down attorney Julius Chambers’ office in 1971 and bombed his home because of his civil rights work.¹²⁵ A county sheriff caned Albany, Georgia civil rights lawyer C.B. King in 1962.¹²⁶ In short, it took great courage for local Black lawyers to join the Civil Rights Movement.

Montgomery’s Fred Gray, Rosa Parks’ lawyer and Dr. King’s first lawyer, epitomized this important group. He was intimately acquainted with the city’s Jim Crow regime, having ridden the local buses regularly.¹²⁷ Gray would have attended law school in Alabama, but the University of Alabama did not admit Blacks in the early 1950s.¹²⁸ When Gray left to attend law school at Cleveland’s Western Reserve

See id. at 701. The firms were quite prominent in the region. *See* MIRIAM DECOSTA-WILLIS, NOTABLE BLACK MEMPHIANS 296 (2008); *History*, BURCH, PORTER & JOHNSON, PLLC, <http://bpjlaw.com/history.php> (last visited Apr. 6, 2016). The presiding federal district court judge, Bailey Brown, had been a partner in the Burch firm before he was elevated to the bench. Cody, *supra*, at 702. A member of his firm described Lucius Burch as “the senior partner in our office and one of the most experienced and well-respected trial lawyers in the region and a man of significant stature.” *Id.*

¹¹⁹ *See* GARROW, *supra* note 2, at 619; Cody, *supra* note 118, at 703–04.

¹²⁰ Cody, *supra* note 118, at 703. Movement lawyers in Atlanta and New York also asked their Memphis colleagues to assist Dr. King. GARROW, *supra* note 2, at 619.

¹²¹ *See infra* Appendix.

¹²² *See, e.g.*, TUSHNET, *supra* note 13, at 52; *see also* GRAY, *supra* note 7, at 77.

¹²³ *See, e.g.*, Coleman, Nee & Rubinowitz, *supra* note 34, at 694–95, 727 n.203.

¹²⁴ GREENBERG, *supra* note 51, at 39.

¹²⁵ *See id.*; Tom Foreman Jr., *Julius Chambers, Civil Rights Attorney, Dies at 76*, WASH. POST (Aug. 4, 2013), https://www.washingtonpost.com/national/julius-chambers-civil-rights-attorney-dies-at-76/2013/08/04/fc7b13c4-fc74-11e2-9bde-7ddaa186b751_story.html.

¹²⁶ *See* KUNSTLER, *supra* note 1, at 117. The next year someone poured acid on the front seat of his car. *Id.* at 242.

¹²⁷ Gray was born and raised in Montgomery and graduated from the historically Black Alabama State College located there. GRAY, *supra* note 7, at 6, 10–12. The college is now named Alabama State University. *See id.* at 10; *see also About ASU*, ALA. ST. U., <http://www.alasu.edu/about-asu/index.aspx> (last visited Sept. 14, 2015). In his part-time job with the local newspaper while attending Alabama State College, Gray made multiple daily bus trips during which he routinely experienced discrimination. *See* GRAY, *supra* note 7, at 5–6, 11–12.

¹²⁸ *See* GRAY, *supra* note 7, at 13–15; Jonathan L. Entin, ‘*Destroying Everything Segregated I Could Find*’: Fred Gray and Integration in Alabama, 7 CRITICAL REV. INT’L SOC. & POL. PHIL. 252, 253 (2004); Bill Lubinger, *A Legal Legend*, THINK MAG. (Fall 2004), <http://case.edu/think/fall2014/fred-gray.html>. Even though the U.S. Supreme Court held in 1950 that it was unconstitutional for state law schools to exclude applicants because of their race, *see Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the University of Texas Law School’s exclusion of a Black applicant violated the Equal Protection Clause because no equivalent law school existed for Blacks), the University of Alabama continued its discriminatory policy. *See* GRAY, *supra* note 7, at 14–15 (explaining how the university imposed strategic financial barriers to entry designed to keep Black students out).

University, he had made a secret vow to return to his home state and use his legal training to “destroy everything segregated [he] could find.”¹²⁹

When Gray opened his law office in Montgomery in 1954, he and Rosa Parks became NAACP colleagues and friends.¹³⁰ It was thus natural that he served as her defense counsel after she refused to give up her bus seat.¹³¹ That representation led to Gray’s involvement in other Alabama movements and events, including Dr. King’s 1960 perjury trial and the related *New York Times Co. v. Sullivan* libel litigation, and the Selma movement.¹³² When Dr. King left Montgomery in 1960 and moved back to his hometown of Atlanta, he asked Fred Gray to join him there as SCLC’s counsel.¹³³ Gray declined, choosing to remain in Alabama and continue the civil rights struggle there.¹³⁴

Dr. King called on a number of local lawyers over the years, mostly in Alabama and Georgia. In Alabama, Birmingham’s Arthur Shores was the “senior member” of this group.¹³⁵ For two decades, Shores had been the only Black lawyer in Alabama.¹³⁶ The others that joined him during the Civil Rights Movement

¹²⁹ GRAY, *supra* note 7, at 13. The university is now Case Western Reserve University. *See History*, CASE W. RES. U., <http://www.case.edu/about/history> (last visited Sept. 14, 2015).

¹³⁰ GRAY, *supra* note 7, at 31. Because of his interest in civil rights, and in order to build a network for his practice, Gray became active in the local branch of the NAACP. *Id.* Rosa Parks was secretary of the branch. *Id.* She and Gray worked together in bringing local youth into the organization. *See* DAYBREAK OF FREEDOM, *supra* note 32, at 8; GRAY, *supra* note 7, at 31. They often had lunch together at his office, located a block and a half from the department store where Parks worked as a seamstress. *Id.* at 31.

¹³¹ *See* GRAY, *supra* note 7, at 50. With the activities leading to the beginning of the bus boycott, Gray recognized that his “days of having little to do in [his] fledgling law practice were over.” *Id.* at 52; *accord* Kennedy, *supra* note 112, at 1030 n.198 (noting that Gray’s legal career changed dramatically after he represented Rosa Parks).

¹³² *See* GRAY, *supra* note 7, at 61, 149, 156–57, 216; *see also* discussion *infra* Sections II.A.1.i.b, II.A.1.ii, III.B.3.iii. As Gray recounts, “Mrs. Parks’s arrest . . . launched my legal career.” GRAY, *supra* note 7, at 33. Initially, virtually all of the participants in the boycott were local. *See generally* THORNTON, *supra* note 27, at 20–140 (discussing the Montgomery movement).

¹³³ *See* GRAY, *supra* note 7, at 145.

¹³⁴ *Id.* When Dr. King left Montgomery and his civil rights activities took him to other states, Gray did not accompany him or continue to represent him. *See id.* at 155. As Gray said, “I feel honored and proud that I was Dr. King’s first lawyer in the civil rights movement. . . . Martin was to have many other lawyers on other occasions, but I was his first.” *Id.* Gray’s goal remained to challenge segregation in central Alabama, where he went on to have an illustrious career as a civil rights lawyer well into the twenty-first century. *See id.* at 155, 383–86; Kennedy, *supra* note 112, at 1030 n.198. Notably, he argued and won *Gomillion v. Lightfoot* before the Supreme Court. *See* 364 U.S. 339 (1960) (holding that the Alabama legislature violated the Fifteenth Amendment when it redrew the boundary lines of the City of Tuskegee in a way that excluded most Black residents from voting).

¹³⁵ Kennedy, *supra* note 112, at 1031 n.198. Fred Gray considered Shores the “dean of African-American lawyers in Alabama.” GRAY, *supra* note 7, at 347. Shores “hand[ed] civil rights cases [across] Alabama before [Gray even] went to law school.” *Id.* Gray considered Shores his mentor. *Id.* When Gray became president of the National Bar Association in 1985, he initiated the “NBA Hall of Fame” to honor pioneers like Shores. *Id.*

¹³⁶ Kennedy, *supra* note 112, at 1031 n.198. After the Voting Rights Act was passed in 1965, Black voter registration in Birmingham increased dramatically. ALAN F. WESTIN & BARRY MAHONEY, THE TRIAL OF MARTIN LUTHER KING: THE LANDMARK BIRMINGHAM CASE AND ITS MEANING FOR AMERICA TODAY 274 (1974). *See generally* GARROW, *supra* note 2, at 454 (discussing emphasis on voter registration efforts in Birmingham). By the mid-1970s, Arthur Shores was a member of the city council. WESTIN & MAHONEY, *supra*, at 274.

included Orzell Billingsley Jr.,¹³⁷ Peter A. Hall,¹³⁸ Charles D. Langford,¹³⁹ and Solomon S. Seay Jr.¹⁴⁰ In Georgia, Donald Hollowell came to be known as “Mr.

¹³⁷ Orzell Billingsley Jr. graduated from Howard University Law School in 1950 and became one of the first Black lawyers in Alabama. *Bravery and Vision: Black Firsts in Birmingham*, BIRMINGHAM PUB. LIBR., <http://www.bplonline.org/resources/BlackBirmingham.aspx> (last visited Sept. 14, 2015); see also GREENBERG, *supra* note 51, at 38. Billingsley was involved with Dr. King’s movements early on, representing Dr. King in Montgomery when he was indicted for allegedly violating Alabama’s anti-boycott statute. See *id.* at 225–26. Billingsley also served as one of the couriers who carried Dr. King’s famous “Letter from a Birmingham Jail” out of jail. See GARROW, *supra* note 2, at 246. See generally *infra* note 659 (discussing Dr. King’s “Letter from a Birmingham Jail”). He was heavily involved in voter registration efforts as a legal advisor to the NAACP and worked with Peter Hall to “challenge[] the exclusion of African Americans from Alabama’s juries.” 3 THE PAPERS OF MARTIN LUTHER KING, JR.: BIRTH OF A NEW AGE, DECEMBER 1955–DECEMBER 1956, at 184 n.4 (Clayborne Carson et al. eds., 1997); see also, e.g., *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965) (recognizing that a “State’s purposeful and deliberate denial” to Blacks of a chance to serve as jurors because of their race violates the Equal Protection Clause). Billingsley was also active in other civil rights cases in Alabama, most importantly in the case of Caliph Washington, a Black man convicted of capital murder for an accidental death. See Sherrel Wheeler Stewart, *Civil Rights Lawyer Orzell Billingsley Dead at 77*, BIRMINGHAM NEWS, Dec. 19, 2001, at 1C. Billingsley fought the case through various appeals for fifteen years, eventually securing an acquittal, as well as successfully challenging the county’s practice of excluding Blacks from juries. See *id.*

¹³⁸ Peter Hall earned his law degree in 1946 from DePaul University. 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 184 n.4. He was one of the first Black lawyers in Birmingham, where he worked in private practice with Arthur Shores and Orzell Billingsley Jr. MIGNETTE Y. PATRICK DORSEY, *SPEAK TRUTH TO POWER* 53 (2010); Frank Couch, *Pete Hall, Son of Peter Hall, Civil Rights Attorney and Birmingham’s First Black Judge*, AL.COM (Feb. 19, 2013), http://videos.al.com/birmingham-news/2013/02/pete_hall_son_of_peter_hall_ci.html. He also served as LDF’s local counsel in Birmingham. See 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 184. Hall was part of the legal team that defended Dr. King in Montgomery for violating Alabama’s anti-boycott statute and, along with Billingsley, “repeatedly challenged” the practice of excluding Blacks from juries in Alabama. *Id.* at 184 n.4; see, e.g., *Swain*, 380 U.S. 202. In 1965, Hall joined LDF lawyers in Montgomery to secure a federal injunction protecting the Selma-to-Montgomery march for voting rights. See *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965). He was a founding member of the Alabama Black Lawyers Association and secured significant victories in several civil rights cases before becoming Birmingham’s first Black judge in 1972. *History & Mission*, ALA. LAW. ASS’N, <http://www.ala-lawyers.org/history-mission/> (last visited Sept. 23, 2015); Jon Solomon, *Pete Hall: Son of Birmingham’s First Black Judge Gains History Lesson About His Dad*, AL.COM (Feb. 21, 2013, 8:00 AM), http://blog.al.com/spotnews/2013/02/pete_hall_son_of_birmingham_f.html; see Kennedy, *supra* note 112, at 1030 n.198.

¹³⁹ Charles Langford received his LL.B degree in 1952 from Catholic University of America and was admitted to the Alabama State Bar the following year. 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 70 n.9; *Alabama Senator Charles Langford; Rosa Parks’s Lawyer*, WASH. POST, Feb. 13, 2007, at B7 [hereinafter *Charles Langford*]. He opened his own law practice in Montgomery and was the only Black lawyer in his hometown until Fred Gray returned there after law school. THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT: THE MEMOIR OF JO ANN GIBSON ROBINSON 44 (David J. Garrow ed., 1987) [hereinafter ROBINSON MEMOIR]; see also GRAY, *supra* note 7, at 26. Langford represented Rosa Parks after her arrest in 1955 and was active in other “legal battles that shaped Alabama,” *Charles Langford*, *supra*, including the federal litigation that ended segregation on public transportation, GARROW, *supra* note 2, at 59, and Dr. King’s 1960 perjury trial, *id.* at 130. He represented both the MIA and Dr. King until 1960 and later became law partners with Fred Gray. 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 70 n.9.

In addition to his legal contributions to the Civil Rights Movement, Langford had a distinguished political career. He was elected to the Alabama legislature in 1978, serving two terms in the Alabama House of Representatives and then five terms in the Alabama Senate before retiring in 2002. See *Charles Langford*, *supra*. Langford died in 2007 at age eighty-four. *Id.*

¹⁴⁰ After graduating from Howard University School of Law in 1957, Solomon S. Seay Jr. returned home to Montgomery to join the civil rights struggle. *Selma to Montgomery March Profiles*, NAACP

Civil Rights.”¹⁴¹ Other important local civil rights lawyers in the state included C.B. King of Albany and Horace Ward of Atlanta.¹⁴² While all of these lawyers had

LDF (Mar. 7, 2015), <http://www.naacpldf.org/press-release/selma-montgomery-march-profiles-ldf-counsel-charles-stephen-ralston-fred-d-gray-and> [hereinafter *Selma Profiles*]. His return to Montgomery made him the third of only three Black lawyers practicing there at the time, with Charles Langford and Fred Gray being the other two. *Id.* Seay frequently joined forces with LDF as local counsel and devoted his career to “challenging segregation and discrimination across the State of Alabama.” *LDF Mourns Passing of Legendary Civil Rights Attorney Solomon Seay Jr.*, NAACP LDF (Sept. 12, 2015), <http://www.naacpldf.org/press-release/ldf-mourns-passing-legendary-civil-rights-attorney-solomon-seay-jr/> [hereinafter *LDF Release*]. He litigated significant cases in almost every area of civil rights, including school desegregation, employment discrimination, police brutality, and voting rights. *Id.*; see also GRAY, *supra* note 7, at 193–94, 202, 204, 216 & n.26, 250. Seay was a member of Dr. King’s defense team for the 1960 Alabama perjury trial, and he represented the four Black ministers, including his father, who later became the MIA’s third president, in the related *New York Times Co. v. Sullivan* libel litigation. *Id.* at 149, 156–57; Donald T. Ferron, Notes on MIA Executive Board Meeting (Jan. 30, 1956), in 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 109, 111 n.6; see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). He also helped secure the injunction to prevent interference with Dr. King’s 1965 voting rights march from Selma to Montgomery. See *Williams*, 240 F. Supp. 100; GRAY, *supra* note 7, at 216–17, 216 n.26. Seay was active in many other civil rights cases throughout Alabama and worked for decades to provide Black students equal opportunities in education. *LDF Release, supra*; see, e.g., *Knight v. Alabama*, 458 F. Supp. 2d 1273 (N.D. Ala. 2004); *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967). Seay died in 2015 at age eighty-one. Rick Harmon, *Civil Rights Attorney Solomon Seay Dies at Age 81*, MONTGOMERY ADVERTISER (Sept. 11, 2015, 6:30 p.m.), <http://www.montgomeryadvertiser.com/story/news/2015/09/11/civil-rights-attorney-solomon-seay-dies-age/72101862/>.

¹⁴¹ Vernon E. Jordan, Jr., *Foreword* to DANIELS, *supra* note 41, at ix. People similarly called Thurgood Marshall “Mr. Civil Rights” when he began to distinguish himself through his accomplishments as a young lawyer with the NAACP. See KLUGER, *supra* note 13, at 271.

Donald Hollowell graduated from Chicago’s Loyola University Law School in 1951, then moved to Atlanta and set up his own practice. DANIELS, *supra* note 41, at 29–30; see also Edward A. Hatfield, *Donald Hollowell (1917–2004)*, NEW GA. ENCYCLOPEDIA (Sept. 12, 2007), <http://www.georgiaencyclopedia.org/articles/history-archaeology/donald-hollowell-1917-2004>. He quickly became well-known across Georgia as an effective advocate for social justice. See MAURICE C. DANIELS, HORACE T. WARD: DESEGREGATION OF THE UNIVERSITY OF GEORGIA, CIVIL RIGHTS ADVOCACY, AND JURISPRUDENCE 78 (2001) [hereinafter DANIELS, HORACE WARD]. He is perhaps best known for his work on school desegregation cases across Georgia. Hatfield, *supra*.

Hollowell represented Dr. King at his hearing and eventually secured his release during his imprisonment in a Georgia state prison for violating his probation. DANIELS, HORACE WARD, *supra*, 166–69; see *King v. State*, 119 S.E.2d 77 (Ga. Ct. App. 1961); see also DANIELS, *supra* note 41, at 115–19; GARROW, *supra* note 2, at 145, 148; discussion *infra* Section II.A.1.i.c. He also was one of the attorneys who represented the Albany Movement in negotiations with the City of Albany. See DANIELS, *supra* note 41, at 143–44, 146–47, 149–51; GARROW, *supra* note 2, at 185; discussion *infra* Section II.B.2. He again represented Dr. King in court after mass arrests for another demonstration in Albany. See DANIELS, *supra* note 41, at 152–53; GARROW, *supra* note 2, at 196; discussion *infra* Section II.A.1.i.d. In 1962, Hollowell and C.B. King acted as local counsel for LDF and assisted in the appeals to overturn an injunction against demonstrations in Albany. MOTLEY, *supra* note 13, at 138–39; see also discussion *infra* Section II.A.2.ii.

In 1966, President Johnson appointed Hollowell director of the southeastern regional office of the Equal Employment Opportunity Commission, where he remained for nineteen years, becoming chairman of the board in 1971. DANIELS, *supra* note 41, at 189, 201; Hatfield, *supra*. Hollowell died at the age of 87 in 2004. See *id.*

¹⁴² See Jordan, *supra* note 141, at xii–xiii. After graduating from Case Western Reserve University School of Law in 1952, Chevene Bowers (C.B.) King returned to his home state of Georgia and became the only Black lawyer in the southwestern region of the state. DANIELS, *supra* note 41, at 132; Mary Sterner Lawson, *C.B. King (1923–1988)*, NEW GA. ENCYCLOPEDIA (Dec. 9, 2003), <http://www.georgiaencyclopedia.org/articles/history-archaeology/c-b-king-1923-1988>. During the early years of his practice, C.B. King earned a reputation as “the only black lawyer south of Atlanta who would take

important roles, the limited number of available local lawyers left some roles needing to be filled by lawyers from other regions.

on civil and criminal cases,” and later became a prominent figure in defending protesters during the Civil Rights Era. *Id.*

As “chief counsel” to the Albany Movement, C.B. King represented demonstrators arrested in Albany, including Martin Luther King, Jr., Ralph Abernathy, William G. Anderson, and Andrew Young. Ellen Lake, *C.B. King*, HARV. CRIMSON (May 13, 1964), <http://www.thecrimson.com/article/1964/5/13/cb-king-pcb-king-is-a/>; *see also* Lawson, *supra*; discussion *infra* Section II.A.1.i.d. He participated in negotiations with Albany city officials and helped draft the petition to dissolve the federal injunction those officials had secured against the movement. GARROW, *supra* note 2, at 204, 207; *see also* discussion *infra* Section II.A.2.ii. He also defended Freedom Riders. Lawson, *supra*.

C.B. King ran twice for political office in the mid- to late-1960s. *Id.* Though unsuccessful, he was Georgia’s first Black candidate since Reconstruction to run for the U.S. House of Representatives and the first Black to run for governor of Georgia. *Id.* He was influential in the lives of numerous law students who worked as interns with his law firm in Albany, many of whom “underwent life-changing experiences under his tutelage, and . . . went on to become highly distinguished judges, members of Congress, and respected civil and environmental rights advocates.” *Id.*

Shortly before C.B. King’s death, Georgia’s governor and state legislature presented him with the first “Martin Luther King Jr. Humanitarian Award,” and he was honored posthumously in 2002 as namesake of the new federal courthouse constructed in downtown Albany. *Id.* C.B. King died in 1988 at age sixty-four. *Id.*

Horace Ward graduated from Northwestern University School of Law in 1959, after he was rejected by the University of Georgia School of Law—the university’s first Black applicant—and lost his racial discrimination suit against the university. *See* DANIELS, HORACE WARD, *supra* note 141, at 40–42, 95, 118; Dan Rodriguez, *Judge Horace Ward ’59, An Extraordinary Alum*, WORD ON STREETERVILLE BLOG (Mar. 25, 2014), <http://deansblog.law.northwestern.edu/2014/03/25/judge-harold-ward-59-an-extraordinary-alum/>; Stephanie Schupska, *Horace Ward to Receive Honorary UGA Degree*, UGA TODAY (Mar. 20, 2014), <http://news.uga.edu/releases/article/horace-ward-to-receive-honorary-uga-degree/>. *See generally infra* note 390 (discussing Donald Hollowell’s involvement in the lawsuit). After Northwestern, Ward returned to his home state of Georgia, where he became partner in Donald Hollowell’s law firm and worked on several civil rights cases throughout the state, including Dr. King’s defense when he was incarcerated in the Reidsville State Prison. *See* DANIELS, HORACE WARD, *supra* note 141, at 118, 166–69; *see also King*, 119 S.E.2d 77; Schupska, *supra*; discussion *infra* Section II.A.1.i.c.

Ward was elected to the Georgia General Assembly in 1964 and became the second Black elected to that office since Reconstruction. Schupska, *supra*. He left the Hollowell law firm to serve briefly as deputy city attorney, and he then opened his own practice. DANIELS, HORACE WARD, *supra* note 141, at 185. After being re-elected to four terms in the Georgia Senate, he was appointed to the state judiciary in 1974 as Georgia’s first Black trial court judge. *See id.* at 189, 197; Schupska, *supra*.

Ward was elevated to the federal bench in 1979 when President Carter appointed him to the U.S. District Court for the Northern District of Georgia. DANIELS, HORACE WARD, *supra* note 141, at 200–01; *see also* Robert A. Pratt, *Horace T. Ward (b. 1927)*, NEW GA. ENCYCLOPEDIA (May 9, 2003), <http://www.georgiaencyclopedia.org/articles/history-archaeology/horace-t-ward-b-1927>. He was the first Black federal judge in Georgia. Lericia Harris, *Civil Rights Attorney, Federal Judge Horace Ward Dead at 88*, CBS ATLANTA (Apr. 26, 2016, 8:40 AM), <http://atlanta.cbslocal.com/2016/04/26/civil-rights-attorney-federal-judge-horace-ward-dead-at-88/>; *see also* DANIELS, HORACE WARD, *supra* note 141, at 201. Judge Ward assumed senior status in 1994 and retired from the bench in 2012. Schupska, *supra*. In 2014, he was awarded an honorary law degree from the University of Georgia. *Id.*

While from an earlier generation, Austin Thomas (“A.T.”) Walden remained active in civil rights work in the 1960s. For biographical information on Walden, *see* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011), and J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 198–99, 482 n.185, 565 (1993).

ii. Northern Lawyers

Southern civil rights activists' practice of enlisting northern lawyers dates back at least to *Plessy v. Ferguson*,¹⁴³ the landmark Supreme Court segregation case of the 1890s. In challenging the constitutionality of a Louisiana train segregation law, the New Orleans Citizens' Committee brought in New York lawyer Albion Tourgée to lead the litigation effort.¹⁴⁴ As civil rights legal organizations formed in the North, their lawyers continued to go south throughout the first half of the twentieth century.¹⁴⁵

From the outset, Dr. King and his colleagues followed the tradition of drawing on northern lawyers.¹⁴⁶ This effort added significantly to the pool of experienced and committed civil rights lawyers.¹⁴⁷ It also increased the participation of Black lawyers, which was particularly important in light of the dearth of Black lawyers—especially Black civil rights lawyers—in the South.¹⁴⁸

The Montgomery Improvement Association reached out to northern lawyers for their assistance in sustaining the bus boycott and adding leverage to it.¹⁴⁹ That experience established a pattern. Throughout his career, Dr. King relied heavily on both individual lawyers and legal organizations from the North.¹⁵⁰ For example,

¹⁴³ 163 U.S. 537 (1896).

¹⁴⁴ See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 30 (1987). The full name of the group that brought suit was the “Citizens’ Committee to Test the Constitutionality of the Separate Car Law.” *Id.* at 29.

¹⁴⁵ See, e.g., KLUGER, *supra* note 13, at 100–04, 113–14, 132–37, 194–96, 222; see also Rabin, *supra* note 75, at 209–18 (discussing the ACLU’s and the NAACP Legal Defense and Education Fund’s early efforts to reform the law through litigation).

¹⁴⁶ See, e.g., TUSHNET, *supra* note 13, at 302 (discussing Montgomery’s boycott organizers seeking counsel from NAACP lawyers in New York). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 265 (1976) (“The refusal of white Southern lawyers to defend black clients, combined with the unavailability of black lawyers, prompted another invasion of carpetbaggers across the Mason-Dixon line: Northern lawyers committed to the objectives of the civil rights movement.”). The lawyers’ experience and expertise included both desegregation litigation and support of civil rights activists, such as criminal defense work. See *infra* note 256.

¹⁴⁷ See GREENBERG, *supra* note 51, at 292; see also discussion *infra* Section I.B.2.iv.

¹⁴⁸ See, e.g., GREENBERG, *supra* note 51, at 36–38, 271. See generally SMITH, *supra* note 142, at 63–65, 199, app. 2 at 623–37. State law schools in the South, with rare exceptions, did not admit Black applicants until forced to do so by the courts throughout the 1930s and ‘40s. Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 429–30 (1987). At the time of the Montgomery Bus Boycott, only a few Black lawyers practiced in Alabama. See GREENBERG, *supra* note 51, at 225–26 (calling Arthur Shores, Fred Gray, and Orzell Billingsley “perhaps half the black bar of Alabama”).

Black civil rights lawyers comprised an even smaller group. The first edition of Fred Gray’s memoir includes a photo from the 1960 meeting of the Southwest Bar Association, the southern affiliate of the National Bar Association. See FRED D. GRAY, *BUS RIDE TO JUSTICE* 108 (1st ed. 1995). He identifies the group of about fifty Blacks as “the major civil rights lawyers in the South at that time.” *Id.*

¹⁴⁹ See GREENBERG, *supra* note 51, at 225–26.

¹⁵⁰ See King, *supra* note 1, at xxiii–xxv; Dyer, *supra* note 38, at 251. As suggested earlier, enlisting northern lawyers risked eliciting resentment of “outside agitators” coming South to upset the customs and traditions that many white people valued so highly. GARROW, *supra* note 2, at 67. Whites’ resentment seemed to be based on memories of the “carpetbaggers” in the post-Civil War Reconstruction regime as well. See generally BRUCE E. BAKER, *WHAT RECONSTRUCTION MEANT: HISTORICAL MEMORY IN THE AMERICAN SOUTH* 69 (2007).

William Ming, of Chicago, and Hubert Delany, from New York, led Dr. King's legal team in his 1960 Alabama perjury trial.¹⁵¹

Many other northern lawyers, including numerous LDF staffers and consultants, the NAACP's Robert Carter, and William Kunstler also played significant roles in Dr. King's career.¹⁵² These northern lawyers, among others, were just one of the identities that filled a specific role for Dr. King.

¹⁵¹ William Ming graduated from the University of Chicago Law School in 1933. SMITH, *supra* note 142, at 39. Ming was one of the first Black members of a law review and was published in the *University of Chicago Law Review's* inaugural issue in 1933. *See id.* at 40. He became a member of the faculty there in 1947. *Id.* at 52. Ming worked on numerous Supreme Court cases throughout his career, including *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding state judicial enforcement of racially restrictive covenants in deeds unconstitutional), and *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding exclusion of an applicant to the University of Texas Law School based on his race unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because separate facility provided for Blacks was inferior in several respects). Howard Univ. Sch. of Law, *William R. Ming*, BROWN@50, <http://www.brownat50.org/brownbios/BioWmMing.html> (last visited Sept. 14, 2015). Ming also served on the legal team for *Brown v. Board of Education*. *Id.*; *see* 347 U.S. 483 (1954).

Hubert Delany graduated from New York University Law School in 1926. George James, *Hubert T. Delany, 89, Ex-Judge and Civil Rights Advocate, Dies*, N.Y. TIMES, Dec. 31, 1990, at 24. He served as a justice in Domestic Relations Court in New York from 1942 to 1955, after which he worked in private practice for many years. *Id.* He was an early civil rights advocate, serving on the boards of the NAACP and LDF. *Id.*

Chauncey Eskridge also went south from Chicago to join the legal team for Dr. King's perjury trial. *See* discussion *infra* Section II.A.1.i.b. He graduated from the John Marshall Law School in 1949. Kenan Heise, *Chauncey Eskridge, 70, Close Ally of Rev. King*, CHI. TRIB., JAN. 19, 1988, at A10. Eskridge was a longtime SCLC attorney and advised Dr. King on issues relating to his Chicago and Memphis movements. *See* GARROW, *supra* note 2, at 585, 622–23; *see also* discussion *infra* Section III.B.3.v. He also assisted with fundraising strategy. *See* GARROW, *supra* note 2, at 462–63. Dr. King often stayed at Eskridge's home while in Chicago. *Id.* at 465. Eskridge was with Dr. King when he was assassinated and represented Dr. King's estate. Heise, *supra*.

Eskridge argued many civil rights cases throughout the 1960s as an attorney for the NAACP's Chicago office. *Id.* He is perhaps best known for representing Muhammad Ali before the Supreme Court in *Clay v. United States*. *See* 403 U.S. 698 (1971) (reversing Ali's conviction for refusing to report for the draft). Eskridge was elected circuit judge in 1981 and remained on the bench until 1986, when he retired. Heise, *supra*. He died in 1988 at the age of seventy. *Id.*

¹⁵² *See* GARROW, *supra* note 2, at 59, 206–07, 213; GREENBERG, *supra* note 51, at 225–26, 323, 360–64, 374; KING, *supra* note 7, at 127. Arthur Kinoy, Kunstler's law partner, was also an active civil rights lawyer. *See* LANGUM, *supra* note 84, at 66–73; Paul Lewis, *Arthur Kinoy is Dead at 82; Lawyer for Chicago Seven*, N.Y. TIMES, Sept. 20, 2003, at A11; *Rutgers Professor Liberties Advocate*, NEWARK EVENING NEWS, Aug. 18, 1966, <http://www.thekingcenter.org/archive/document/rutgers-professor-liberties-advocate>; *see also, e.g.*, KINOY, *supra* note 30, at 151–53, 180–208 (discussing Kinoy's work in the Montgomery and Danville movements). Kinoy also served as a legal mentor to Clarence Jones, who became a member of Dr. King's inner circle. JONES & CONNELLY, *supra* note 53, at 5–6, 13. Kinoy had extensive involvement in civil rights matters unrelated to Dr. King and SCLC. *See generally* KINOY, *supra* note 30, at 161–80; Lewis, *supra*. While Kinoy also worked on movements closely tied to Dr. King and SCLC, because of his communist past, Dr. King made clear that “Kinoy had no [official] affiliation with SCLC.” GARROW, *supra* note 2, at 308.

2. Identity Factors

i. Race

Dr. King had a strong preference for Black lawyers, though he enlisted many white lawyers as well.¹⁵³ During his initial attempt to enlist Clarence Jones, Dr. King urged:

The movement is fortunate to have the generous support of many northern white liberals, including lawyers. . . . One of my concerns, however, is our dire need of committed Negro professionals—doctors, accountants, insurance agents. Particularly lawyers. The movement doesn't have nearly enough of them—of people like you. We'd like to see them get more involved with the movement to help our southern brothers and sisters.¹⁵⁴

Judging by the numbers and the reputations of the Black lawyers who joined him, Dr. King achieved extraordinary success in this effort. While Black lawyers

¹⁵³ See *infra* note 154 and accompanying text.

¹⁵⁴ JONES & ENGEL, *supra* note 86, at 6–7. Recounting similar remarks by Dr. King in a sermon he delivered the following weekend at an affluent Black Los Angeles church, Jones said that Dr. King “noted the ‘literally hundreds of offers’ from white northern professionals, particularly lawyers.” *Id.* at 12. “What a shame it was, [Dr. King] said, that the kindness, generosity, and good will of those whites, while dearly appreciated, was not dwarfed by the kindness, generosity, and good will of those Negroes most in a position to offer them *to their own people.*” *Id.*

Part of Dr. King's reason for making that point was to recruit Clarence Jones as part of the defense team for his 1960 Alabama perjury trial. Forming an all-Black defense team for such a critical matter showed Dr. King's confidence in those Black lawyers' ability to operate effectively in an all-white legal system. It also underscored his stated racial priority.

Recruiting Black lawyers seemed to be part of Dr. King's broader agenda of engaging middle-class Black people in the Civil Rights Movement. Starting with the Montgomery Bus Boycott, he sought both to build unity within Black communities and to bring to bear the skills and resources of middle-class and more affluent Blacks. See Coleman, Nee & Rubinowitz, *supra* note 34, at 675 & 708 n.53, 710 n.70. One of the great strengths of the bus protest was the unity that overcame previous factions within Montgomery's Black community, including class divisions. See *id.* at 675, 689. See generally THORNTON, *supra* note 27, at 29, 31–33 (discussing divisions within the Black community). Middle-class Blacks actively supported the protest, working in concert with the low-income and working-class bus riders who were directly affected by the discriminatory policies and practices. Coleman, Nee & Rubinowitz, *supra* note 34, at 708 n.53. For example, some affluent Blacks offered their expensive cars and their time as drivers to transport boycotters, as part of the “car pool” system. *Id.* at 676. The strength and power of that unity became one of the lessons from the Montgomery protest. See *id.* at 676–77, 689.

Dr. King later pointed to this unity in reflecting on the MIA's weekly meetings:

The mass meetings . . . cut across class lines. The vast majority present were working people; yet there was always an appreciable number of professionals in the audience. Physicians, teachers, and lawyers sat or stood beside domestic workers and unskilled laborers. The Ph.D's and the no "D's" were bound together in a common venture. The so-called "big Negroes" who owned cars and had never ridden the buses came to know the maids and the laborers who rode the buses every day. Men and women who had been separated from each other by false standards of class were now singing and praying together in a common struggle . . .

KING, *supra* note 7, at 68.

constituted a tiny fraction of the bar nationally in the 1950s and 1960s,¹⁵⁵ they comprised nearly half of the more than seventy lawyers involved with Dr. King.¹⁵⁶

*Table 1: Black Representation in the Legal Profession, 1950–1970*¹⁵⁷

Year	Number	Percentage
1950	1,450	.80
1960	2,180	1.03
1970	3,728	1.37

In addition to the significant numbers of Black lawyers that Dr. King enlisted overall, his preference for Black lawyers became clear in his heavy reliance on them at critical times in his career. For example, the defense team in his Alabama perjury trial consisted entirely of Black lawyers.¹⁵⁸ Using Black lawyers in court provided an opportunity to showcase their skills and talents.¹⁵⁹ Black lawyers could sometimes best their white counterparts in a direct competition, showing that Black lawyers could have success even on white segregationists' terms.¹⁶⁰

Dr. King shared a paradox with those lawyers. Both Dr. King and his lawyers “represented the race” in two very different senses: seeking authenticity within the Black community, while at the same time trying to be perceived as worthy representatives of Blacks to the white community.¹⁶¹ Martin Luther King, Jr. faced that dual challenge of “representing the race” in dealing with white government officials, media, supporters, and opponents, while trying to build and retain credibility and support in the Black community.¹⁶² Black lawyers served as the face of the race and sought respect in virtually all-white courts and other public forums, while establishing credibility in the Black community.¹⁶³

¹⁵⁵ See *infra* Table 1.

¹⁵⁶ See *infra* Appendix (identifying lawyers by race).

¹⁵⁷ 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: CHARACTERISTICS OF THE POPULATION pt. 1, § 2, at 739 tbl.223 (1973) [hereinafter 1970 CENSUS OF POPULATION]; 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS OF POPULATION: 1950, CHARACTERISTICS OF THE POPULATION pt. 1, ch. C, at 276 tbl.128 (1953) [hereinafter 1950 CENSUS OF POPULATION]; 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS OF POPULATION: 1960, CHARACTERISTICS OF THE POPULATION pt. 1, ch. D, at 544 tbl.205 (1964) [hereinafter 1960 CENSUS OF POPULATION].

¹⁵⁸ See discussion *infra* Section II.A.1.i.b. Similarly, his defense team in his Georgia incarceration was entirely Black until his father added a white lawyer on his own initiative. See DANIELS, *supra* note 41, at 116; see also discussion *infra* Section II.A.1.i.c.

¹⁵⁹ See *infra* notes 349–350 and accompanying text.

¹⁶⁰ See, e.g., Kennedy, *supra* note 112, at 1047–54 (discussing landmark bus segregation decision in *Gayle v. Browder* and the initial reluctance to file the suit); see also JONES & ENGEL, *supra* note 86, at 6–7 (recounting Dr. King as having intimated a “dire need of committed Negro professionals” becoming involved with the movement). Black lawyers’ participation represented an additional symbol of racial unity across class lines. See Kennedy, *supra* note 112, at 1023–24.

¹⁶¹ See generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

¹⁶² See generally BRANCH, *supra* note 32, *passim*; GARROW, *supra* note 2, *passim*.

¹⁶³ White police, judges, and juries held all the positions of power. See, e.g., King, *supra* note 1, at xxiii–xxiv (reflecting on the “white Southern power structure”); see also discussion *infra* Sections II.A.1.i.a–d, II.A.2.i–ii, III.B.1.i, III.B.3.i–iii, III.B.3.v.

ii. Gender

While women comprised a larger percentage of the nation's lawyers than Blacks, they too constituted a tiny fraction of the bar nationally in the 1950s and 1960s.¹⁶⁴

*Table 2: Women's Representation in the Legal Profession, 1950–1970*¹⁶⁵

Year	Number	Percentage
1950	6,256	3.47
1960	7,434	3.50
1970	13,180	4.84

Unlike Dr. King's efforts to enlist Black lawyers, there is no evidence Dr. King expressed a desire to include a significant number of women among the counsel.¹⁶⁶ Nor did any of his colleagues or those to whom he delegated the selection of lawyers.¹⁶⁷ In contrast to Blacks' impressive statistical overrepresentation, just two women—both of whom were Black—played significant roles.¹⁶⁸ While Dr. King did not seem to seek out women lawyers, he did sing the praises of Constance Baker Motley and Marian Wright Edelman.¹⁶⁹

Constance Baker Motley, a prominent civil rights lawyer, served with LDF from 1946 to 1965.¹⁷⁰ As LDF staff counsel and later associate counsel, Motley

¹⁶⁴ See *infra* Table 2. Justice Sandra Day O'Connor's experience illustrates the limited opportunities those women had in the profession. She graduated near the top of her class from Stanford Law School in 1952. 'Out of Order' at the Court: O'Connor on Being the First Female Justice, NPR (Mar. 5, 2013, 2:00 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=172982275>. She contacted forty legal employers, all of whom refused to interview her. *Id.* Many stated explicitly that they would not hire a woman. *Id.* Justice O'Connor eventually took a job with the District Attorney for San Mateo County, California based on her agreement to work for no pay at first and to sit at a desk next to the secretary. *Id.*

¹⁶⁵ 1970 CENSUS OF POPULATION, *supra* note 157, at 739 tbl.223; 1950 CENSUS OF POPULATION, *supra* note 157, at 278 tbl.128; 1960 CENSUS OF POPULATION, *supra* note 157, at 546 tbl.205; *cf.* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 4 tpls.I.1 & I.2 (1983) (listing slightly different figures and percentages, while acknowledging discrepancies in government records). Virtually all of the Black civil rights lawyers in the South were men. See GRAY, *supra* note 148, at 108 (displaying a photograph of members of the Southwest Bar Association in 1960, showing one woman out of about fifty members).

Similarly, the cover photo of J. Clay Smith's book, *Emancipation*, shows the 1932 moot court class of Howard Law School, with twenty-six men and one woman. See SMITH, *supra* note 142.

¹⁶⁶ The sources consulted do not reveal any internal discussion of the lawyers' gender having any bearing on their selection.

¹⁶⁷ See discussion *supra* Section I.A.

¹⁶⁸ Several other women played limited, behind-the-scenes roles. See *infra* Appendix.

¹⁶⁹ See *infra* notes 175–176, 182 and accompanying text.

¹⁷⁰ MOTLEY, *supra* note 13, at 59, 155, 206. Constance Baker Motley interned with Thurgood Marshall at the fledgling NAACP Legal Defense and Education Fund (LDF) while attending Columbia Law School. *Id.* at 58–59. She volunteered at LDF between the spring and summer of 1945, and worked there as law clerk from October 1945 until she graduated from law school in June 1946. *Id.* After law school, she became the first female staff attorney at LDF. See *VRA at 50: Day 17*, NAACP LDF, <http://www.naacpldf.org/vra-at-50-day-17> (last visited Apr. 26, 2016). In her time at LDF, she argued ten cases before the Supreme Court, winning nine of them. See MOTLEY, *supra* note 13, at 193–202. Her victories also included helping James Meredith gain admission to the University of Mississippi in 1962 as its first Black student. *Id.* at 162–83; see *Meredith v. Fair*, 83 S. Ct. 10 (1962). Motley had a distinguished career after her time at LDF as well. In 1964, she became the first Black

represented Dr. King and other activists.¹⁷¹ LDF directors Thurgood Marshall and his successor Jack Greenberg assigned her to provide assistance in various places.¹⁷² On other occasions, local counsel called on Motley as reinforcement when they faced difficult challenges, as in Albany, Georgia.¹⁷³ They did so out of respect for her experience and expertise.¹⁷⁴ In a 1966 statement about the “tremendous role” that lawyers played in the Civil Rights Movement, Dr. King included Constance Baker Motley as one of a half-dozen of those lawyers he mentioned by name.¹⁷⁵ He singled her out as “that Portia” among “defenders of great renown” in American history.¹⁷⁶

Marian Wright Edelman met Dr. King in 1960 in Atlanta, when she was an undergraduate student at Spelman College.¹⁷⁷ They developed their relationship when she spent several years with LDF’s Mississippi office after law school.¹⁷⁸ Through her work in Mississippi, she also came to know Senator Robert Kennedy.¹⁷⁹ In a 1967 meeting with Kennedy, she expressed her strong concerns about the widespread existence of poverty and the need to educate the public about poverty.¹⁸⁰ She passed along Kennedy’s suggestion to Dr. King to “bring the poor to Washington” to dramatize their plight and to press Congress for legislation to address it.¹⁸¹ For bringing that message to him, Dr. King called her “an angel sent

woman elected to the New York State Senate. LINN WASHINGTON, *BLACK JUDGES ON JUSTICE* 127 (1994); MOTLEY, *supra* note 13, at 206. In 1965, she was the first woman elected to the Manhattan (New York) Borough presidency. Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES (Sept. 29, 2005), <http://www.nytimes.com/2005/09/29/nyregion/29motley.html>. In 1966, President Johnson appointed her as a federal district court judge. *Id.* She was the first Black female appointed to the federal bench. *Id.* In 1982, she became the first woman to serve as Chief Judge of the Southern District of New York, “the largest federal trial bench” in the United States. Rachel Christmas Derrick, *A Columbian Ahead of Her Time: Constance Baker Motley*, COLUM. MAG., <http://www.columbia.edu/cu/alumni/Magazine/Spring2004/motley.html> (last visited Sept. 15, 2015). In 2001, President Bill Clinton awarded her the Presidential Citizens’ Medal, in recognition of her service to the nation. *Id.* She died in 2005 at the age of eighty-four. Martin, *supra*.

¹⁷¹ See generally MOTLEY, *supra* note 13, at 132–55.

¹⁷² See discussion *infra* Sections II.A.1.i.d, II.A.2.ii, II.B.2, III.B.1.i, III.B.3.i. See generally MOTLEY, *supra* note 13, at 70–73, 113, 142, 145, 162–63, 193 (illustrating instances in which Thurgood Marshall assigned Motley to assist with LDF cases); Allan Morrison, *Top Woman Civil Rights Lawyer: Securing Rights for Millions, Negro Woman Is One of World’s Most Influential Lawyers*, EBONY, Jan. 1963, at 50, 52, 54 (quoting Jack Greenberg on his view of Motley as LDF’s “field general” and on assigning her to the organization’s most challenging cases: “If a case is important or tough, one that really requires a major undertaking, then Connie gets it.”).

¹⁷³ See MOTLEY, *supra* note 13, at 138–39; see also discussion *infra* Section II.A.2.ii.

¹⁷⁴ See DANIELS, *supra* note 41, at 154–55. See generally *id.* at 79, 88–89; WESTIN & MAHONEY, *supra* note 136, at 105.

¹⁷⁵ King, *supra* note 1, at xxi, xxiii.

¹⁷⁶ *Id.* at xxiii. The reference to Shakespeare’s heroine in *The Merchant of Venice* also suggests that she was rare, if not unique, as a woman doing civil rights work. See generally WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*. She was doing men’s work, since the legal profession was historically a male domain.

¹⁷⁷ See MARIAN WRIGHT EDELMAN, *LANTERNS: A MEMOIR OF MENTORS* 63 (1999).

¹⁷⁸ See *id.* at 73–75, 102–04. While in Mississippi, she engaged in a protracted struggle to secure federal funding for the Child Development Group of Mississippi, a pre-school program for poor children. See *id.* at 102–04. Mississippi’s segregationist senators strongly opposed the program. See *id.* at 103. Dr. King assisted her in advocating on behalf of the program. See *id.* at 102–04.

¹⁷⁹ See *id.* at 104–07, 172.

¹⁸⁰ See *id.* at 104, 106–09.

¹⁸¹ See *id.* at 109.

by God.”¹⁸² The idea evolved into the “Poor People’s Campaign,” which Dr. King was planning when he was killed.¹⁸³ Marian Wright Edelman served as counsel to the campaign.¹⁸⁴

It is not entirely clear why Dr. King had so few women lawyers.¹⁸⁵ Dr. King’s focus was on race, and attracting Black lawyers was a key part of his agenda. There would be no reason to expect a similar effort to attract women lawyers unless they were Black and added to the level of participation of Black lawyers.¹⁸⁶

Moreover, with the separate spheres ideology still holding sway and the women’s movement yet to be born to challenge it,¹⁸⁷ Dr. King headed an organization that was male-dominated in its board, leadership, and staff.¹⁸⁸ The men, including Dr. King, retained many traditional views about gender roles.¹⁸⁹

¹⁸² *Id.* The admiration and respect were mutual. In Edelman’s memoir about her mentors, she wrote at length about Martin Luther King, Jr. Describing a meeting with him when she was in college, she said: “He was wonderful. He’s almost Christ-like. Went up afterwards and he greeted me as if I were an old and dear friend.” *Id.* at 63. Later she described him as “our greatest twentieth-century national prophet.” *Id.* at 122.

¹⁸³ See *infra* Section III.B.1.iii.

¹⁸⁴ *Marian Wright Edelman*, CHILD. DEF. FUND, <http://www.childrensdefense.org/about/leadership/marian-wright-edelman/> (last visited Feb. 18, 2015); see also *infra* notes 746, 754 and accompanying text. She went on to become the founder of the Children’s Defense Fund, which she continued to lead well into the twenty-first century. See *Marian Wright Edelman*, *supra*.

¹⁸⁵ Coretta Scott King’s observation about her husband suggested the complexity and perhaps contradictory nature of her husband’s views about women:

On the one hand, he believed that women are just as intelligent and capable as men and that they should hold positions of authority and influence. But when it came to his own situation, he thought in terms of his wife being a homemaker and a mother for his children. He was very definite that he would expect whoever he married to be home waiting for him.

CLAYBORNE CARSON, *MARTIN’S DREAM: MY JOURNEY AND THE LEGACY OF MARTIN LUTHER KING JR.* 203 (2013).

¹⁸⁶ See, e.g., Dorothy I. Height, “*We Wanted the Voice of a Woman to Be Heard*”: *Black Women and the 1963 March on Washington*, in *SISTERS IN THE STRUGGLE* 83, 86 (Bettye Collier-Thomas & V.P. Franklin eds., 2001) (“There was an all-consuming focus on race. We women were expected to put all our energies into [the March on Washington]. . . . [T]here was a low tolerance level for . . . questions about the women’s participation . . .”).

¹⁸⁷ The separate spheres philosophy is the idea that men should occupy the public sphere of work and public policy, while women should occupy the private sphere of the home and family. The late nineteenth-century conception of separate spheres is epitomized in Justice Bradley’s concurrence in *Bradwell v. Illinois*, which upheld the State’s exclusion of women from the practice of law based solely on their gender. See 83 U.S. (16 Wall.) 130 (1873). It expresses both the positive and normative view that men are biologically and genetically equipped for work and the public sphere while women are suited for the domestic and family realm. See *id.* at 141–42 (Bradley, J., concurring).

Separate spheres ideology remained a common view of women’s nature, capacity, and appropriate role in society well beyond the middle of the twentieth century. Law schools, the legal profession, and the Civil Rights Movement itself reflected that constrained conception of women’s place. See generally Cary Franklin, *Separate Spheres*, 123 *YALE L.J.* 2878 (2014).

¹⁸⁸ See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 103 (1984) (detailing how the SCLC’s male leaders’ views on women drove them to select John Tilley over Ella Baker as SCLC’s first executive director).

¹⁸⁹ See *id.* Bernard Lee, one of Dr. King’s personal assistants, once referred to him as a “male chauvinist . . . believ[ing] that the wife should stay home and take care of the babies while he’d be out there in the streets.” GARROW, *supra* note 2, at 375–76. See generally Lee, *Bernard Scott (1935–1991)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_lee_bernard_scott_1935_1991/ (last visited Sept. 25, 2015).

Furthermore, as SCLC turned increasingly to LDF for legal representation in the early 1960s, it relied heavily on that organization's staff, volunteers, and local cooperating attorneys.¹⁹⁰ LDF was also a male-dominated organization. A lack of women lawyers working at LDF (Constance Baker Motley was the organization's only woman lawyer for much of this period) may also help to explain the relatively small number of women lawyers serving the movement.¹⁹¹ A number of other women lawyers made their mark as civil rights advocates during this period in movements unrelated to Dr. King.¹⁹²

When William Ming, Dr. King's co-lead counsel in his 1960 perjury trial, was teaching at Howard Law School, he wondered aloud why women were in law school at all. *See* MACK, *supra* note 161, at 229.

In his co-authored book *Behind the Dream*, Clarence Jones, who helped write the "I Have a Dream" speech, noted with regret that virtually all the speakers at the March on Washington were men. JONES & CONNELLY, *supra* note 53, at 100–01. This was the case even though there were prominent activists like Rosa Parks on the podium who the crowd would have wanted to hear. *See id.*

Lawyer and civil rights activist Pauli Murray expressed strong feelings about the exclusion of women:

It was bitterly humiliating for Negro women on August 28 to see themselves accorded little more than token recognition in the historic March on Washington. Not a single woman was invited to make one of the major speeches or to be part of the delegation of leaders who went to the White House. This omission was deliberate. Representations for recognition of women were made to the policy-making body sufficiently in advance of the August 28 arrangements to have permitted the necessary adjustments of the program.

Pauli Murray, *The Negro Woman in the Quest for Equality*, ACORN, June 1964, reprinted in *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* 172, 175 (J. Clay Smith Jr. ed., 1998).

Coretta Scott King also expressed concerns about the treatment of women at the March on Washington. She had hoped to march at her husband's side: "I felt that the involvement in the Movement of some of the wives had been so extensive that they should have been granted the privilege of marching with their husbands and of completely sharing this experience together, as they had shared the dangers and the hardships." CARSON, *supra* note 185, at 210.

¹⁹⁰ *See infra* Section I.B.4.i. Pauli Murray, one of the most prominent Black women lawyers of the era, sought employment with LDF after law school but Thurgood Marshall rejected her application. *See* PAULI MURRAY, PAULI MURRAY: THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET 263 (1987). Murray dressed and carried herself in an androgynous style. *See* MACK, *supra* note 161, at 214. That made Marshall concerned about how she would fare in front of southern judges and juries. *See id.* at 220.

¹⁹¹ *See* Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 *YALE L.J.* 19, 19 (1991) ("My tribute acknowledges my personal debt to Thurgood Marshall for aiding my career at a time when nobody was hiring women lawyers."); Dorothy Roberts, *Constance Baker Motley*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 393, 394 (Roger K. Newman ed., 2009) ("Upon graduating in 1946, Motley was hired as the only woman on the LDF legal team . . ."). *See generally* GREENBERG, *supra* note 51, at 32–36; MOTLEY, *supra* note 13, at 151–55.

¹⁹² In his 1966 civil rights memoir, lawyer William Kunstler listed about 350 lawyers who made significant contributions to the civil rights cause. *See* KUNSTLER, *supra* note 1, at xi–xv. While men dominated the list, it included more than thirty women civil rights lawyers. *See id.* Many of those women lived in the North and did their civil rights work in their own communities. However, women were represented among the lawyers who joined hundreds of college students in Mississippi in the massive voter registration drive in 1964's "Freedom Summer." *See* LEN HOLT, *THE SUMMER THAT DIDN'T END: THE STORY OF THE MISSISSIPPI CIVIL RIGHTS PROJECT OF 1964* app. 3, at 280 (1965). Eight of the sixty-nine lawyers who went to Mississippi in support of the activists were women. *See id.* Most of them appeared to have been associated with the National Lawyers Guild. *See id.*

iii. Religion

An SCLC board member once said, “SCLC is not an organization, it’s a church.”¹⁹³ Black ministers led it, and it was “firmly rooted in the Black church.”¹⁹⁴ Even the name reflected the faith-based core of the organization.¹⁹⁵ Dr. King felt it was important that “Christian” be included in the name to emphasize that the organization’s participants and its potential base came mostly from the church.¹⁹⁶ Ministers dominated the formal structure, including the Board and the high levels of the staff.¹⁹⁷ Those origins could have led to a search for Christian lawyers who shared the organization’s religious beliefs and motivations. Nevertheless, religious affiliation did not seem to matter in the selection of lawyers.¹⁹⁸ Movement leaders seemed indifferent about whether their lawyers shared the same faith and faith-based commitment to civil rights.¹⁹⁹

In fact, several of Dr. King’s lawyers were Jewish.²⁰⁰ Having Jewish lawyers seemed consistent with Dr. King’s sense of kinship with the Jewish people because of their shared history of struggle against systematic oppression.²⁰¹ For example, Jack Greenberg, who succeeded Thurgood Marshall in leading LDF, was Jewish.²⁰² Stanley Levison and Harry Wachtel, two members of Dr. King’s inner circle, were also Jewish.²⁰³ Levison was one of Dr. King’s most loyal and trusted advisers.²⁰⁴ It thus appears Dr. King did not attempt to recruit lawyers exclusively of the Christian faith.

¹⁹³ FAIRCLOUGH, *supra* note 21, at 1.

¹⁹⁴ *Id.*

¹⁹⁵ See MORRIS, *supra* note 188, at 86.

¹⁹⁶ GARROW, *supra* note 2, at 97. Bayard Rustin tried to dissuade Dr. King, for fear that the name might put off non-religious civil rights supporters, but Dr. King was unmoved. *Id.*

¹⁹⁷ See *id.* at 104–05; MORRIS, *supra* note 188, at 103.

¹⁹⁸ While Fred Gray is a minister as well as a lawyer, that seemed irrelevant to his selection to represent the Montgomery Improvement Association. See GRAY, *supra* note 7, at 13, 52–54.

¹⁹⁹ The sources do not reveal any internal discussion of the lawyers’ religion having any bearing on their selection.

²⁰⁰ In a 2007 panel discussion on Jewish lawyers in the Civil Rights Movement, former LDF head Jack Greenberg recalled: “[O]f the 17 [lawyers who signed the *Brown v. Board of Education* brief], four were white. And of the four, three were Jewish. And the fourth was Charles Black, who . . . was married to Barbara Black, who was Jewish . . . Jewish involvement in LDF was substantial . . . among the whites, in the early days at least, I would say ninety percent of them were Jewish. As time went on, more and more non-Jews became involved.” *Jewish Lawyers in the Civil Rights Movement*, *supra* note 74. The involvement of Jewish lawyers in Dr. King’s campaigns may have reflected the more general connection between Blacks and Jews in the Civil Rights Movement, especially in the 1950s and early 1960s. See generally JONES & ENGEL, *supra* note 86, at 125–41.

²⁰¹ See JONES & ENGEL, *supra* note 86, at 126–27. Jones quotes Dr. King as having said: “There isn’t anyone in this country more likely to understand our struggle than Jews. Whatever progress we’ve made so far as a people, their support has been essential.” *Id.* at 129.

²⁰² GREENBERG, *supra* note 51, at 48.

²⁰³ BRANCH, *supra* note 32, at 582.

²⁰⁴ See discussion *infra* Section I.B.5.

iv. Age

Dr. King's lawyers included the country's most experienced and celebrated civil rights lawyers.²⁰⁵ At the same time, Dr. King also welcomed—even embraced—relatively inexperienced young lawyers.²⁰⁶ That inclusiveness is not surprising in light of the fact that Dr. King was only twenty-six years old and a year into his first ministry when he assumed the mantle of leadership of the MIA.²⁰⁷ Moreover, there were few established civil rights lawyers available to serve the burgeoning Civil Rights Movement.²⁰⁸ Young, idealistic lawyers provided an important source of supply to meet a growing demand.

Once again, Fred Gray epitomized the significant role that young lawyers played.²⁰⁹ In 1955, at age twenty-four, and only a year and a half out of law school, Gray defended Rosa Parks and then served as the MIA's lawyer.²¹⁰ While Martin Luther King, Jr.'s first lawyer may have been his youngest, least experienced one, he was not the only one whose youth stood out. In his account of Dr. King recruiting him for the perjury defense team, Clarence Jones says that Dr. King repeatedly described him as a “young man” or young lawyer.²¹¹ It was as if his youth helped to qualify him for the assignment as a legal researcher, while at the same time

²⁰⁵ See discussion *infra* Section I.B.4.i. See generally WILLIAM T. COLEMAN JR. WITH DONALD T. BLISS, COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA'S PROMISE 199 (2010) (“Since the 1930s LDF lawyers have forged much of the transformative legal precedent on civil rights through litigation in the federal and state courts and appeals to the Supreme Court. The Inc[.] Fund has attracted some of the finest lawyers, regardless of color, who have gone on to extraordinary careers as federal judges, law school professors, leading law firm partners, and elected officials.”); MOTLEY, *supra* note 13, at 59 (discussing LDF's “outstanding lawyers”); WESTIN & MAHONEY, *supra* note 136, at 93–94 (discussing extensive credentials of lead-LDF lawyers Jack Greenberg and Constance Baker Motley).

²⁰⁶ See, e.g., JONES & ENGEL, *supra* note 86, at 2, 4–7 (noting that Clarence Jones was “less than a year out of law school” when Dr. King recruited him). Unlike twenty-first century law students, who have access to legal clinics, externships, and summer jobs, most of these young lawyers had limited practical experience when they joined the Civil Rights Movement. See, e.g., MOTLEY, *supra* note 13, at 58–59.

Moreover, some young lawyers were seeking to represent civil rights activists. See *id.* at 154–55. Their ideological commitment sometimes grew out of their own encounters with racism. For example, Fred Gray rode the Montgomery buses extensively and felt the sting of discrimination there. See *supra* note 127 and accompanying text. Horace Ward was rejected from the University of Georgia Law School and lost his suit challenging that exclusion. See *supra* note 142. These young lawyers graduated when the modern Civil Rights Movement was getting started, and there were opportunities for idealistic young lawyers to become activists for social change.

Also, it was difficult for Black lawyers to make a living practicing law at that time. For example, Fred Gray had a great deal of time on his hands when he started his practice in Montgomery. See GRAY, *supra* note 7, at 31.

²⁰⁷ GARROW, *supra* note 2, at 32.

²⁰⁸ See *Jewish Lawyers in the Civil Rights Movement*, *supra* note 74.

²⁰⁹ When Rosa Parks refused to give up her bus seat, Gray's life and career took a remarkable turn. See GRAY, *supra* note 7, at 33.

²¹⁰ See *id.* at 6, 22, 50–53, 55–56.

²¹¹ JONES & ENGEL, *supra* note 86, at 12–13. Jones was twenty-nine years old in 1960, having graduated from law school in 1959 after serving in the military. See Jones, *Clarence Benjamin (1931–)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_jones_clarence_benjamin_1931/ (last visited Sept. 17, 2015).

obligating him both to remember where he came from and to serve the civil rights cause.²¹²

In addition to Fred Gray and Clarence Jones, three other young lawyers similarly assumed significant roles. The first was Horace Ward, of Atlanta, who attended Morehouse College with Martin Luther King, Jr.²¹³ In 1960, the year after Ward graduated from law school, he assisted Dr. King's defense counsel in a Georgia criminal matter.²¹⁴ The second was Norman Amaker, who was only twenty-eight years old when he played a central role in the Birmingham Movement of 1963.²¹⁵ A staffer at the NAACP Legal Defense and Education Fund, Amaker had been out of law school just four years.²¹⁶ And the third was Marian Wright Edelman, who worked on the Poor People's Campaign in 1968, and who was just twenty-eight years old and less than five years out of law school when she assumed that important responsibility.²¹⁷

At the same time, Dr. King, his colleagues, and the young lawyers themselves relied very heavily on the older, more experienced lawyers who had established the field of civil rights law and repeatedly brought their expertise to bear.²¹⁸ Those lawyers included Thurgood Marshall, Robert Carter, Jack Greenberg, and Constance Baker Motley.²¹⁹

3. Strategic Commitments

In light of Dr. King's commitment to nonviolent direct action, it would be understandable if he expected the lawyers to share a belief in the principle and its efficacy. As Dr. King's own understanding of, and commitment to, nonviolent direct action deepened,²²⁰ he might have become insistent that his lawyers were on the same strategic page. But Dr. King did not seem concerned about strategic conformity. While most of his lawyers supported nonviolent direct action, several remained committed to litigation as the essential means to bring about civil rights progress.

²¹² See JONES & ENGEL, *supra* note 86, at 13–14.

²¹³ DANIELS, HORACE WARD, *supra* note 141, at 26.

²¹⁴ See discussion *infra* Section II.A.1.i.c.

²¹⁵ See ESKEW, *supra* note 50, at 249, 252; GARROW, *supra* note 2, at 243; WESTIN & MAHONEY, *supra* note 136, at 77; *Who is Norman Amaker?*, LOY. U. CHI. SCH. L., http://www.luc.edu/law/amaker/who_is_norman_amaker.html (last visited Jan. 30, 2016); see also discussion *infra* Section III.B.3.i.

²¹⁶ See *Who is Norman Amaker?*, *supra* note 215.

²¹⁷ See EDELMAN, *supra* note 177, at 67, 73–74, 76, 109–11; Krissah Thompson, *Marian Wright Edelman Marks 40 Years of Advocacy at Children's Defense Fund*, WASH. POST (Sept. 29, 2013), <http://wpo.st/mBsc1>; Interview by Henry Hampton with Marian Wright Edelman (Dec. 21, 1988), <http://digital.wustl.edu/cgi/t/text/text-idx?c=eop;cc=eop;rgn=main;view=text;idno=ede5427.0676.044>. Edelman graduated from Yale Law School in 1963. *Marian Wright Edelman*, BRITANNICA.COM, <http://www.britannica.com/biography/Marian-Wright-Edelman> (last visited Sept. 17, 2015).

²¹⁸ See, e.g., GRAY, *supra* note 7, at 72–73; see also sources cited *supra* note 205.

²¹⁹ See discussion *supra* Section I.A, *infra* Sections II.A.1.i.a, II.A.1.i.d, II.A.2.ii, II.B.1–2, III.B.1.i, III.B.1.iii, III.B.3.i–iii, III.B.3.vi.

²²⁰ See generally KING, *supra* note 7; MLK AUTOBIOGRAPHY, *supra* note 32, at 67–68, 79, 99, 121–34.

Thurgood Marshall served as the most prominent case in point.²²¹ His training and experience led him to view the courts as the central venue for achieving racial progress.²²² He even expressed disdain for the Montgomery Bus Boycott: “All that walking for nothing. They might as well have waited for the Court decision.”²²³ A Marshall biographer suggests that “[i]n his heart, he viewed the bus boycott and King’s speeches as street theater that did not come close to equaling the main event—the NAACP’s effort to get the courts to end legal segregation.”²²⁴

William Ming, Dr. King’s co-lead counsel in his perjury trial, came from the same court-focused tradition as Thurgood Marshall.²²⁵ He had worked with Marshall on the NAACP Legal Defense and Education Fund’s school desegregation litigation campaign that included a series of Supreme Court higher education decisions and culminated with *Brown v. Board of Education* in 1954.²²⁶

Birmingham lawyer Arthur Shores initially expressed deep skepticism about nonviolent direct action.²²⁷ He strongly opposed the 1963 direct action campaign

²²¹ See Aldon Morris, Leon Forrest Professor of Sociology & African Am. Studies, Nw. Univ., Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King’s Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL’Y 624, 631 (2016).

²²² See generally KLUGER, *supra* note 13, at 133–36, 156, 213–15, 222–24, 265–68, 270–73.

²²³ LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 74 (2000).

²²⁴ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 247 (Three Rivers Press 2004) (1998). Williams also suggests that, notwithstanding Marshall’s deep reservations, he did make some supportive comments about the bus boycott publicly: “Even as he dismissed King’s protest tactics in private, Marshall told the delegates that the NAACP had to evaluate King’s nonviolent technique to see ‘to what extent it can be used in addition to our other means of protest.’” *Id.* at 251 (quoting Thurgood Marshall, Special Counsel, Keynote Address at the NAACP Annual Convention (June 26, 1956)).

While Dr. King may not have been fully aware of Marshall’s attitude toward the boycott and direct action generally, Marshall’s core strategic commitment to the courts as the engine for social change was a matter of long-standing public record. See, e.g., *id.* at 247 (describing Marshall’s belief that “people [should] obey the laws and the courts, even if they disliked them”). See generally TUSHNET, *supra* note 13, at 232–82; *Thurgood Marshall*, NAACP LDF, <http://www.naacpldf.org/thurgood-marshall> (last visited Sept. 17, 2015).

²²⁵ See, e.g., TUSHNET, *supra* note 13, at 91, 113, 134–35, 137, 198; see also *infra* notes 683–684 and accompanying text (discussing the interaction between Ming and Dr. King during the Chicago Freedom Movement).

²²⁶ See TUSHNET, *supra* note 13, at 89–91, 137, 198. The cases included *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Brown v. Board of Education*, 347 U.S. 483 (1954).

²²⁷ See ESKEW, *supra* note 50, at 324; Glenn T. Eskew, *The Alabama Christian Movement for Human Rights and the Birmingham Struggle for Civil Rights, 1956–1963*, in BIRMINGHAM, ALABAMA, 1956–1963: THE BLACK STRUGGLE FOR CIVIL RIGHTS 3, 17 (David J. Garrow ed., 1989). Professor Eskew identifies Shores as having been a member of “Birmingham’s black bourgeoisie,” which had long “opposed [the] use of direct action confrontation.” *Id.* at 66–67.

in his hometown.²²⁸ He preferred to negotiate a compromise and then turn to the courts if necessary, rather than engaging in any type of direct action.²²⁹

Notwithstanding these divergent strategic commitments, the lawyers were prepared to provide whatever assistance activists needed.²³⁰ Consequently, the lawyers' stance on nonviolent direct action seemed largely immaterial to Dr. King.

4. Civil Rights Legal Organizations

In addition to individual lawyers, Martin Luther King, Jr. relied heavily on civil rights legal organizations. He established an especially close working relationship with the NAACP Legal Defense and Education Fund (LDF).²³¹ He also secured legal assistance from the similarly named but separate NAACP.²³² On occasion, American Civil Liberties Union (ACLU) cooperating attorneys also played a role.²³³ While Dr. King avoided having too many public ties to the National Lawyers Guild (NLG), he did enlist individual members from that organization.²³⁴

i. NAACP Legal Defense and Education Fund

In 1940, the NAACP Legal Defense and Education Fund (LDF) formed as a separate entity from the NAACP to carry out litigation campaigns, and Thurgood Marshall served as the organization's first director-counsel.²³⁵ Marshall emerged as

²²⁸ See BRANCH, *supra* note 32, at 768, 901. Shores and other Black lawyers in Birmingham were opposed to a lawsuit to desegregate the city's parks, viewing it as a bad idea because history showed the city would close all the parks if it lost. See THORNTON, *supra* note 27, at 222–23. They collectively agreed that none of them would handle the case unless the Alabama Christian Movement for Human Rights hired all of them, which they knew it could not afford to do. See *id.* at 223–24.

²²⁹ See ESKEW, *supra* note 50, at 324; THORNTON, *supra* note 27, at 194; see also, e.g., TUSHNET, *supra* note 13, at 113–14, 119. Professor Thornton describes Shores as “a man always eager to accommodate white community leaders” through compromise. THORNTON, *supra* note 27, at 223.

²³⁰ See *supra* note 30 and accompanying text; see also, e.g., KINOY, *supra* note 30, at 192–93 (“Lawyers were no longer the central agents fighting to achieve the goals of freedom and equality through their own special arena, the courts of law. Their role now was vastly different. Their primary task was to find ways of helping the Black people themselves resist the efforts of the power structure to derail their own forward movement to enforce the constitutional promises of freedom and equality.”); ANDREW YOUNG, AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA 215–16 (1996) (“[LDF’s] style was such that they never discouraged us from anything. Their position was that they could not dictate the strategy of the movement but would be there to manage the legal ramifications of our decisions. . . . [Dr. King] determined the political strategy, and the LDF crafted a complementary legal strategy to minimize our exposure to legal sanctions.”). See generally KINOY, *supra* note 30, at 168–69, 189.

²³¹ See *infra* Section I.B.4.i.

²³² See *infra* Section I.B.4.ii.

²³³ See GREENBERG, *supra* note 51, at 375.

²³⁴ See *infra* Section I.B.4.iv. Jack Greenberg avoided the National Lawyers Guild, presumably because of its reputation of having connections to the Communist Party. See, e.g., GREENBERG, *supra* note 51, at 376–80. However, Dr. King listed NLG among the legal organizations that had helped advance civil rights. King, *supra* note 1, at xxv. His list also included the ACLU, the Law Students Civil Rights Research Council, the Lawyers Constitutional Defense Committee, the NAACP LDF, and the President’s Committee on Civil Rights Under Law. *Id.*

²³⁵ See GREENBERG, *supra* note 51, at 17–18 (discussing LDF’s incorporation in March 1940). Because the NAACP’s lobbying and propaganda activities disqualified it from receiving tax-deductible contributions, its board created LDF as an independent charitable organization that would carry out the

the most prominent civil rights litigator of his era,²³⁶ and LDF became the country's preeminent civil rights litigation organization.²³⁷

Fred Gray turned to LDF for assistance early in the Montgomery Bus Boycott.²³⁸ After that, Dr. King relied increasingly on the organization for legal assistance.²³⁹ In 1961, as Thurgood Marshall left LDF for a seat on the Second Circuit Court of Appeals bench, he picked Jack Greenberg as his successor.²⁴⁰ Greenberg had been with LDF for more than a decade, and he was on the legal team that won *Brown v. Board of Education*.²⁴¹ The relationship between LDF and Dr.

NAACP's non-lobbying and non-propaganda activities, hoping that its tax-exempt status would attract contributions from the Rockefeller family. *See id.* at 17; *see also* NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 132 (D.C. Cir. 1985) ("Besides serving as a means to ensure on-going financing of civil rights litigation, the creation of the LDF provided an important tax advantage."). LDF had its own board of directors, though all of its original directors also served on the NAACP's board. GREENBERG, *supra* note 51, at 18. That influence "assured indirect control" over LDF's operations. *Id.*

²³⁶ *See, e.g.,* William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991) ("Thurgood Marshall was probably the most important advocate in America, one who used his formidable legal skills to end the evils of discrimination. . . . [I]t was his presentations, in case after case and in court after court, that helped bring about a society in which 'equal protection of the laws' could be a reality and not merely a legal phrase.").

²³⁷ *See* GREENBERG, *supra* note 51, at 551; Rabin, *supra* note 75, at 216–18. Marshall led the organization through its decades-long public education desegregation litigation campaign, culminating with *Brown v. Board of Education*, 347 U.S. 483 (1954). For more on those efforts, *see* KLUGER, *supra* note 13.

²³⁸ *See* GRAY, *supra* note 7, at 70 (stating Gray sought input from Thurgood Marshall shortly after the boycott began to guide his discussion with movement leaders about filing a case in federal court).

²³⁹ *See* GREENBERG, *supra* note 51, at 360–64, 374; MOTLEY, *supra* note 13, at 135, 159; MLK AUTOBIOGRAPHY, *supra* note 32, at 216–17; King, *supra* note 1, at xxv.

²⁴⁰ GREENBERG, *supra* note 51, at 315–17; WESTIN & MAHONEY, *supra* note 136, at 51. As a white lawyer, Greenberg's appointment produced controversy both within and outside of the organization. *See* GREENBERG, *supra* note 51, at 7, 318–19; MOTLEY, *supra* note 13, at 151–54.

Thurgood Marshall went on to serve as Solicitor General from 1965 to 1967. WILLIAMS, *supra* note 224, at 317, 338. In 1967, President Johnson appointed him to the Supreme Court, where he served until 1991. *Id.* at 330–31, 391.

²⁴¹ GREENBERG, *supra* note 51, at 25, 175, 551–52; *see* 347 U.S. 483 (1954) (overturning the "separate but equal" doctrine); *see also* Jack Greenberg, NAACP LDF, <http://www.naacpldf.org/jack-greenberg-biography> (last visited Jan. 16, 2016) [hereinafter *Greenberg LDF Bio*]. Jack Greenberg graduated from Columbia Law School in 1948, and the following year he joined LDF as an assistant counsel under Thurgood Marshall. GREENBERG, *supra* note 51, at xiii; *see also* Jack Greenberg, COLUM. L. SCH., http://www.law.columbia.edu/fac/Jack_Greenberg (last visited Jan. 16, 2016) [hereinafter *Greenberg Faculty Bio*]. During his thirty-five years with LDF, Greenberg argued forty cases before the U.S. Supreme Court and hundreds more in the lower courts, in areas such as school desegregation, employment discrimination, and the death penalty. GREENBERG, *supra* note 51, at xiii; *see, e.g.,* *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that, in the three cases before the Court, the death penalty violated the "cruel and unusual punishment" clause of the Eighth Amendment—applicable to the states through the Fourteenth Amendment—and temporarily ending all executions); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (prohibiting reliance on tests with discriminatory impact for employment and promotion decisions unless the employer can show that such practice is "related to job performance"); *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969) (holding that segregated school systems must desegregate "at once").

Greenberg was an adjunct professor at Columbia Law School from 1970–84, and he left LDF in 1984 to join the law school's faculty. GREENBERG, *supra* note 51, at xiii; *Greenberg Faculty Bio, supra*. He served as Dean of Columbia College from 1989–93, and then returned to teaching full-time as a professor at the law school. *Id.* He has spent numerous semesters as a visiting professor at law schools worldwide, and has written several books and other publications reflecting on his battles and victories in the Civil Rights Movement. *See id.; Greenberg LDF Bio, supra*.

King deepened, since Greenberg was far more sympathetic to Dr. King's nonviolent direct action strategies than Marshall had been.²⁴² By 1963, LDF had become SCLC's primary legal counsel.²⁴³

Dr. King's relationship with LDF had many benefits for the movement. First, it added substantially to the supply of capable, committed lawyers.²⁴⁴ LDF's level of experience and the depth and breadth of expertise dwarfed that of any other group. The staff included many of the top civil rights lawyers in the country.²⁴⁵ Including Greenberg and Motley, LDF had seventeen staff lawyers by the mid-

In 1996, the American Bar Association recognized Greenberg for his exceptional contributions to civil rights by awarding him the Thurgood Marshall Award. *Id.* In 2001, President Clinton awarded Greenberg a Presidential Citizens Medal, noting, "In the courtroom and the classroom, Jack Greenberg has been a crusader for freedom and equality for more than half a century." *Id.*; see also Jennifer Shotz, *Law Professor Jack Greenberg Awarded Presidential Citizens Medal*, COLUM. NEWS (Jan. 12, 2001), <http://www.columbia.edu/cu/news/01/01/jackGreenberg.html>.

Greenberg is a founding member of the Mexican-American Legal Defense and Education Fund, and continued to serve on LDF's Board of Directors. *Greenberg Faculty Bio*, *supra*.

²⁴² See GREENBERG, *supra* note 51, at 463–65. There had also been personal tensions between Thurgood Marshall and Dr. King. Marshall resented the fact that Dr. King's reputation was growing and overtaking his own as a leader of the Civil Rights Movement. See WILLIAMS, *supra* note 224, at 251–52.

²⁴³ GREENBERG, *supra* note 51, at 374. SCLC never had a full-time in-house legal staff. As its primary outside counsel, LDF became the closest thing the organization had to such an arrangement. *See id.*; see also FAIRCLOUGH, *supra* note 21, at 178 (stating LDF took over all SCLC's important litigation in June 1964 when the Gandhi Society expired); Letter from Martin Luther King, Jr. to Robert McDougal, Jr. (Dec. 14, 1965), <http://thekingcenter.org/archive/document/letter-mlk-robert-mcdougal-jr#> ("[T]he NAACP's Legal Defense [F]und handles all litigations and judicial proceedings for the Southern Christian Leadership Conference."). Michael Meltsner, an LDF staff attorney during this period, argued that "[w]hile every lawyer who was ever in the same room with Martin Luther King has claimed to have represented him, it was Greenberg—and LDF—that King asked time and time again to do his most important legal work." MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 135 (2006). But some sources suggest that Chauncey Eskridge acted as SCLC "legal counsel" for a period of time. *See, e.g.*, GARROW, *supra* note 2, at 622 (calling Eskridge "[l]ongtime SCLC attorney"); Heise, *supra* note 151 (stating Eskridge was SCLC's "legal counsel in the late 1960s").

²⁴⁴ See GREENBERG, *supra* note 51, at 323–26, 374. LDF had a very large and varied docket of its own, both substantively and geographically. *See id.* at 323–26. Even so, LDF provided far more legal resources to SCLC than any other organization. *See id.* at 374, 552.

²⁴⁵ See GRAY, *supra* note 7, at 72–73; King, *supra* note 1, at xxiii; Rabin, *supra* note 75, at 217 n.38, 232 n.78.

1960s.²⁴⁶ They included James Nabrit III,²⁴⁷ Norman Amaker,²⁴⁸ Leroy Clark,²⁴⁹ Melvyn Zarr,²⁵⁰ and Steve Ralston,²⁵¹ among others. LDF's consultants constituted

²⁴⁶ GREENBERG, *supra* note 51, at 323.

²⁴⁷ After graduating from Yale Law School in 1955, James M. Nabrit III served in the Army and then practiced at a Washington, D.C. law firm before joining LDF as a staff attorney in 1959. Matt Schudel, *Civil Rights Stalwart Argued Key Cases Before High Court*, WASH. POST, Mar. 27, 2013, at B5. He worked on a variety of civil rights cases at LDF, including school desegregation, prison conditions, public accommodations, and criminal defense. *James M. Nabrit, 1932–2013*, NAACP LDF (Mar. 24, 2013), <http://www.naacpldf.org/news/james-m-nabrit-1932-2013> [hereinafter *Nabrit*].

Nabrit co-wrote the Supreme Court brief for the appeal of Dr. King's 1964 arrest in Birmingham for violating an injunction. GREENBERG, *supra* note 51, at 363; *see Walker v. City of Birmingham*, 388 U.S. 307 (1967); *see also* discussion *infra* Section III.B.3.i. Nabrit also helped write the detailed plan for the Selma to Montgomery 1965 voting rights march that the district court approved. *Nabrit, supra*; *see* discussion *infra* Section III.B.3.iii.

Nabrit continued to work for LDF until 1989. *Nabrit, supra*. He argued twelve cases before the Supreme Court, including *Keyes v. School District No. 1*, 413 U.S. 189 (1973), which found that Denver's segregated schools violated the Equal Protection clause. After his retirement, Nabrit continued to advise the organization until his death at the age of 80 in 2013. *See Nabrit, supra*.

²⁴⁸ After graduating from Columbia Law School in 1959, Norman Amaker became a staff attorney for LDF. *Who is Norman Amaker?*, *supra* note 215. Amaker worked on a variety of civil rights cases at LDF, including school desegregation, voting rights, employment discrimination, and the death penalty, and argued cases before all levels of state and federal courts, including the Supreme Court. *Id.*; *see also* James Janega, *Norman Amaker, 65, Key Civil Rights Figure*, CHI. TRIB. (June 11, 2000), http://articles.chicagotribune.com/2000-06-11/news/0006110048_1_adam-clayton-powell-naacp-legal-defense-fund-first-year-students.

Amaker represented demonstrators arrested during Martin Luther King, Jr.'s voter registration drive in Selma, Alabama, GREENBERG, *supra* note 51, at 381, and he briefed Dr. King and other SCLC leaders on the likely consequences of violating the injunction against marches in Birmingham. BRANCH, *supra* note 32, at 728; *see* discussion *infra* Section III.B.3.i. After Dr. King was arrested for violating the injunction, Amaker served as one of the couriers who carried Dr. King's famous "Letter from a Birmingham Jail" out of jail. *Who is Norman Amaker?*, *supra* note 215. *See generally infra* note 659 (discussing Dr. King's "Letter from a Birmingham Jail").

Amaker left LDF in 1971 to become the Executive Director of Neighborhood Legal Services Program, a Washington, D.C. legal aid organization. *See Who is Norman Amaker?*, *supra* note 215. He became a law professor at Rutgers Law School in 1973, and moved to Loyola University Chicago School of Law in 1976. *Id.* Amaker taught at Loyola until his death in 2000 at the age of sixty-five. *See id.*

²⁴⁹ After Leroy Clark graduated from Columbia Law School in 1961, he worked briefly at the State of New York Attorney General's office before joining LDF as a staff attorney in 1962. *See New Member Joins NAACP Defense Fund*, ST. PETERSBURG TIMES, Jan. 22, 1962, at 8-D. Clark defended Dr. King after his arrest for violating the injunction against demonstrating in Birmingham in 1963. GREENBERG, *supra* note 51, at 362; *see* discussion *infra* Section III.B.3.i. He also represented demonstrators arrested in 1965 for participating in voting rights demonstrations in Selma. GREENBERG, *supra* note 51, at 381. *See generally infra* Section III.B.3.iii (discussing Selma arrests). After Selma, Clark worked with Dr. King on planning for the Poor People's Campaign and was instrumental in bringing the campaign to fruition. GREENBERG, *supra* note 51, at 463; *see also* discussion *infra* Sections III.B.1.iii, III.B.3.vi.

In 1968, Clark became a professor at NYU Law School, where he worked for eleven years, and then served as general counsel for the EEOC from 1979–1981. *Leroy D. Clark*, CATH. U. AM. COLUMBUS SCH. LAW, <http://www.law.edu/fac-staff/clark-leroy/index.cfm> (last visited Sept. 17, 2015). He went on to become a professor at Catholic University of America Columbus School of Law from 1981 until his retirement in 2006. *Black Law Students Association Honors Professor Emeritus Leroy Clark*, CATH. U. AM. COLUMBUS SCH. LAW, <http://www.law.edu/2013-Winter-Spring/BLSA-Honors-Prof-Emeritus-Leroy-Clark.cfm> (last visited Sept. 15, 2015).

²⁵⁰ Melvyn Zarr graduated from Harvard Law School in 1963. Melvyn Zarr, *Recollections of My Time in the Civil Rights Movement*, 61 ME. L. REV. 365, 366 (2009). He started working for LDF as a summer position to make money before the bar exam, and ended up accepting a full time position at the

a small group of highly committed civil rights advocates,²⁵² including law professors Louis Pollak²⁵³ and Anthony Amsterdam.²⁵⁴ A network of local

end of the summer. *Id.* at 367–69. Zarr worked on numerous civil rights issues during his time at LDF, starting with demonstrator cases. *See id.* at 368. He spent the summer of 1966 in Grenada, Mississippi, giving advice and doing defense work for Dr. King and others involved with a string of SCLC demonstrations. *See id.* at 372. Starting in the mid-60s, Zarr was the Mississippi member of LDF’s “Demonstration Team.” *Id.* at 373. If Dr. King was demonstrating in Mississippi, Zarr traveled there to supplement the local lawyers. *Id.* He also worked with Dr. King to plan the Poor People’s Campaign. GREENBERG, *supra* note 51, at 463; *see* discussion *infra* Section III.B.1.iii.

Zarr continued doing civil rights work with LDF after Dr. King’s death, including arguing before the Supreme Court in *Davis v. Mississippi*, 394 U.S. 721 (1969), which held that the exclusionary rule applies to fingerprint evidence obtained during an illegal detention. In 1969, he left LDF to become co-director of a group focusing on poverty law reform. Zarr, *supra*, at 375. He went on to become a professor at University of Maine School of Law in 1973. *Id.*

²⁵¹ Charles Stephen Ralston earned his law degree in 1962 from the University of California at Berkeley Boalt Hall School of Law. *Selma Profiles*, *supra* note 140. After law school, he served in the United States Army Reserves and then taught for a year at Columbia Law School before joining LDF in 1964 as a staff attorney. *Id.* His caseload at LDF included housing and employment discrimination, capital punishment, school desegregation, and voting rights. *Id.*

Ralston co-wrote the motion for a temporary restraining order to prevent interference with Dr. King’s 1965 voting rights march from Selma to Montgomery. GREENBERG, *supra* note 51, at 383; *see also* discussion *infra* Section III.B.3.iii. He moved to San Francisco in 1968 to open LDF’s West Coast office, but eventually returned to New York and, in 1988, was appointed to lead LDF’s appellate litigation practice. *Selma Profiles*, *supra* note 140. After serving as senior staff attorney and LDF’s employment litigation practice lead from 1993 to 2001, Ralston moved back to San Francisco, where he opened his own practice and continued his work with LDF as a cooperating attorney. *Id.*

²⁵² *See generally* GREENBERG, *supra* note 51, at 171.

²⁵³ Louis Pollak graduated from Yale Law School in 1948. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 1 (1959). After law school, he clerked for Supreme Court Justice Wiley Rutledge, and then went to work for a New York law firm. Dennis Hevesi, *Louis H. Pollak, Civil Rights Activist and Federal Judge, Dies at 89*, N.Y. TIMES, May 13, 2012, at A24. While at the firm, he began volunteering at LDF, doing consulting and brief writing for school desegregation cases. *See id.*; *see also* COLEMAN, *supra* note 205, at 122, 143, 145, 147, 153; GREENBERG, *supra* note 51, at 171. He at one time was vice president of LDF’s Board. Jack Greenberg, *Louis H. Pollak*, 127 U. PA. L. REV. 295, 296 (1978). He went on to work for the State Department and in the legal department of a union. *See* GREENBERG, *supra* note 51, at 171. In 1955, Pollak joined the faculty at Yale Law School, and in 1965 he became dean. *See* Hevesi, *supra*. While at Yale, Pollak continued to volunteer with LDF and played an active role in cases during the Freedom Riders Movement. *Id.* He successfully argued *Abernathy v. Alabama*, 380 U.S. 447 (1965), the Supreme Court decision that overturned the convictions of Freedom Riders by citing its holding in *Boynton v. Virginia*, 364 U.S. 454 (1960), that racial segregation in public transportation was illegal. Pollak was also part of the team that met with Dr. King to plan the Poor People’s Campaign. *See* GREENBERG, *supra* note 51, at 463; *see also* discussion *infra* Section III.B.1.iii.

Pollak left Yale in 1974 to join the faculty at University of Pennsylvania Law School, and became dean of the law school the following year. Hevesi, *supra*. In 1978, President Carter appointed him district judge for the Eastern District of Pennsylvania. *Id.* Pollak assumed senior status in 1992. *Id.* He died in 2012 at the age of eighty-nine. *Id.*

²⁵⁴ Anthony Amsterdam graduated in 1960 from University of Pennsylvania Law School and then clerked for Justice Felix Frankfurter. *Anthony G. Amsterdam – Biography*, NYU SCH. L., <http://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=19743> (last visited Oct. 1, 2015) [hereinafter *Amsterdam Profile*]. After his clerkship, Amsterdam spent a year as an Assistant United States Attorney and then joined the faculty of the University of Pennsylvania Law School. *See* THE RULE OF LAW ORAL HISTORY PROJECT: THE REMINISCENCES OF ANTHONY G. AMSTERDAM 29–30 (Columbia Univ. Oral History Research Office ed., 2010) [hereinafter REMINISCENCES].

Amsterdam had written a student note for the *University of Pennsylvania Law Review* on the Supreme Court’s application of the vagueness doctrine to address local officials’ use of vague statutes such as disorderly conduct and trespassing to discriminate against civil rights demonstrators. *Id.* at 35–

cooperating lawyers multiplied the organization's resources.²⁵⁵ By the mid-1960s, about 200 cooperating lawyers served as local counsel in LDF's litigation.²⁵⁶

With significant numbers of lawyers at its disposal, LDF gave priority to Dr. King and SCLC in assigning its lawyers. With so many crises, Dr. King often needed lawyers on very short notice who could commit the time and resources required to address Dr. King's needs.²⁵⁷ Jack Greenberg repeatedly dispatched staff lawyers upon request, with little or no delay.²⁵⁸ He also made himself and

36. Based on that research, LDF called on him, starting in 1963, for assistance in defending demonstrators, including those involved in SCLC demonstrations. *Id.* Amsterdam worked with cooperating LDF attorneys, primarily writing briefs. *Id.* at 41; *see, e.g.*, discussion *infra* Section III.B.3.i.

Amsterdam went on to do a variety of pro bono work throughout his career, including civil rights cases with LDF and poverty work with the ACLU. *See* REMINISCENCES, *supra*, at 117. His primary focus was the death penalty, including arguing *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court decision that ruled existing state death penalty laws unconstitutional. He argued numerous cases before the Supreme Court and wrote amicus briefs in many others. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina's mandatory death sentence for first-degree murder violated the Eighth and Fourteenth Amendments); *Boykin v. Alabama*, 395 U.S. 238 (1969) (reversing a death penalty conviction for a Black Alabama man who had pled guilty to robbery, where it was unclear whether the defendant had voluntarily and understandingly entered his guilty plea).

Amsterdam left Penn Law School for Stanford in 1969 and went on to NYU in 1981. *Amsterdam Profile, supra*.

²⁵⁵ *See* GREENBERG, *supra* note 51, at 298, 394; Rabin, *supra* note 75, at 216–18.

²⁵⁶ GREENBERG, *supra* note 51, at 394. Along with performing substantial work for Dr. King and SCLC, LDF performed significant litigation in many areas of civil rights during that time. After its victories in *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954), holding “separate but equal” unconstitutional in the area of public education, and *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955), directing localities to move towards compliance with “all deliberate speed,” *id.* at 301, LDF initiated lawsuits all over the South to enforce *Brown*. *History*, NAACP LDF, <http://www.naacpldf.org/history> (last visited Mar. 3, 2015); *see, e.g.*, *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968) (holding that a Virginia school board's adoption of a “freedom-of-choice” plan, in which each student chose which public school to attend, did not constitute adequate compliance with *Brown* when not a single white student had chosen to attend a formerly Black school and eighty-five percent of Black students still attended the same school that they attended prior to *Brown*); *Cooper v. Aaron*, 358 U.S. 1 (1958) (denying an Arkansas school board's post-*Brown* request to suspend its judicially-approved school integration plan pending the resolution of various legal challenges of state laws aimed at circumventing *Brown*). In 1961, LDF had forty-six school cases, and that number grew to 185 in 1965. GREENBERG, *supra* note 51, at 324.

Throughout the 1960s, LDF argued approximately forty demonstration cases before the Supreme Court, virtually all of which were successful except for Dr. King's conviction for marching in Birmingham when there was a state court injunction prohibiting the march. *Id.* at 323; *see* *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *see also* discussion *infra* Section III.B.3.i. Demonstration cases involved fighting for those convicted of crimes like trespass or breach of the peace for participating in sit-ins or other demonstrations against segregation. *See* GREENBERG, *supra* note 51, at 288–92. LDF used various arguments against these types of convictions, largely focusing on how the state enforced segregation violated the Fourteenth Amendment. *See id.* at 292–95.

By the mid-1960s, those types of cases began to decrease as consistent victories led to widespread compliance with integration of public accommodations. *See id.* at 323. Also in the mid-1960s, LDF's legal staff and budget grew substantially, which enabled LDF to increase the variety of cases it litigated. *See id.* LDF attorneys began working on enforcing the Civil Rights Act of 1964, with an emphasis on the equal employment sections of the Act. *Id.* at 323–24. They also expanded their criminal defense work, fighting against racial discrimination in capital punishment, which eventually developed into an attack on the constitutionality of capital punishment. *See id.* at 326, 394.

²⁵⁷ *See, e.g.*, GREENBERG, *supra* note 51, at 364, 374, 381–83, 465; MOTLEY, *supra* note 13, at 135, 159.

²⁵⁸ *See* sources cited *supra* note 94.

Constance Baker Motley available at times and places that Dr. King requested.²⁵⁹ Moreover, turning to LDF advanced Dr. King's objective of maximizing representation by Black lawyers. Blacks comprised the majority of the organization's lawyers.²⁶⁰

In addition, LDF was responsive to SCLC's changing legal needs. Dr. King and Jack Greenberg shared the same conception of the appropriate lawyer-client relationships.²⁶¹ Dr. King and his colleagues needed to be able to make the final decisions about strategies and tactics.²⁶² Jack Greenberg perceived the role of LDF as laying out the law and the implications of taking alternative routes, without pressing its views about what SCLC should do.²⁶³ LDF lawyers willingly carried out whatever tasks Dr. King asked of them. Since the lawyers' roles changed significantly with the movement's strategic shifts, LDF's flexibility proved valuable.²⁶⁴

LDF also had the geographical flexibility necessary to support the SCLC campaigns.²⁶⁵ The organizations' structures and methods of operation mirrored each other's. Each had a base, with LDF in New York and SCLC in Atlanta, and each pursued its goals in many places, with LDF's local cooperating lawyers and SCLC's affiliate organizations throughout the region.²⁶⁶

Still another significant attraction of LDF was that the non-profit organization did not charge fees to its clients. LDF relied on its own fund-raising efforts to sustain its staff and network of cooperating lawyers.²⁶⁷ That was extremely important in light of SCLC's recurring financial challenges.²⁶⁸

ii. NAACP

In response to Fred Gray's request, NAACP General Counsel Robert Carter provided legal backup in Montgomery early on.²⁶⁹ He assisted local lawyers both

²⁵⁹ See, e.g., GREENBERG, *supra* note 51, at 306–08, 362, 463; MOTLEY, *supra* note 13, at 158–59.

²⁶⁰ See MOTLEY, *supra* note 13, at 154–55.

²⁶¹ See GREENBERG, *supra* note 51, at 374.

²⁶² See *id.*

²⁶³ See *id.*; *id.* at 380.

²⁶⁴ See, e.g., discussion *infra* Section III.B.3.i (discussing example of LDF respecting Dr. King's decision to violate a state court injunction in Birmingham in 1963).

²⁶⁵ See Rabin, *supra* note 75, at 216–17. See generally GREENBERG, *supra* note 51, at 291–92, 298, 323, 374, 394 (discussing LDF's network of cooperating lawyers and alliance with SCLC).

²⁶⁶ See FAIRCLOUGH, *supra* note 21, at 71; GREENBERG, *supra* note 51, at 17; sources cited *supra* note 265.

²⁶⁷ For insights into LDF's fundraising strategies, see GREENBERG, *supra* note 51, at 395–403. In appreciation for the services, Dr. King contributed to LDF, with apologies for the modest size of the contributions. See Letter from Martin Luther King, Jr. to Thurgood Marshall (Feb. 6, 1958), in 4 THE PAPERS OF MARTIN LUTHER KING, JR.: SYMBOLS OF THE MOVEMENT, JANUARY 1957–DECEMBER 1958, at 360, 360 (Clayborne Carson et al. eds., 2000).

²⁶⁸ See FAIRCLOUGH, *supra* note 21, at 47, 142.

²⁶⁹ See TUSHNET, *supra* note 13, at 302; Coleman, Nee & Rubinowitz, *supra* note 34, at 682. Robert L. Carter graduated from Howard Law School in 1940 and earned an LL.M. from Columbia Law School in 1941. Howard Univ. Sch. of Law, Robert L. Carter (1917–2012), BROWN@50, <http://www.brownat50.org/brownbios/biojudgerbtcarter.html> (last visited Sept. 21, 2015). He served in the Army from 1941 to 1944, where he first experienced harsh racism and became determined to end racial discrimination. ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 36, 49–50 (2005).

in defending Rosa Parks for refusing to give up her seat and in Martin Luther King, Jr.'s prosecution under the state anti-boycott statute.²⁷⁰ The NAACP also joined in the challenge to the constitutionality of the state and local bus segregation laws along with LDF and Fred Gray.²⁷¹

After Montgomery, the NAACP had much less interaction with Dr. King and SCLC than LDF. It had a much smaller legal staff than LDF, and it had to direct substantial resources to defending itself against legal attacks from southern states.²⁷²

iii. American Civil Liberties Union

In addition to its own small staff, the American Civil Liberties Union (ACLU) operated through a network of “cooperating attorneys.”²⁷³ In April 1968, the head of the ACLU's southern region called on a Memphis law firm to provide pro bono

After leaving the Army, Carter joined LDF in 1944 as Thurgood Marshall's legal assistant, and then became an assistant special counsel the following year. Roy Reed, *Robert L. Carter*, 94, *Leading Strategist Against Segregation and U.S. Judge, Dies*, N.Y. TIMES, Jan. 4, 2012, at A17; *Black History Month Spotlight: Robert L. Carter*, NAACP LDF (Feb. 5, 2014), <http://www.naacpldf.org/press-release/black-history-month-spotlight-robort-l-carter> [hereinafter *Carter Spotlight*]; see also KLUGER, *supra* note 13, at 271 (referring to Carter as Thurgood Marshall's “key assistant” and describing him as “limber, quiet, and strongly self-disciplined”). He played a critical role in the long series of school desegregation cases, including working as a lead attorney in *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding the University of Texas's refusal to admit a Black student to its law school because of his race unconstitutional, where separate facility provided for Blacks was inferior in several respects), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Carter Spotlight*, *supra*; see also GREENBERG, *supra* note 51, at 166, 180, 422–23. In 1956, Carter became NAACP's general counsel. See MOTLEY, *supra* note 13, at 150; see also TUSHNET, *supra* note 13, at 310. During his tenure as a civil rights attorney, Carter argued twenty-two cases before the Supreme Court, winning twenty-one of them. *Carter Spotlight*, *supra*.

Carter resigned from the NAACP in 1968. CARTER, *supra*, at 202. He began a yearlong fellowship at Columbia University, after which he became a partner at a small New York City law firm. See *id.* at 204, 207. In 1972, Carter was appointed by President Nixon to the U.S. District Court for the Southern District of New York, where he served until retiring in 2009 as a senior judge. Dennis McLellan, *Robert L. Carter, 1917–2012; NAACP Attorney Fought Segregation*, L.A. TIMES, Jan. 7, 2012, at AA6; *Carter Spotlight*, *supra*. Carter died in 2012, at age 94. McLellan, *supra*.

²⁷⁰ See TUSHNET, *supra* note 13, at 302–03.

²⁷¹ See GRAY, *supra* note 7, at 71–72; see also *Gayle v. Browder*, 352 U.S. 903 (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956); discussion *infra* Section II.B.1. In addition to providing lawyers and helping with legal costs, the NAACP supported the boycott by raising funds for the MIA. *National Association for the Advancement of Colored People (NAACP)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_national_association_for_the_advancement_of_colored_people_naacp1/ (last visited Sept. 17, 2015). Dr. King wrote NAACP Executive Secretary Roy Wilkins in May 1956 to thank him for encouraging these efforts:

[T]he whole Executive Board of the Montgomery Improvement Association is deeply gratified to know of the support that the National Office consented to give for our struggle. All of the offers that were made concerning the three legal matters are satisfactory to us. I assure you that this will go a long, long way in lifting the legal burden that we confront. Moreover, this deep spirit of cooperation from the NAACP will give us renewed courage and vigor to carry on.

Letter from M.L. King, Jr., President, Montgomery Improvement Ass'n, to Roy Wilkins, Exec. Sec'y, NAACP (May 1, 1956), in 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 243, 243–44.

²⁷² See GREENBERG, *supra* note 51, at 237, 261.

²⁷³ See Rabin, *supra* note 75, at 223–24.

representation to Dr. King and the local striking sanitation workers in seeking the court's permission to carry out a protest march.²⁷⁴

iv. National Lawyers Guild

In 1937, a group of lawyers organized the National Lawyers Guild (NLG) as an alternative to the politically conservative and racially exclusionary American Bar Association.²⁷⁵ It had a “general commitment to progressive government and the use of the law as an instrument for social change.”²⁷⁶ It was the first white-organized lawyers' organization to accept Black members.²⁷⁷

Dr. King recognized the Guild's important contributions to the Civil Rights Movement.²⁷⁸ At the same time, there was reason for Dr. King to be wary of having too close and too public ties to NLG. The federal government viewed the organization as closely tied to the Communist Party.²⁷⁹ Since opponents of the Civil

²⁷⁴ See BEIFUSS, *supra* note 65, at 268; Cody, *supra* note 118, at 703–04; see also W.J. Michael Cody, Burch, Porter & Johnson (Memphis), Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL'Y 679, 683 (2016) [hereinafter Cody Remarks]; discussion *infra* Section III.B.3.v.

²⁷⁵ See SMITH, *supra* note 142, at 550. See generally TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, AM. BAR ASS'N, REPORT WITH RECOMMENDATIONS 14–16 (1986); THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN (Ann Fagan Ginger & Eugene M. Tobin eds., 1988); *Our History*, NAT'L LAW. GUILD, <http://www.nlg.org/our-history> (last visited Sept. 21, 2015). By the time Martin Luther King, Jr.'s career began, NLG had become the first racially integrated organization of lawyers to have a Black president. See ROBERT J. BLAKELY WITH MARCUS SHEPARD, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY, at xviii (2006). Earl Dickerson, a Chicago activist, lawyer, and businessman, led NLG from 1951 to 1954. John T. McQuiston, *Earl B. Dickerson Dies at 95; Lawyer and Rights Advocate*, N.Y. TIMES, Sept. 4, 1986, at B12; *The Early Years*, NAT'L LAW. GUILD, <http://www.nlg.org/early-years> (last visited Sept. 21, 2015).

²⁷⁶ STEVE BABSON, DAVE RIDDLE & DAVID ELSILA, THE COLOR OF LAW: ERNIE GOODMAN, DETROIT, AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS 80 (2010).

²⁷⁷ See SMITH, *supra* note 142, at 550. More than a dozen Black lawyers attended NLG's first annual meeting. *Id.* It took the form of a membership organization rather than housing a staff of lawyers like LDF and the NAACP. See *Our History*, *supra* note 275. The organization was structured around local chapters. See *The Early Years*, *supra* note 275. Members participated through committees and projects. See *id.* At the first annual meeting, pioneering civil rights lawyer Charles Hamilton Houston was elected to serve as the New York chapter's second vice-president, making him “the first black lawyer to hold office in a nationally affiliated association founded by white lawyers.” SMITH, *supra* note 142, at 550; see also *Houston an Officer of Lawyers' Guild*, 44 CRISIS 48 (1937).

²⁷⁸ See King, *supra* note 1, at xxv. In 1962, NLG created the “Committee to Assist Southern Lawyers.” THE NATIONAL LAWYERS GUILD, *supra* note 275, at 187–88. It announced the committee's formation at a meeting held under the auspices of SCLC, at a Virginia church. *Id.* at 188. Dr. King was the main speaker. *Id.*

Also in 1962, SCLC co-sponsored an NLG “Workshop Seminar for Lawyers on Civil Rights and Negligence Law.” BABSON, RIDDLE & ELSILA, *supra* note 276, at 303. This was a major step in NLG's southern campaign, attracting nearly sixty Black and white lawyers from every state in the South, and from the North, as well. *Id.* Once again, Dr. King spoke at the event. See *id.*

²⁷⁹ The House Un-American Activities Committee (HUAC) published a report in 1950, entitled *National Lawyers Guild: Legal Bulwark of the Communist Party*, that “decimated the ranks of the [NLG].” *Blacklist Resistance: The NLG Fights for Its Life*, NAT'L LAW. GUILD <http://www.nlg.org/about/history/blacklist-resistance-nlg-fights-its-life> (last visited Sept. 21, 2015).

Rights Movement consistently tried to discredit the movement by painting it as a tool of the Communist Party, associating with NLG posed risks.²⁸⁰

Nevertheless, a number of the lawyers that Dr. King enlisted were prominent members of the National Lawyers Guild. Clifford Durr, who worked with Fred Gray on the bus boycott,²⁸¹ served as president of the Guild from 1949 to 1950.²⁸² Hubert Delany, who served as co-lead counsel in Dr. King's 1960 perjury trial, was elected to NLG's national board in 1939.²⁸³ William Kunstler, who was special counsel to SCLC at one point, was also a Guild member.²⁸⁴

5. An Inner Circle

While Dr. King headed Atlanta-based SCLC, he formed an informal inner circle of advisers and confidants based in New York.²⁸⁵ The group granted him refuge from the institutional challenges and tensions within the SCLC.²⁸⁶ It served him both personally and in his institutional role as president of SCLC.²⁸⁷

While SCLC's Board and top staff members were comprised largely of southern Black ministers,²⁸⁸ Dr. King's inner circle was racially integrated, with

²⁸⁰ When he became head of LDF, Jack Greenberg continued LDF's previous policies and practices by consistently declining to cooperate with NLG. See GREENBERG, *supra* note 51, at 376–80. He declined NLG's invitation to its workshop on civil rights “in a terse two-line note . . . that conveyed, by its brevity, the wariness of [LDF] toward [NLG].” BABSON, RIDDLE & ELSILA, *supra* note 276, at 303. The perceived taint of communist sympathies loomed large. See GREENBERG, *supra* note 51, at 378.

²⁸¹ See GRAY, *supra* note 7, at 44.

²⁸² See Sarah Hart Brown, *Clifford Durr*, ENCYCLOPEDIA ALA. (July 31, 2007), <http://www.encyclopediaofalabama.org/article/h-1254>. Starting in 1949, Durr served as President of NLG for eighteen months, forever marking him as a radical, tying him to the communist party, and causing both personal and professional ostracism. See BROWN, *supra* note 114, at 24, 82–84.

²⁸³ SMITH, *supra* note 142, at 551; see discussion *infra* Section II.A.1.i.b. Delany and Earl Dickerson, who was elected to the board at the same time, were the first Black lawyers who served on the board of a national white-organized bar organization. SMITH, *supra* note 142, at 551.

However, when faced with questions from President Johnson's administration about “subversives,” Dr. King made it clear that one NLG member had no affiliation with SCLC. See *supra* note 152.

²⁸⁴ LANGUM, *supra* note 84, at 64–65.

²⁸⁵ See FAIRCLOUGH, *supra* note 21, at 5, 38. Clarence Jones says that, in addition to himself, Dr. King's inner circle included Bayard Rustin, Stanley Levison, Harry Wachtel, Professor Lawrence Reddick, Cleveland Robinson, and Reverends Ralph Abernathy, Walter Fauntroy, Thomas Kilgore, Wyatt Tee Walker, and Andy Young. JONES & CONNELLY, *supra* note 53, at 4–6.

²⁸⁶ See BRANCH, *supra* note 32, at 860; FAIRCLOUGH, *supra* note 21, at 38–41, 168.

²⁸⁷ See FAIRCLOUGH, *supra* note 21, at 50–51, 165–66, 169–73; GARROW, *supra* note 2, *passim*; JONES & CONNELLY, *supra* note 53, at 5, 44–45.

²⁸⁸ See JONES & CONNELLY, *supra* note 53, at 4–5; see also *supra* note 21 and accompanying text.

Northerners as well as Southerners,²⁸⁹ and ministers²⁹⁰ and activists,²⁹¹ as well as three lawyers.²⁹² The lawyers included Stanley Levison, a prosperous white businessman and attorney, Harry Wachtel, a white New York corporate lawyer, and Clarence Jones, the Black lawyer Dr. King recruited for his perjury defense team.²⁹³

²⁸⁹ See JONES & CONNELLY, *supra* note 53, at 4–6.

²⁹⁰ See *id.* at 5–6. After completing his undergraduate and master’s degrees, Ralph David Abernathy accepted a call to be the pastor at First Baptist Church in Montgomery in 1951. RALPH DAVID ABERNATHY, AND THE WALLS CAME TUMBLING DOWN: AN AUTOBIOGRAPHY 93, 97–99 (1989); Richard Severo, *Ralph David Abernathy, Rights Pioneer, is Dead at 64*, N.Y. TIMES, Apr. 18, 1990, at B7. He and Martin Luther King, Jr. met when Dr. King visited Montgomery’s Dexter Avenue Church for the first time, and the two became fast friends. See ABERNATHY, *supra*, at 123–24, 128–29. During the Montgomery Bus Boycott, Abernathy served Dr. King as a second-in-command. STEPHEN B. OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR. 74 (1st HarperPerennial ed. 1994). Later, Abernathy served as vice president of SCLC, and was Dr. King’s chosen heir since “no one articulate[d his] ideas more thoroughly than Ralph Abernathy.” BRANCH, *supra* note 59, at 197. Abernathy worked with Dr. King throughout all of his major movements, going to jail with him seventeen times and cradling him after he was shot. Severo, *supra*.

After Dr. King’s death, Abernathy became president of SCLC, having previously been designated his “automatic successor.” FAIRCLOUGH, *supra* note 21, at 257, 385. He spearheaded the Poor People’s Campaign. ABERNATHY, *supra*, at 494, 499. In 1977, Abernathy resigned from his role as president of SCLC to launch a campaign for the U.S. House of Representatives. See *id.* at 583–84. After losing that election, Abernathy returned to his work as a minister. See *id.* at 585–86. He died in 1990, at the age of 64. Severo, *supra*.

²⁹¹ See JONES & CONNELLY, *supra* note 53, at 4–6. Bayard Rustin was one of Martin Luther King, Jr.’s closest advisors, starting with the Montgomery Bus Boycott. See FAIRCLOUGH, *supra* note 21, at 24–25, 29–33, 38–42. In 1937, Rustin became a member of a communist organization, which he left in 1941 when he began working as a race relations organizer for an international justice organization. See DANIEL LEVINE, BAYARD RUSTIN AND THE CIVIL RIGHTS MOVEMENT 18–20, 25–26, 28–30 (2000). In 1946, he organized and participated in an early version of the Freedom Rides. *Id.* at 52–56. In 1953, Rustin was arrested on a “morals charge” for performing a homosexual act and later convicted, which ultimately cost him his job. See *id.* at 70–72 (“Within a week, Bayard had resigned or been asked to resign . . .”). He then became the executive secretary for a pacifist organization, which was his only official job for the next twelve years, though he was frequently on loan to the Civil Rights Movement. See JERVIS ANDERSON, BAYARD RUSTIN: TROUBLES I’VE SEEN: A BIOGRAPHY 172–73, 286–87 (Univ. of Cal. Press 1998) (1997); LEVINE, *supra*, at 91, 153–55.

A few days after the Montgomery Bus Boycott began, an anti-segregationist author called Rustin to encourage him to work with Dr. King and vice versa. See *id.* at 78. Rustin was forced to leave Montgomery a few days after he arrived due to concerns about his homosexuality and his communist ties hurting the movement. See HARVARD SITKOFF, KING: PILGRIMAGE TO THE MOUNTAINTOP 43–44 (2008). However, Dr. King and Rustin had formed an immediate connection, and Rustin became a trusted advisor, teaching him about Gandhi and nonviolence. *Id.* at 43. From the time of the boycott until Dr. King’s death, Rustin worked with Dr. King as a ghostwriter, strategic advisor, and fundraiser, as well as working to increase publicity and northern support for Dr. King’s movements. See FAIRCLOUGH, *supra* note 21, at 38–40, 51, 170–71; LEVINE, *supra*, at 84–85, 91; SITKOFF, *supra*, at 49–50. Rustin also worked on a team of advisors that helped create the SCLC, calling a group of Black activists together, and fighting for the all-Black, top-down structure of the organization. *Id.* at 58–59. Rustin’s best-known contribution to the Civil Rights Movement was his organization of the 1963 March on Washington, which was attended by 250,000 people. See LEVINE, *supra*, at 131, 144–46. Rustin was also helping Dr. King plan the Poor People’s Campaign before Dr. King died. See *id.* at 202–04.

²⁹² See JONES & CONNELLY, *supra* note 53, at 5–6. The non-lawyers in the inner circle included Bayard Rustin, Cleveland Robinson, Professor Lawrence Reddick, and Reverends Thomas Kilgore, Walter Fauntroy, Wyatt Tee Walker, Ralph Abernathy, and Andrew Young. *Id.*

²⁹³ FAIRCLOUGH, *supra* note 21, at 30, 97–98; JONES & CONNELLY, *supra* note 53, at 5–6; see *supra* notes 86–87 and accompanying text. Professor Fairclough describes Wachtel as “a wealthy corporation lawyer, the general counsel and executive vice-president of the McCrory Corporation, the well-known chain store.” FAIRCLOUGH, *supra* note 21, at 97. In 1984, Wachtel helped found Gold & Wachtel, a

Like the other members of the inner circle, the lawyers took on roles as strategists, counselors, writers, fundraisers, and confidants.²⁹⁴

Stanley Levison met Dr. King very early in the minister's career, in 1956, and quickly became part of his inner circle.²⁹⁵ Levison was forty-four, and Martin Luther King, Jr. was twenty-seven at the time.²⁹⁶ The relationship developed into Dr. King's "closest friendship with a white person."²⁹⁷ Levison was more of a confidant and advisor than a traditional lawyer to Dr. King. His contributions included strategizing about movements, providing political advice, assisting with drafting SCLC's founding documents, negotiating book contracts, editing Dr. King's writings, fundraising, and even preparing Dr. King's income tax returns.²⁹⁸ He was also "one of the few people willing to criticize King to his face."²⁹⁹

Martin Luther King, Jr. kept trying to compensate Levison for his invaluable assistance, but Levison explained his refusal in terms of the benefits he received from their relationship:

My skills were acquired not only in a cloistered academic environment, but also in the commercial jungle. . . . Although our culture approves, and even honors th[ose] practices, to me they were always abhorrent. Hence, I looked forward to the time when I could use these skills not for myself but for socially constructive ends. The liberation struggle is the most positive and rewarding area of work anyone could experience.³⁰⁰

Some years before meeting Dr. King, Levison had been directly tied to the Communist Party.³⁰¹ The Kennedy administration was aware of Levison's prior activities.³⁰² In 1963, President Kennedy personally urged Dr. King to cut ties with Levison to avoid tainting the Civil Rights Movement and undermining the administration's ability to get civil rights legislation through Congress.³⁰³

midsize Manhattan law firm specializing in litigation and corporate work. Wolfgang Saxon, *Harry H. Wachtel, 79, Confidant and Legal Counsel to Dr. King*, N.Y. TIMES, Feb. 5, 1997, at B10; see also BRANCH, *supra* note 59, at 28 (calling Wachtel "a Wall Street law partner").

²⁹⁴ See FAIRCLOUGH, *supra* note 21, at 172–73; JONES & CONNELLY, *supra* note 53, at 5, 25–27, 68–71, 78; JONES & ENGEL, *supra* note 86, at 6–7, 25; Saxon, *supra* note 293.

²⁹⁵ See JONES & CONNELLY, *supra* note 53, at 5. Civil rights activists Ella Baker and Bayard Rustin introduced them. Garrow, *supra* note 88, at 80, 85.

²⁹⁶ Garrow, *supra* note 88, at 85.

²⁹⁷ *Id.* Professor Garrow suggests that the FBI wiretap on Levison's phone "attest[s] to what a valuable, insightful, and influential friend Stanley Levison remained to King right up to King's death." *Id.* at 86. Clarence Jones, a fellow member of Dr. King's inner circle, said "Stanley Levison is someone who deserves a statue for his devotion to Martin and [his] work for the civil rights movement." JONES & ENGEL, *supra* note 86, at 7.

²⁹⁸ See FAIRCLOUGH, *supra* note 21, at 30–32, 38–48, 66, 97–98, 172, 199–200, 287, 361, 369; GARROW, *supra* note 2, at 102, 116. Commenting on Levison's level of commitment, Clarence Jones said, "[I]t's safe to say that if Stanley had ever been convinced that complete civil rights for Negroes could have been accomplished somehow by his own impoverishment and death, Stanley would've considered it a bargain." JONES & ENGEL, *supra* note 86, at 6–7.

²⁹⁹ GARROW, *supra* note 2, at 105.

³⁰⁰ *Id.* at 117.

³⁰¹ See *id.* at 194–95.

³⁰² See *id.*

³⁰³ *Id.* at 272–73; see JONES & ENGEL, *supra* note 86, at 179, 184–86.

Levison's loyalty to Martin Luther King, Jr. and to the movement led Levison to readily agree to cut off their relationship.³⁰⁴ With great reluctance, Dr. King ceased direct contact with Levison.³⁰⁵ However, he continued their extensive communication by using Clarence Jones as an intermediary, and then resumed direct contact eighteen months later.³⁰⁶ Dr. King's willingness to take the risks involved in continuing that relationship attests to its importance to him.

As discussed earlier, Dr. King recruited Clarence Jones to join his defense team for the 1960 perjury trial. That beginning soon led to a very close professional and personal relationship. Jones went from reluctant participant to a self-described "disciple" of Martin Luther King, Jr.³⁰⁷ After his "conversion," Jones became devoted to Dr. King.³⁰⁸ He served as lawyer, advisor, confidant, and speechwriter, with intense and continuous involvement until Dr. King's death in 1968.³⁰⁹ Jones's contributions also included helping write the "I Have a Dream" speech and assisting with critical fund-raising for bail and for SCLC generally.³¹⁰

While Harry Wachtel's relationship with Martin Luther King, Jr. was not as long or as close as those of Stanley Levison or Clarence Jones, it also developed quickly into a personal one.³¹¹ Wachtel met Dr. King at a New York fundraiser and

³⁰⁴ JONES & CONNELLY, *supra* note 53, at 40–41. Levison did not participate in the March on Washington, to avoid the risk of being seen with anyone connected with Dr. King, but he agreed to be available by phone from New York if his input was needed. *See id.* at 42.

³⁰⁵ *See id.* at 41. When members of the Kennedy administration began informing Dr. King about their concerns with Levison, he listened, thanked them for their concern, and said "he was not one to question" Levison's motives. GARROW, *supra* note 2, at 195. He only unwillingly ceased direct contact over a year later, at Levison's encouragement. *See id.* at 275.

³⁰⁶ BRANCH, *supra* note 59, at 27; *see also* GARROW, *supra* note 2, at 275; JONES & CONNELLY, *supra* note 53, at 40 & 195 n.15. In March 1965, FBI Director J. Edgar Hoover hand-delivered a "classified" letter to President Johnson in the White House, reporting that Dr. King was resuming contact with Levison a year and a half after breaking off all communication under heavy pressure from President Kennedy. BRANCH, *supra* note 59, at 27.

³⁰⁷ *See supra* note 87.

³⁰⁸ JONES & CONNELLY, *supra* note 53, at 44, 121.

³⁰⁹ *See id.* at 44–45, 54–55, 57–59; JONES & ENGEL, *supra* note 86, *passim*.

³¹⁰ *See* GARROW, *supra* note 2, at 462, 480, 535–36; JONES & CONNELLY, *supra* note 53, at xvi; JONES & ENGEL, *supra* note 86, at 181. Jones even made his New York City home available as a refuge for Dr. King in the lead-up to the 1963 March on Washington. JONES & CONNELLY, *supra* note 53, at 12.

While Clarence Jones had great success in both law and business long after Dr. King's death, he remained loyal to Martin Luther King, Jr.'s memory even a half century later. He was the first Black partner in a Wall Street investment banking firm, founded many successful business ventures, and has "provided strategic legal and financial consulting services to several governments around the world." Clarence B. Jones, AM. PROGRAM BUREAU, <http://www.apbspeakers.com/speaker/clarence-b-jones> (last visited Sept. 22, 2015). He also taught courses at Stanford University, where he went on to become a scholar writer in residence at the Martin Luther King Research and Education Institute, along with becoming a diversity scholar and visiting professor at the University of San Francisco. *See id.* He has also co-authored two books related to Dr. King. *Id.*; *see* JONES & CONNELLY, *supra* note 53; JONES & ENGEL, *supra* note 86.

³¹¹ *See* Saxon, *supra* note 293. Harry Wachtel graduated from Columbia Law School in 1940, and began working at a law firm in New York City. *See Wachtel, Harry H. (1917–1997)*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_watchel_harry_h_1917_1997/ (last visited Sept. 22, 2015) [hereinafter *Wachtel*]. Aside from serving in the military during World War II, he remained in private practice in New York his entire life. *Id.* After meeting Dr. King, he immediately began working to create the Gandhi Society for Human Rights, to further fundraising efforts for Dr. King's movements. *Id.*; *see also* discussion *infra* Section II.A.3. Wachtel

volunteered his help.³¹² Like Levison, he assisted in a variety of ways, including fundraising, arranging meetings for Dr. King with important public officials, and advising him on a range of issues.³¹³ He also refused any compensation for his work.³¹⁴

Membership in the inner circle depended in part on the willingness and ability to carry out a variety of tasks effectively. Loyalty to Dr. King and trustworthiness also seemed to be critical. The relationships were deeply personal as well as professional, so these lawyer-advisors played a crucial role in supporting Dr. King and his work. They also all worked closely with Dr. King for a significant period of time, covering both the early and later years of Dr. King's career.

II. DEPLOYING THE LAWYERS: THE EARLY YEARS (1955–1962)

In the early years of Martin Luther King, Jr.'s career, the activists often engaged in "persuasive nonviolence," which was designed to raise consciousness and change the minds of white officials and the white community through their protests.³¹⁵ The lawyers played two distinct roles. First, most of their responsibilities were new ones that grew out of the movement's central focus on nonviolent direct action.³¹⁶ As activists engaged in boycotts, marches, demonstrations, and other forms of protest, the lawyers' assignments primarily involved supporting, facilitating, and protecting those strategies and tactics.

Second, the lawyers also continued to play the more traditional role of civil rights lawyers—challenging the constitutionality of racially discriminatory laws in federal court. When clients found that nonviolent direct action alone was not

quickly became a member of Dr. King's inner circle, and remained a close advisor until Dr. King's death. *Wachtel, supra*. He also served on the defense team for *New York Times Co. v. Sullivan*, and he traveled with Dr. King to Norway when he won the Nobel Prize. *Id.*

After Dr. King's death, Wachtel remained involved with Dr. King's legacy. He became the personal lawyer for Coretta Scott King, was vice president and counsel for the Martin Luther King, Jr. Center for Nonviolent Social Change from 1969 to 1982, and served as a SCLC trustee. Saxon, *supra* note 293.

³¹² Saxon, *supra* note 293.

³¹³ *See id.*

³¹⁴ *Id.*

³¹⁵ *See* KING, *supra* note 7, at 192–94. *See generally* MOTLEY, *supra* note 13, at 157–58 (describing how Dr. King's "civil disobedience . . . added a new, but also synergistic, dimension" to Blacks' historic struggle for equal rights). Dr. King explained that while the law intends to regulate behavior, nonviolence fills the gap in actually achieving that aim:

In the end, for laws to be obeyed, men must believe they are right.

Here nonviolence comes in as the ultimate form of persuasion. It is the method which seeks to implement the just law by appealing to the conscience of the great decent majority who through blindness, fear, pride, or irrationality have allowed their consciences to sleep.

. . . [P]araphrasing the words of Gandhi: "We will match your capacity to inflict suffering with our capacity to endure suffering. We will meet your physical force with soul force. We will not hate you, but we cannot in all good conscience obey your unjust laws. Do to us what you will and we will still love you. . . . But we will soon wear you down by our capacity to suffer. And in winning our freedom we will so appeal to your heart and conscience that we will win you in the process."

KING, *supra* note 7, at 192–94.

³¹⁶ *See* discussion *infra* Section II.A.

enough to achieve their goals, they sent their lawyers to court to proceed with “complementary desegregation litigation.”³¹⁷ The goal was to add leverage for change by combining direct action and traditional civil rights litigation.

This Part examines both “support efforts” and “complementary desegregation litigation” by the lawyers in the early years. Since the initial activism in each movement involved nonviolent direct action, the discussion focuses on the lawyers’ support efforts first. In addition to movements they initiated, Dr. King and the protesters encountered criminal prosecutions and civil suits requiring legal assistance during that period.

The discussion of “complementary desegregation litigation” begins with a brief history of civil rights litigation and a discussion of Dr. King’s views about the courts’ role. It then turns to the Montgomery and the Albany (Georgia) movements, the two major movements of the early period where the leaders had their lawyers initiate “complementary desegregation litigation.”

A. Support for Nonviolent Direct Action

From Rosa Parks’ arrest on, lawyers were ever present throughout Martin Luther King, Jr.’s career. They provided some sort of support in virtually every movement and major event in which Dr. King was involved. By providing extensive, critical assistance to facilitate the activists’ nonviolent direct action, they contributed significantly to whatever measure of success the movements achieved. The lawyers’ main job was to make it possible for the activists to carry out their boycotts, marches, demonstrations, and other protest tactics.³¹⁸ That entailed: (1) defending Dr. King, his organizations, and the protesters in both criminal and civil litigation;³¹⁹ (2) seeking necessary permissions, challenging court-ordered injunctions preventing or limiting protest activities, and requesting their own injunctions against public officials and private actors impeding protests;³²⁰ and (3) securing funding for these purposes.³²¹

From the outset, local and state officials turned to the legal system to resist movements for change. They used criminal prosecutions and civil suits in an effort to undermine the movements and nullify the activists’ initiatives.³²² They also sought injunctions to block the protest activities at the core of nonviolent direct action.³²³ These two dominant responses repeatedly forced the activists and their lawyers into a reactive posture.³²⁴ The lawyers defended Dr. King, his colleagues, and the protesters on numerous occasions, and they fought and appealed opponents’ efforts to enjoin their nonviolent tactics.

³¹⁷ See discussion *infra* Section II.B.

³¹⁸ See *supra* note 230.

³¹⁹ See *infra* Section II.A.1.

³²⁰ See *infra* Section II.A.2.

³²¹ See *infra* Section II.A.3.

³²² See discussion *infra* Section II.A.1.

³²³ See discussion *infra* Section II.A.2.

³²⁴ See TUSHNET, *supra* note 13, at 234.

1. Defending Dr. King, His Organizations, and the Protesters

Public officials used both criminal prosecutions and civil suits as key parts of their strategic arsenal to resist change and maintain the status quo.³²⁵ In turn, movement lawyers played important roles in defending the activists and enabling them to pursue their nonviolent direct action.³²⁶

The lawyers had significant successes, but also some losses. Two of the most critical cases civil rights lawyers won during this time were the 1960 prosecution of Dr. King for perjury in Alabama,³²⁷ and a libel case that could have crippled the movement.³²⁸ While the lawyers sometimes lost their cases, even a conviction could have benefits by building support and solidarity in a movement.³²⁹

i. Criminal Defense

Martin Luther King, Jr.'s description of himself as a "frequenter of jails"³³⁰ suggests that the southern criminal justice system caught him—and his fellow protesters—in its web repeatedly. The idea of using the criminal justice system to defeat local civil rights campaigns surfaced early on. Local officials in Montgomery believed that successful prosecutions would have a powerful chilling effect on civil rights activism.³³¹

The deployment of civil rights lawyers began on December 1, 1955, when Rosa Parks enlisted Fred Gray as her defense counsel after she was arrested for refusing to give up her bus seat.³³² In a matter of days, Gray went from being a young lawyer struggling to build a solo practice to Rosa Parks' defense counsel and attorney for the newly formed Montgomery Improvement Association (MIA).³³³

Gray lost that first case.³³⁴ Prosecutors initially charged Rosa Parks with violating the city's bus segregation ordinance, but when this proved problematic,

³²⁵ See, e.g., Kennedy, *supra* note 112, at 1028–47 (discussing public officials' efforts to break the Montgomery Bus Boycott); see also discussion *infra* Sections II.A.1.i, II.A.1.ii.

³²⁶ With respect to arrests and jailing of King, other leaders, and protesters, the lawyers once again responded to the decisions of the activists. Sometimes that meant providing defense or assisting with bail. See, e.g., HARRY BELAFONTE WITH MICHAEL SHNAYERSON, *MY SONG: A MEMOIR* 254–65 (2011) (describing lawyer Clarence Jones's involvement in raising bail money for the Birmingham movement); see also discussion *infra* Section II.A.1.i. On other occasions, the movement used mass arrests to build public support, and adopted a "jail, no bail" stance. See BELAFONTE WITH SHNAYERSON, *supra*, at 258–64. See generally Martin Luther King, Jr., "A Creative Protest," Address to Student Protesters at White Rock Baptist Church (Feb. 16, 1960) ("Let us not fear going to jail. If the officials threaten to arrest us for standing up for our rights, we must answer by saying that we are willing and prepared to fill up the jails of the South. Maybe it will take this willingness to stay in jail to arouse the dozing conscience of our nation."), in 5 *THE PAPERS OF MARTIN LUTHER KING, JR.: THRESHOLD OF A NEW DECADE, JANUARY 1959-DECEMBER 1960*, at 367, 369 (Clayborne Carson et al. eds., 2005).

³²⁷ See *infra* Section II.A.1.i.b.

³²⁸ See *infra* Section II.A.1.ii.

³²⁹ See discussion *infra* Section II.A.1.i.a.

³³⁰ King, *supra* note 1, at xxi.

³³¹ See Coleman, Nee & Rubinowitz, *supra* note 34, at 678–80.

³³² See GRAY, *supra* note 7, at 32–33; JEANNE THEOHARIS, *THE REBELLIOUS LIFE OF MRS. ROSA PARKS* 60–66, 75–77 (2013).

³³³ See GRAY, *supra* note 7, at 49–53.

³³⁴ See *infra* notes 337–338 and accompanying text.

she was charged with violating the state bus segregation law.³³⁵ Her defense was that her conduct on the bus constituted a protest against the segregation ordinance.³³⁶ The local judge rejected Gray's argument that the law under which officials prosecuted her was unconstitutional as a denial of equal protection.³³⁷ Parks was found guilty of violating a Montgomery ordinance making it unlawful to commit any state-law misdemeanor in the city, and Gray lost the right to appeal the constitutional issue on procedural grounds.³³⁸

a. Montgomery Boycott Prosecution (1956)

After the bus boycott was well underway, Montgomery officials resorted to a seldom-used 1921 Alabama anti-boycott statute in an attempt to derail it.³³⁹ They secured indictments against Martin Luther King, Jr. and eighty-nine other boycott leaders for conspiring to hinder a business "without a just cause or legal excuse."³⁴⁰ In announcing Dr. King's indictment, the grand jury said: "We are committed to segregation by custom and by law, [and] we intend to maintain it."³⁴¹ Consequently,

³³⁵ GARROW, *supra* note 2, at 21; THORNTON, *supra* note 27, at 62. Montgomery's bus segregation ordinance provided that "it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant." MONTGOMERY, ALA., CODE ch. 6, § 11 (1952); *see also* Browder v. Gayle, 142 F. Supp. 707, 711 n.2 (M.D. Ala. 1956). As Fred Gray explains, "The problem for the city was that the evidence indicated that all the seats were occupied, so there was no vacant seat to which Mrs. Parks could have moved." GRAY, *supra* note 7, at 56 n.5. Prosecutor D. Eugene Loe got around this problem by amending the charging documents to allege that Parks had violated the state segregation statute. *Id.* That statute compelled bus companies to segregate bus seating, terminals, ticket windows, and other facilities. THORNTON, *supra* note 27, at 44. With this amendment, Prosecutor Loe was able to proceed under a city ordinance that made a violation of the state bus segregation statute also a municipal offense. GRAY, *supra* note 7, at 56 n.5 (citing MONTGOMERY, ALA., CODE ch. 1, § 8 (1952)). As Gray points out, the amended complaint was also problematic because the state statute did not apply to municipal bus lines. *Id.* at 57 n.5.

³³⁶ Jonathan L. Entin, Assoc. Dean for Acad. Affairs, David L. Brennan Professor of Law & Professor of Political Sci., Case W. Reserve Univ. Sch. of Law, Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL'Y 640, 649 (2016).

³³⁷ *See* Transcript of Record at 5–7, Parks v. City of Montgomery, 92 So. 2d 683 (Ala. Ct. App. 1957) (No. 3 Div. 5); GRAY, *supra* note 7, at 56; Coleman, Nee & Rubinowitz, *supra* note 34, at 674. Fred Gray states that the constitutional issues he raised were denied summarily: "I knew that this was not the forum to challenge the segregation ordinances because of complications in how the city's ordinances related to state statutes and the way [Parks] was originally charged." GRAY, *supra* note 7, at 56.

³³⁸ GRAY, *supra* note 7, at 56 & n.5.

³³⁹ The Alabama statute read, in relevant part:

Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying, or preventing any other persons, firms, corporation, or association of persons from carrying on any lawful business shall be guilty of a misdemeanor.

ALA. CODE tit. 14, § 54 (1940) (current version at ALA. CODE § 13A-11-122 (2015)). For a detailed discussion of this prosecution, see GRAY, *supra* note 7, at 84–89, and Kennedy, *supra* note 112, at 1029–43.

³⁴⁰ Kennedy, *supra* note 112, at 1029.

³⁴¹ GARROW, *supra* note 2, at 64.

actions like the bus boycott, which was based on opposition to segregation, could not be based on a “just cause.”

Prosecutors proceeded to trial only with Dr. King.³⁴² The State’s theory was that King controlled the MIA, which had been formed for the exclusive purpose of sustaining the boycott—thus hindering the business of the bus company.³⁴³ The prosecutors also tried to show that Blacks had stopped riding the buses mostly because of physical intimidation and violence, which—in their view—was sanctioned by Dr. King and the MIA.³⁴⁴

Alabama’s leading Black lawyers—Fred Gray, Charles Langford, Arthur Shores, Peter Hall, and Orzell Billingsley—represented Dr. King.³⁴⁵ NAACP General Counsel Robert Carter, from New York, assisted, but Judge Eugene W. Carter would not permit him to examine witnesses.³⁴⁶ Because both sides consented to a bench trial, segregationist Judge Carter acted as the fact finder while presiding over the four-day trial.³⁴⁷ As expected, he found Dr. King guilty, even though the prosecution had presented no evidence linking either Dr. King or the MIA to the alleged intimidation and violence.³⁴⁸ Nevertheless, Dr. King’s Black lawyers offered a strong defense, demonstrating their superior skills and talent inside the courtroom.³⁴⁹ In the process, they even secured a modicum of respect from white segregationists.³⁵⁰

³⁴² Thornton, *supra* note 112, at 227.

³⁴³ See Kennedy, *supra* note 112, at 1031.

³⁴⁴ *Id.* at 1031–32.

³⁴⁵ GRAY, *supra* note 7, at 88; *cf.* Kennedy, *supra* note 112, at 1030 (omitting Charles Langford).

³⁴⁶ Kennedy, *supra* note 112, at 1031. Judge Carter said he limited Robert Carter’s participation because (i) the case involved only a misdemeanor, (ii) Carter was not admitted to the Alabama Bar, and (iii) Dr. King had adequate representation by local counsel. *Id.*

³⁴⁷ *Id.* at 1029. On his own motion, Judge Carter asked the grand jury to consider a possible violation of Alabama’s antiboycott statute. *Id.* at 1029–30; *see also* GARROW, *supra* note 2, at 63 (“Montgomery newspapers reported that [Judge Carter] had instructed solicitor William Thetford and the current grand jury to consider whether the MIA’s protest was a violation of Alabama’s antiboycott statute.”).

³⁴⁸ Kennedy, *supra* note 112, at 1031–32, 1034; Thornton, *supra* note 112, at 227.

³⁴⁹ See Kennedy, *supra* note 112, at 1034. As Professor Kennedy notes:

[King’s lawyers] raised a variety of constitutional objections to his prosecution, the most persuasive of which included the following: (1) the anti-boycotting statute deprived King of due process of law by failing to apprise him precisely of the wrong he was charged with committing; (2) because King was “selectively” prosecuted, the application of the law denied him due process and equal protection; and (3) the statute on its face and as applied abridged rights protected by the First Amendment.

Id. at 1036 (footnotes omitted). Dr. King’s lawyers stood their best chance of prevailing on these claims in a federal forum, but the case never made it there. *See id.* at 1043. While the lawyers gave notice of appeal at the time judgment was entered, they missed a filing deadline to perfect the appeal, and on this technicality the Court of Appeals of Alabama granted the State’s motion to dismiss the appeal. *See King v. State*, 98 So. 2d 443, 444 (Ala. Ct. App. 1957); *see also* GRAY, *supra* note 7, at 89. This in turn closed off the route to a federal forum by way of appealing the case through the Alabama state courts and then petitioning for certiorari to the U.S. Supreme Court.

³⁵⁰ Kennedy, *supra* note 112, at 1034 (describing how Mayor Gayle answered “No, sir” to a question posed by a Black attorney, after which “[s]ilent applause erupted from the blacks in the courtroom”). *See generally* Paul Finkelman, *Not Only the Judges’ Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 180 (1994) (reviewing SMITH, *supra* note 142) (“[B]lack lawyers undermined the pervasive psychology of racism. . . . Even in defeat, a black lawyer could demonstrate the competence of African-Americans to white judges, lawyers, jurors, and spectators who otherwise might have resisted notions of racial equality. The mere presence of black lawyers—

After delivering his verdict, Judge Carter announced that he would fine Dr. King \$500 and assess an additional \$500 for court costs.³⁵¹ The judge knew of Dr. King's deep commitment to nonviolence, and he gave this as his reason for not imposing a prison sentence.³⁵²

As suggested earlier, even though prosecutors had secured a conviction against Dr. King, they did not go to trial with any of the other people indicted.³⁵³ The authorities realized that their prosecution of Dr. King had backfired, because the legal attack on Dr. King further solidified the Black community's commitment to the boycott.³⁵⁴ Also, the mass indictments put Dr. King and the entire movement on the national stage, drawing attention from the *New York Times*, the *New York Herald Tribune*, and television networks such as ABC.³⁵⁵ The media coverage resulted in both greater external support and internal solidarity,³⁵⁶ which would be critical in facing the battles ahead.

especially in the South—chipped away at segregation.” (footnote omitted)). At the same time, there were problematic aspects of defense counsel's performance, including inadequate witness preparation and elicitation of testimony that was ostensibly dubious, including Dr. King's—which was evasive, at best. Kennedy, *supra* note 112, at 1034–36; *see also* BRANCH, *supra* note 32, at 184.

³⁵¹ GARROW, *supra* note 2, at 74; *see also* BRANCH, *supra* note 32, at 184; GRAY, *supra* note 7, at 89.

³⁵² Thornton, *supra* note 112, at 227. When Dr. King refused to pay the fine, however, Judge Carter sentenced him to “386 days of [hard] labor in the Montgomery County Jail.” 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 16; *see also* Kennedy, *supra* note 112, at 1034 n.217. The sentence was ultimately suspended after King's lawyers gave notice of appeal to the Alabama Court of Appeals, and King was then released on bond. GARROW, *supra* note 2, at 74; 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 16.

³⁵³ *See* BRANCH, *supra* note 32, at 202. *But see* GRAY, *supra* note 7, at 88 (stating that the prosecutors and the court agreed early on that Dr. King's case would be the only case tried, and that “[t]he other cases would be resolved depending on the outcome of his case”). The other cases were dismissed as charges were simultaneously dropped against multiple whites accused of bombing a Black taxi stand and the homes of numerous MIA leaders. BRANCH, *supra* note 32, at 199–202. But Fred Gray suggests that the charges against the other eighty-nine defendants were dropped because “the defense mounted on King's behalf [showed authorities] it would simply be too expensive to proceed against the others.” Kennedy, *supra* note 112, at 1043 n.266.

³⁵⁴ *See* RICHARD LENTZ, SYMBOLS, THE NEWS MAGAZINES, AND MARTIN LUTHER KING 27 (1990); Kennedy, *supra* note 112, at 1029. When the indictments were announced, many of those indicted proudly turned themselves in to the sheriff. Kennedy, *supra* note 112, at 1029 & n.187. Being on the list of indicted protesters became a “badge of honor.” *Id.* at 1029; *see also* GRAY, *supra* note 7, at 85–86 (explaining how some people involved in the boycott became disappointed when they were not arrested). Moreover, the prosecution may have made martyrs of the movement's leaders. Kennedy, *supra* note 112, at 1029 n.186. The prosecution also gave the boycott a national and international media prominence that it had previously lacked. *Id.* at 1029; *see also* 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 15.

The city also embarked on a so-called “get tough” policy designed to deplete the movement's resources and wear down its will. Coleman, Nee & Rubinowitz, *supra* note 34, at 678; Kennedy, *supra* note 112, at 1026; *see also* THORNTON, *supra* note 27, at 73–77. Police systematically harassed car pool drivers, writing them tickets for minor or non-existent violations. BRANCH, *supra* note 32, at 159; *see also* GARROW, *supra* note 2, at 55; Kennedy, *supra* note 112, at 1028; *Get Tough Policy*, NEWSL. FROM M.I.A. (Montgomery Improvement Ass'n, Montgomery, Ala.), June 7, 1956, at 2, 3, http://kingencyclopedia.stanford.edu/primarydocuments/560607_001.pdf.

³⁵⁵ GARROW, *supra* note 2, at 66; *see also* LENTZ, *supra* note 354, at 27 (noting coverage from *Newsweek* magazine).

³⁵⁶ *See* GARROW, *supra* note 2, at 66–67; Kennedy, *supra* note 112, at 1029.

b. Dr. King's Alabama Perjury Trial (1960)

The worst Alabama prosecution was yet to come. The state's effort to criminalize Martin Luther King, Jr. and remove him from his leadership position reached its apex in 1960, when segregationist Governor John Patterson directed the local prosecutor to seek indictments against Dr. King for perjury based on his state income taxes.³⁵⁷ Charging perjury rather than tax evasion served to ratchet up the crime (and the possible punishment) from a misdemeanor to a felony.³⁵⁸ Dr. King's indictment was the first of its kind ever brought in Alabama, which suggests that the state sought to deprive the movement of Dr. King's leadership for as long as possible.³⁵⁹

The perjury prosecution represented a potential turning point in Dr. King's career and the Civil Rights Movement with which he was associated.³⁶⁰ The stakes were high. If convicted, Dr. King would have faced a prison sentence of two to five years for each of two crimes³⁶¹—an eternity in a movement like this. With a segregationist judge presiding, only white witnesses for the State, and an all-white jury in a segregated courtroom, the odds were stacked against Dr. King.³⁶² Moreover, the public accusations challenging his honesty and integrity forced him to endure the most humiliating encounter thus far in his career.³⁶³ As Dr. King later recollected: "Passions were inflamed. Feelings ran high. The press and other communications media were hostile. Defeat seemed certain[,] and we in the freedom struggle braced ourselves for the inevitable."³⁶⁴

Between February and March 1960, a "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" assembled a highly accomplished legal team of more than half a dozen Black lawyers.³⁶⁵ Some came from the North—William Ming and Chauncey Eskridge from Chicago, former Judge Hubert Delany from New York, and Clarence Jones, from Los Angeles.³⁶⁶ Ming and Delany served as co-lead counsel based on their extensive experience in important

³⁵⁷ See Dyer, *supra* note 38, at 247; see also GRAY, *supra* note 7, at 146 (stating his belief that the charges were "part of the plan of Governor John Patterson, or someone in his administration, to harass and intimidate African Americans in general, and King in particular, for political reasons"); THORNTON, *supra* note 27, at 117, 615 n.147.

³⁵⁸ Dyer, *supra* note 38, at 248.

³⁵⁹ See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 6 (1991).

³⁶⁰ King, *supra* note 1, at xxiii–xxiv.

³⁶¹ The statute provided for a punishment of between two and five years' imprisonment in the state penitentiary. ALA. CODE tit. 14, § 382 (1940). See generally MLK AUTOBIOGRAPHY, *supra* note 32, at 141 ("The white Southern power structure . . . indicted me for perjury and openly proclaimed that I would be imprisoned for at least ten years.").

³⁶² See King, *supra* note 1, at xxiv.

³⁶³ GARROW, *supra* note 2, at 130. A conviction would have cast a huge cloud over Dr. King. Entin, *supra* note 336, at 655. Even if he had been able to get a conviction overturned on appeal, "the argument would be [that] he got off on [a] technicality . . ." *Id.*

³⁶⁴ King, *supra* note 1, at xxiv.

³⁶⁵ See GRAY, *supra* note 7, at 149 (naming Hubert Delany, William Ming, Arthur Shores, Solomon Seay Jr., and himself as the lawyers selected to represent Dr. King, and stating that Ming added Chauncey Eskridge as a tax expert); JONES & ENGEL, *supra* note 86, at 6–7, 10–16 (naming Clarence Jones as part of Dr. King's perjury defense team); Dyer, *supra* note 38, at 251.

³⁶⁶ Dyer, *supra* note 38, at 251; see also discussion *supra* Section I.B. Ming added Chauncey Eskridge, a young tax expert from his office. GRAY, *supra* note 7, at 149.

litigation.³⁶⁷ Alabamians rounded out the team, including Fred Gray, Solomon Seay Jr., and Arthur Shores.³⁶⁸

Dr. King's counsel effectively undercut the State's case both through cross-examination of the State's witnesses and through careful presentation of the facts through their own witnesses. For example, William Ming's cross-examination of the State's auditor helped expose the trumped-up nature of the charges. The auditor acknowledged that after a detailed review of Dr. King's tax documents for the years in question (1956 and 1958), he informed Dr. King he had found no evidence of fraud in his tax returns.³⁶⁹

Dr. King's lawyers also brought out strong supportive testimony from their own witnesses.³⁷⁰ In the end, the jury took less than four hours to return a verdict of acquittal.³⁷¹ In his statement to the press outside the Montgomery courtroom, Dr. King said, "I certainly want to commend all of the lawyers, this brilliant array of lawyers who represented me in this case. And I'm sure that their brilliant and profound arguments and that factual evidence played a great part in the ultimate decision, which was one of not guilty."³⁷²

Dr. King later paid homage to his defense team again, singling out the co-lead counsel for special praise:

There were two men among us who persevered with the conviction that it was possible, in this context, to marshal facts and law and thus win vindication. These men were our lawyers, Negro lawyers—Negro lawyers from the North: William Ming of Chicago and Hubert Delaney from New York.

They brought to the courtroom wisdom, courage, and a highly developed art of advocacy; but most important, they brought the

³⁶⁷ See GRAY, *supra* note 7, at 149–50 (calling Ming “an excellent trial lawyer with substantial experience in tax law,” and referring to Delaney as both “an expert in research and appellate law” and a “masterful jurist”); MLK AUTOBIOGRAPHY, *supra* note 32, at 141; Dyer, *supra* note 38, at 252; see also *supra* note 151 and accompanying text.

³⁶⁸ See discussion *supra* Sections I.A, I.B.1.i; see also GRAY, *supra* note 7, at 148–49. The committee selected the members of the team from nominations and offers of assistance they received. Dyer, *supra* note 38, at 251. Dr. King added Clarence Jones to the team. See *supra* notes 86–87 and accompanying text.

³⁶⁹ Dyer, *supra* note 38, at 255.

³⁷⁰ The defense called R.D. Nesbitt Sr., who served as a deacon and clerk at Dexter Avenue Baptist Church when Dr. King was pastor there. GRAY, *supra* note 7, at 153. Nesbitt testified to many of the transactions between Dr. King and the church, and pointed out that Dr. King had refused an increase in pay. *Id.* As their final witness, the defense called Black bank president Jesse B. Blayton Sr. Dyer, *supra* note 38, at 256. Blayton was also certified public accountant. *Id.* He had audited Dr. King's financials after Dr. King was indicted and was able to account for every cent of his tax returns. *Id.* Fred Gray described Blayton as “a real wizard”: “I don't think any of those white jurors had ever listened to a person, African American or white, who knew as much about facts and figures and accounting as Mr. Blanton [sic]. He completely mesmerized the jurors.” GRAY, *supra* note 7, at 153.

³⁷¹ See Dyer, *supra* note 38, at 258. According to Gray, the entire team was “joyfully surprised No one would have predicted that an all-white jury in Montgomery, Alabama, the Cradle of the Confederacy, in May 1960, . . . would exonerate Martin Luther King Jr. But it really happened.” GRAY, *supra* note 7, at 154.

³⁷² Martin Luther King, Jr., Statement on Perjury Acquittal (May 28, 1960), in 5 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 326, at 462, 462.

lawyers' indomitable determination to win. After a trial of three days, by the sheer strength of their legal arsenal, they overcame the most vicious Southern taboos festering in a virulent and inflamed atmosphere and they persuaded an all-white jury to accept the word of a Negro over that of white men.³⁷³

c. Dr. King's Incarceration in Georgia (1960)

Later in 1960, Dr. King faced still another state court prosecution. This time it was in the Georgia courts, in an episode steeped in racial undertones from start to finish. Once again, the stakes were high. Rather than humiliation and the risk of a lengthy prison sentence, this time there was a very serious threat to Dr. King's personal safety from racist prison guards and white prisoners in a maximum-security prison.³⁷⁴

Earlier that year, Dr. King had resigned his Montgomery ministry and returned home to Atlanta to serve as associate pastor at his father's large and prominent Ebenezer Baptist Church.³⁷⁵ After moving back to Georgia, Dr. King neglected to get a Georgia driver's license within the ninety-day period allowed by law.³⁷⁶

In May 1960, local police in DeKalb County stopped Dr. King and cited him for driving without a valid driver's license.³⁷⁷ At the time he was stopped, Dr. King was driving Lillian Smith, the white southern author of the anti-racist novel *Strange Fruit*, from his house in Atlanta back to Emory University Hospital in neighboring DeKalb County.³⁷⁸ The police stopped him because he was a Black man driving with a white woman sitting in the front seat with him.³⁷⁹ For the minor traffic violation, Judge Oscar Mitchell of the DeKalb Civil and Criminal Court fined Dr. King \$25 and sentenced him to twelve months of labor in the public works camp.³⁸⁰ Judge Mitchell suspended that sentence, however, and placed Dr. King on probation for a year.³⁸¹

³⁷³ King, *supra* note 1, at xxiv.

³⁷⁴ See DANIELS, *supra* note 41, at 116–17; GARROW, *supra* note 2, at 146; LEWIS, *supra* note 47, at 126–27.

³⁷⁵ BRANCH, *supra* note 32, at 266–67.

³⁷⁶ GARROW, *supra* note 2, at 135–36.

³⁷⁷ *Id.*; see also DANIELS, HORACE WARD, *supra* note 141, at 166. Dr. King was also cited for having expired license plates on the borrowed car he was driving. GARROW, *supra* note 2, at 135, 143.

³⁷⁸ GARROW, *supra* note 2, at 135; GREENBERG, *supra* note 51, at 301; LEWIS, *supra* note 47, at 121; see also BRANCH, *supra* note 32, at 356–57; Judge Horace Ward, N. Dist. of Ga., Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 NW. J.L. & SOC. POL'Y 657, 664 (2016). Lillian Smith was receiving cancer treatments from Emory University Hospital. BRANCH, *supra* note 32, at 356.

³⁷⁹ See BRANCH, *supra* note 32, at 356–57; see also GARROW, *supra* note 2, at 135; Ward, *supra* note 378, at 664. It was a customary practice for police to conduct traffic stops when they spotted “interracial groups of travelers.” BRANCH, *supra* note 32, at 356–57.

³⁸⁰ See King v. State, 119 S.E.2d 77 (Ga. Ct. App. 1961); see also DANIELS, HORACE WARD, *supra* note 141, at 166.

³⁸¹ GARROW, *supra* note 2, at 143; see also BRANCH, *supra* note 32, at 357. According to Professor Garrow, Dr. King heard Judge Mitchell impose the \$25 fine but did not see the paperwork detailing the terms of his probation, which required that King “not violate any Federal or State penal statutes or municipal ordinances.” GARROW, *supra* note 2, at 143; see also King, 119 S.E.2d at 79 (quoting this language in Judge Mitchell's sentence).

Shortly thereafter, young local activists urged Dr. King to join them in a sit-in, seeking luncheon service at one of Atlanta's major department stores.³⁸² They were protesting the Jim Crow practices at the restaurants in those stores.³⁸³ Though initially hesitant, Dr. King eventually submitted to the student protest leaders' renewed requests and agreed to join the sit-in.³⁸⁴ Dr. King was promptly arrested for trespass, along with more than fifty other demonstrators.³⁸⁵ When Dr. King refused bail, he spent the night in jail for the first time in his life.³⁸⁶

Based on this arrest, Judge Mitchell revoked Dr. King's probation and sentenced him to four months of hard labor for the original traffic violation.³⁸⁷ What made matters even worse is that officials took Dr. King from the county jail in the middle of the night, "put him in leg irons and handcuffs, . . . laid him on the floor in the back of a paddy wagon with nobody back there but a German Shepherd," and drove 300 miles over bad country roads to a state maximum-security prison.³⁸⁸ Dr. King described it as the worst night of his life.³⁸⁹ Once imprisoned at that facility, Dr. King was at the mercy of white racist prison guards and inmates convicted of very serious crimes.

Dr. King had already enlisted Atlanta civil rights lawyer Donald Hollowell and his associate Horace Ward as defense counsel to appeal his sentence and secure

³⁸² GARROW, *supra* note 2, at 143.

³⁸³ DANIELS, HORACE WARD, *supra* note 141, at 166.

³⁸⁴ GARROW, *supra* note 2, at 143.

³⁸⁵ See DANIELS, HORACE WARD, *supra* note 141, at 166.

³⁸⁶ *Id.* at 166–67; see also DANIELS, *supra* note 41, at 110–11; GARROW, *supra* note 2, at 143–44.

³⁸⁷ DANIELS, *supra* note 41, at 115. The sentence for the original traffic violation included twelve months in the public works camp, which Judge Oscar Mitchell immediately suspended, placing Dr. King on probation for one year. See *supra* note 381 and accompanying text. After Dr. King's arrest in Atlanta, Judge Mitchell ordered him to show cause why he should not serve the twelve-month sentence for violating the terms of his probation. DANIELS, *supra* note 41, at 115.

³⁸⁸ DANIELS, *supra* note 41, at 116–17; see also GARROW, *supra* note 2, at 146.

³⁸⁹ See DANIELS, *supra* note 41, at 117.

his release.³⁹⁰ During the appeal, Dr. King's lawyers secured his release from the maximum-security prison on bond.³⁹¹ He had spent eight days incarcerated.³⁹²

On appeal, Hollowell argued that the original sentence of twelve months exceeded the statutory maximum of six months for the traffic offense and was therefore invalid.³⁹³ If Hollowell's arguments were correct, the sentence originally entered by Judge Mitchell was illegal, meaning Dr. King was not under any probationary sentence that could be revoked.³⁹⁴

³⁹⁰ See *id.* at 115. After the student arrests in Atlanta, Thurgood Marshall of the LDF promised to pay the legal expenses and "appeal every fine." *Id.* at 108. Marshall eventually hired Donald Hollowell and his partners, promising "unlimited financial support." *Id.*

Horace T. Ward joined Hollowell's law office as an associate in 1960 and became partner in 1962. DANIELS, HORACE WARD, *supra* note 141, at 165. Hollowell and Ward knew each other from when Hollowell represented Ward in his case challenging the University of Georgia School of Law's rejection of his application for admission. See *id.* at 30–35, 40, 77. Ward lost his case and ultimately graduated from Northwestern University School of law in 1959. *Id.* at 111, 118. He began to work with Hollowell shortly thereafter. See *id.* at 118.

On his own initiative, Martin Luther King Sr. enlisted Morris Abram, a prominent white Atlanta attorney, to work on Dr. King's defense, as well. His father believed that a white lawyer might have an advantage in operating within "the virtually all-white criminal justice system." DANIELS, *supra* note 41, at 116; see also BRANCH, *supra* note 32, at 353, 362. In fact, Hollowell did endure blatant racism as a Black lawyer in Georgia in the 1960s: "The trial judge listened very attentively to the lawyers who represented the state of Georgia. When Donald Hollowell got up to speak, to argue . . . the trial judge spun around and turned his back on Hollowell." DANIELS, *supra* note 41, at 122.

³⁹¹ DANIELS, HORACE WARD, *supra* note 141, at 168; DANIELS, *supra* note 41, at 119. Before Dr. King was jailed, Hollowell filed an appeal of his original traffic conviction. See *id.* at 115. Hollowell used this appeal to argue that Dr. King should be released for his arrest in Atlanta while his conviction was being appealed. *Id.* After Judge Mitchell rejected Hollowell's argument and sentenced Dr. King, Robert Kennedy personally called Judge Mitchell to express his disagreement with the judge's decision. GARROW, *supra* note 2, at 147. After filing a writ of habeas corpus, Hollowell again argued that Dr. King should be released while his traffic conviction was being appealed. This time, Judge Mitchell agreed. DANIELS, *supra* note 41, at 116, 119.

³⁹² DANIELS, HORACE WARD, *supra* note 141, at 168; DANIELS, *supra* note 41, at 119.

³⁹³ See *King v. State*, 119 S.E.2d 77, 81 (Ga. Ct. App. 1961); DANIELS, HORACE WARD, *supra* note 141, at 168–69; DANIELS, *supra* note 41, at 120.

³⁹⁴ Hollowell raised the same argument in a hearing before Judge Mitchell six days after Dr. King was arrested:

The statutes expressly and particularly limit the amount of imprisonment sentence which can be issued or imposed by the court, that the maximum sentence shall not exceed six months to work on the chain gang or public road and I submit to Your Honor that in his Order of the 23rd of September, Your Honor sentenced the defendant to 12 months on the Public Works Camp and that inasmuch as the sentence of the Court exceeds that which the statute provided, then that sentence is a nullity, and if said sentence is a nullity, then this particular hearing, your Honor, which is based upon that sentence, would be dismissed because there is nothing upon which to base it, Sir.

DANIELS, *supra* note 41, at 115. When Judge Mitchell sentenced King to four months of hard labor, Hollowell objected to the unusually harsh treatment:

We Submit Your Honor that the judgment which we are asking Your Honor to vacate, in all legal fairness, and in all conscionable fairness, we would submit that it should be vacated and this man ought to be at liberty. I don't think the Solicitor could bring me in one case . . . which shows that there has ever been in the history of the State of Georgia, from the time of its inception, been an individual who was sentenced to serve four months on the public works for failing to have a driver's license.

Id. at 115–16.

At the same time that Hollowell was seeking Dr. King's release in court, Senator John Kennedy, who was nearing the final stages of his run for the presidency, intervened.³⁹⁵ He called Coretta Scott King to express his concern about her husband's plight.³⁹⁶ Through continuing involvement by both Senator Kennedy and his brother Robert, Judge Mitchell agreed to release Dr. King.³⁹⁷ As a result, candidate Kennedy received much of the credit for Dr. King's release.³⁹⁸

However, Donald Hollowell and Horace Ward provided the legal basis for the release. Following Dr. King's release, they appealed his sentence to the Court of Appeals of Georgia.³⁹⁹ Ultimately, the appellate court vindicated their claim.⁴⁰⁰ The court agreed that Judge Mitchell's initial sentence of twelve months was illegal:

Since the sentence as originally entered was, as to that part of it relating to imprisonment, illegal and therefore a nullity, it could not be enforced by any subsequent order such as that passed revoking its probationary feature. The probationary feature of the sentence being void, the defendant was not under probation at the time he allegedly committed the crime [trespass] for which the purported probationary sentence was sought to be revoked. Accordingly, no probationary sentence may be revoked for the commission of this crime. The judgment of revocation in case No. 38718 is reversed.⁴⁰¹

The lawyers had done their job. The threat to Dr. King's personal safety in a maximum-security prison and on a chain gang had passed. However, there would be more arrests still to come.

d. The Albany (Georgia) Movement (1961–1962)

A year later, Donald Hollowell found himself, along with local civil rights lawyer Chevene Bowers (C.B.) King, defending Dr. King and hundreds of demonstrators arrested in the southwest Georgia city of Albany.⁴⁰² In 1961, Albany

³⁹⁵ DANIELS, *supra* note 41, at 117–18.

³⁹⁶ *Id.* at 118; *see also* BRANCH, *supra* note 32, at 362.

³⁹⁷ According to then-Georgia Governor Ernest Vandiver, Senator Kennedy called to ask if there was anything he could do to get Dr. King out of jail. DANIELS, *supra* note 41, at 118. Vandiver enlisted former Georgia Secretary of State George Stewart to talk to Judge Mitchell, who agreed to let Dr. King go if either Robert or Senator Kennedy relayed the message. *Id.*; *see also supra* note 391 (discussing Robert Kennedy's phone call to Judge Mitchell).

³⁹⁸ DANIELS, *supra* note 41, at 118–19.

³⁹⁹ *Id.* at 120.

⁴⁰⁰ *See King v. State*, 119 S.E.2d 77 (Ga. Ct. App. 1961). The Court of Appeals held that “[t]he sentence was not an alternative sentence entitling [Dr. King] to an absolute discharge on payment of the fine assessed against him,” but because its imprisonment feature exceeded the maximum term permitted by statute, the “illegal sentence of probation” could not “form a basis for [any] subsequent order of revocation.” *Id.* at 79.

⁴⁰¹ *Id.* at 81.

⁴⁰² *See* DANIELS, *supra* note 41, at 130–59 (detailing Donald Hollowell's and C.B. King's involvement in the Albany Movement). Professor Daniels points out that “the southwest region of Georgia was one of the most notoriously racist parts of the state, well known for its violence against

had 60,000 residents, about forty percent of whom were Black.⁴⁰³ Albany was characterized by pervasive, rigid segregation, with the white majority unwilling to allow even modest reform.⁴⁰⁴

In October 1961, two field staff of the Student Nonviolent Coordinating Committee (SNCC, pronounced “Snick”) began to organize the Black community to challenge the city’s structure of segregation.⁴⁰⁵ SNCC had been formed a year earlier by young sit-in protesters who saw themselves as the vanguard of the freedom struggle in the South.⁴⁰⁶ Their initial small sit-in garnered attention from Albany’s Black community, whose leaders then formed the “Albany Movement.”⁴⁰⁷ The coalition of organizations that joined forces favored different strategies and tactics, resulting in significant internal tensions.⁴⁰⁸ The campaign used demonstrations, bus boycotts, sit-ins, and jail-ins to challenge the status quo.⁴⁰⁹

As the movement carried out protests, Police Chief Laurie Pritchett ordered hundreds of arrests for minor violations such as disturbing the peace, disorderly conduct, trespassing, and carrying out a parade without a permit.⁴¹⁰ He avoided applying state and local segregation laws to prevent appeals to the federal courts.⁴¹¹ He also instructed his officers to make the arrests peacefully and to avoid the use of force that could draw federal attention.⁴¹²

blacks.” *Id.* at 134. For useful overviews of the Albany Movement, see BRANCH, *supra* note 32, at 528–58, 602–39; FAIRCLOUGH, *supra* note 21, at 85–91, 100–06; GARROW, *supra* note 2, at 173–230.

⁴⁰³ CARSON, *supra* note 27, at 56.

⁴⁰⁴ *See id.* at 56–58. On the surface, relations between the races seemed quite peaceful; but the deeper reality was quite different. *See id.*; LEWIS, *supra* note 47, at 140–43.

⁴⁰⁵ *See* CARSON, *supra* note 27, at 56. The “field secretaries” were Charles Sherrod and Cordell Reagon. *Id.*

⁴⁰⁶ *See* FAIRCLOUGH, *supra* note 21, at 62–64; GARROW, *supra* note 2, at 131–34. For an in-depth study of SNCC, see CARSON, *supra* note 27.

⁴⁰⁷ *See* LEWIS, *supra* note 47, at 144–45. On November 1, 1961, SNCC coordinated a small bus station sit-in to protest Albany’s refusal to abide by the Interstate Commerce Commission’s order to desegregate transportation facilities. CARSON, *supra* note 27, at 58; *see also* KUNSTLER, *supra* note 1, at 94. For a slightly different account of the Albany Movement’s formation, see BRANCH, *supra* note 32, at 528–29, which describes an incident involving a white sheriff shooting a Black field hand in the neck without justification as the impetus behind the movement.

The participating organizations included SNCC, the NAACP, the Federation of Women’s Clubs, the Negro Voters League, the Ministerial Alliance, and the Criterion Club. MORRIS, *supra* note 188, at 241; *see also* CARSON, *supra* note 27, at 58; LEWIS, *supra* note 47, at 145.

⁴⁰⁸ *See* BRANCH, *supra* note 32, at 529. The lack of trust among the several organizations plagued the Albany Movement from the outset. *See* DANIELS, *supra* note 41, at 139 (explaining that this lack of trust was what led the various civil rights groups to form the movement).

⁴⁰⁹ DANIELS, *supra* note 41, at 137. For additional insight into the Albany Movement’s strategies and tactics, see BRANCH, *supra* note 32, at 530–44, GARROW, *supra* note 2, at 176, and MORRIS, *supra* note 188, at 241.

⁴¹⁰ *See* DANIELS, *supra* note 41, at 138.

⁴¹¹ BRANCH, *supra* note 32, at 527; DANIELS, *supra* note 41, at 138.

⁴¹² MORRIS, *supra* note 188, at 250. Nevertheless, there were still incidents of police violence. In one instance, a pregnant woman was knocked down and kicked by a police officer while attempting to pass food to jailed protesters. DANIELS, *supra* note 41, at 143. On another occasion, a Black man was knocked to the floor and dragged to the back of a courtroom for sitting at the front. *Id.*

C.B. King, Albany's sole civil rights lawyer, and Atlanta's Donald Hollowell represented protesters that were arrested.⁴¹³ With the demonstrations continuing, the arrests mounted. When the local jail filled up, Pritchett shipped his prisoners to surrounding counties' jails.⁴¹⁴ In all, attorneys King and Hollowell represented more than 700 jailed demonstrators.⁴¹⁵ They worked extraordinary hours to provide representation for the protesters.⁴¹⁶ They secured the release of hundreds of them.⁴¹⁷ They continued to serve their clients after the marches and demonstrations ended, trying to clear their records and helping them return to their jobs.⁴¹⁸

In addition to the hundreds of demonstrators, Hollowell and C.B. King represented Dr. King and his SCLC colleagues.⁴¹⁹ Notwithstanding strong internal opposition, the Albany Movement invited Dr. King to come to the aid of their faltering movement in December 1961.⁴²⁰ He needed legal representation almost immediately because he was arrested while leading a prayer vigil to city hall the day after he arrived.⁴²¹ Police Chief Pritchett arrested Dr. King and the participants

⁴¹³ DANIELS, *supra* note 41, at 137, 156. C.B. King and Hollowell had met by chance in 1949, when King was an undergraduate at Fisk University and Hollowell a law student at Loyola Law School in Chicago. *Id.* at 132. During that meeting, they discovered their shared passion for using the law to achieve racial justice. *Id.*

LDF lawyer Constance Baker Motley joined the team later. *See id.* at 154–55; *see also* MOTLEY, *supra* note 13, at 138–39.

C.B. King and Hollowell began representing Albany protesters in November 1961, with the trial of five youths jailed for refusing to leave the white waiting room at the local bus terminal. DANIELS, *supra* note 41, at 139–41; GARROW, *supra* note 2, at 177. While the lawyers were able to prevent further jail time, the judge convicted their clients, fined them each \$100, and placed them on probation for a brief period. DANIELS, *supra* note 41, at 141–42; GARROW, *supra* note 2, at 178.

⁴¹⁴ *See* BRANCH, *supra* note 32, at 536; GARROW, *supra* note 2, at 208. Professor Daniels gives a less benign account of Pritchett's tactics: "In a clever effort to avoid filling the jails, a strategy often employed by civil rights leaders to force officials to concede to some of their demands, Chief Pritchett negotiated agreements for additional jail space with surrounding counties . . . notorious for their cruel treatment of blacks." DANIELS, *supra* note 41, at 142.

⁴¹⁵ DANIELS, *supra* note 41, at 141. They also participated in negotiations with Albany officials to end segregation in the city. *Id.* at 137.

⁴¹⁶ *Id.* at 143–44. John Lewis, a civil rights activist and later congressman from Atlanta, credited King and Hollowell as the central lawyers representing the demonstrators: "C.B. King and Don Hollowell . . . more than any other two lawyers, played a major role in defending the people that were arrested, people who had been beaten in jail in Albany . . ." *Id.* at 137. Hollowell rarely took credit for his achievements; but at C.B. King's burial, he acknowledged, "No one knows how hard we worked." *Id.* at 159.

⁴¹⁷ *Id.* at 145. Hollowell and King did a number of things to get protesters released, including bailing them out, *id.* at 151–52, and negotiating agreements with Albany officials to release protesters on their own recognizance, *id.* at 146, 152, 154.

⁴¹⁸ *Id.* at 156. Activist Joseph Lowery recalled that the young demonstrators would say, "King is our leader, Hollowell is our lawyer. We shall not be moved." *Id.*

⁴¹⁹ *See id.* at 150 (stating that Hollowell was chief lawyer to Dr. King, Ralph Abernathy, and other movement leaders); GARROW, *supra* note 2, at 185–86, 196, 211 (discussing Hollowell and C.B. King representing Dr. King and the Albany Movement). Hollowell managed to maintain trust and credibility with all of the factions involved in the Albany Movement. DANIELS, *supra* note 41, at 151. Ultimately, this may have created a rift with Dr. King because Hollowell supported the more radical SNCC, which openly opposed King's leadership. *Id.* at 148, 151.

⁴²⁰ GARROW, *supra* note 2, at 180–81.

⁴²¹ *See* DANIELS, *supra* note 41, at 144–45; GARROW, *supra* note 2, at 184.

for parading without a permit.⁴²² Once again, Donald Hollowell and C.B. King represented Dr. King, as well as others who had joined the vigil.⁴²³

Months later, Dr. King and Reverend Abernathy went before Judge A.N. Durden Sr. for sentencing.⁴²⁴ He imposed a \$178 fine or forty-five days in jail.⁴²⁵ Since the defendants believed that their conviction was unjust, they refused to pay the fine and opted for imprisonment.⁴²⁶ City officials were concerned about the attention the incarceration might receive, including possible federal intervention, and arranged to have King's and Abernathy's fines paid surreptitiously, under the pretense that "an anonymous black donor had paid [them]."⁴²⁷

While the Albany Movement failed to achieve its immediate goals, it laid the groundwork for subsequent movements. Many give credit to Donald Hollowell and C.B. King for helping to underpin the movement, and for providing the support and hope needed to sustain it.⁴²⁸

* * *

Years later, Dr. King expressed his respect, admiration, and appreciation for the services of his numerous defense counsel who represented him in his many encounters with state prosecutors: "I cannot help but wish in my heart that the same kind of skill and devotion which Bob Ming and Hubert Delaney accorded to me could be available to thousands of civil rights workers, to thousands of ordinary Negroes, who are every day facing prejudiced courtrooms."⁴²⁹

⁴²² DANIELS, *supra* note 41, at 145; GARROW, *supra* note 2, at 184.

⁴²³ See DANIELS, *supra* note 41, at 151 (pointing out that Dr. King and Abernathy were released from jail on bond after Hollowell, C.B. King, and city officials reached an agreement); GARROW, *supra* note 2, at 195–96 (stating that Hollowell and C.B. King represented Dr. King when he returned to Albany in late February to stand trial for his December arrest). Dr. King was initially brought to trial two days after his arrest, but proceedings were postponed once negotiations began that morning between Hollowell, C.B. King, and Albany officials. *Id.* at 185. Hollowell and C.B. King eventually negotiated with Albany officials a "gentlemen's understanding that none of the jailed demonstrators would be brought to trial, although their release would not include dropping charges." *Id.* at 186. The city later denied that there was ever an agreement. DANIELS, *supra* note 41, at 152.

⁴²⁴ GARROW, *supra* note 2, at 201–02.

⁴²⁵ DANIELS, *supra* note 41, at 152.

⁴²⁶ See *id.* at 153.

⁴²⁷ *Id.* at 154; see also LEWIS, *supra* note 47, at 159–60. Dr. King expressed his disappointment with the situation: "[T]his is one time that I'm out of jail and I'm not happy to be out . . . I do not appreciate the subtle and conniving tactics used to get us out of jail." GARROW, *supra* note 2, at 203.

⁴²⁸ DANIELS, *supra* note 41, at 156. Civil rights leader Joseph Lowery gave the following assessment of Hollowell's and C.B. King's importance in the Albany Movement:

When the Albany Movement heated up in '61 when King got arrested, it was [Hollowell and C.B. King] who stepped into the breach, who filed lawsuits, who tried to fight off the attempts of Chief of Police Laurie Pritchett to suspend the First Amendment in Albany. Hollowell and C.B. King raised the legal questions and forced the government at the local, state, and national levels to face the issues of segregation and discrimination and brutality on the part of law enforcement officials. They did it brilliantly, and Albany was never the same.

Id. (alteration in original).

⁴²⁹ King, *supra* note 1, at xxiv.

ii. Civil Actions: Libel Cases

Another team of lawyers represented civil rights leaders, including Dr. King, and the *New York Times*, in libel litigation that was a direct outgrowth of Dr. King's Alabama perjury prosecution.⁴³⁰ The perjury trial required resources that were not readily available to the movement.⁴³¹ In an effort to raise money for Dr. King's defense, his supporters formed the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."⁴³² The committee ran a full-page advertisement in the *New York Times* on March 29, 1960.⁴³³ Without naming any public officials, it made both general and specific charges about southern racist policies and practices.⁴³⁴ It also made an urgent plea for donations.⁴³⁵ A number of activists', celebrities', and ministers' names appeared in support of the fundraising effort.⁴³⁶ The advertisement had the desired effect, attracting donations several times its cost.⁴³⁷

However, when word of the advertisement reached Alabama, public officials reacted swiftly and furiously. Montgomery Police Commissioner L.B. Sullivan sued the *New York Times* and four Black Alabama ministers named in the ad for libel.⁴³⁸ He sought \$500,000 in damages,⁴³⁹ an amount that would translate into millions of dollars in twenty-first century terms. He did not include Martin Luther King, Jr. as a defendant, apparently because his name did not appear as an endorser. However, Alabama Governor Patterson quickly followed up with his own suit, naming Dr. King among the defendants.⁴⁴⁰ Patterson sought \$1 million dollars in damages.⁴⁴¹

⁴³⁰ See Dyer, *supra* note 38, at 249–50; Entin, *supra* note 128, at 262. The lawyers were a combination of *New York Times* lawyers—both locally-based and from New York—and civil rights lawyers. See GRAY, *supra* note 7, at 157; LEWIS, *supra* note 359, at 23–24, 27. For a discussion of the lawyers and the extent to which they focused their advocacy on race, see Carlo A. Pedrioli, *New York Times v. Sullivan and the Rhetorics of Race: A Look at the Briefs, Oral Arguments, and Opinions*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 109, 119–20 (2015).

⁴³¹ See GARROW, *supra* note 2, at 130; see also Dyer, *supra* note 38, at 249.

⁴³² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257 (1964); Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223, 1225 (1992).

⁴³³ *Sullivan*, 376 U.S. at 256–57; see also BRANCH, *supra* note 32, at 288–89; GRAY, *supra* note 7, at 148, 156.

⁴³⁴ See LEWIS, *supra* note 359, at 6–7.

⁴³⁵ See *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25, reprinted in LEWIS, *supra* note 359, at 2–3.

⁴³⁶ See *id.*

⁴³⁷ BRANCH, *supra* note 32, at 312–89; see also LEWIS, *supra* note 359, at 7.

⁴³⁸ LEWIS, *supra* note 359, at 10, 12. None of the endorsers other than the four ministers were from Alabama. The ministers were included as defendants to preclude removal to federal court. See *id.* at 13–14. Including the four Alabama ministers was also designed to deter their activism. Gray, *supra* note 432, at 1226.

⁴³⁹ LEWIS, *supra* note 359, at 12.

⁴⁴⁰ BRANCH, *supra* note 32, at 312; LEWIS, *supra* note 359, at 13. Besides Sullivan and Patterson, three other officials filed libel suits: "Earl James, the mayor of Montgomery; Frank Parks, another city commissioner; and Clyde Sellers, a former commissioner." *Id.* Each sought \$500,000 in damages from the *New York Times* and the four ministers. *Id.*

⁴⁴¹ LEWIS, *supra* note 359, at 13.

For the *New York Times*, even that sum was less of a problem than the threat the suit posed to the future of a free press.⁴⁴² Sullivan hoped that a large monetary judgment would intimidate the media and keep them from covering racial events in Alabama.⁴⁴³ The libel suits by the governor and two other commissioners were part of the same strategy.⁴⁴⁴

For SCLC, the suit endangered the very survival of the organization.⁴⁴⁵ While the legal issues in the litigation focused on the First Amendment, the outcome of the case had profound implications for the future of the Civil Rights Movement. As a result, the defense lawyers included both litigators protective of the *New York Times* and the media's freedoms, and civil rights lawyers seeking to avoid the fiscal disaster that could accompany an adverse decision.⁴⁴⁶

Fred Gray, a member of the Black ministers' legal team, described his view of the case:

There was not a scintilla of evidence against our clients. They had no knowledge of the advertisement. They had not written it. They had never seen it. They did not know their names would be in it. They were not aware of it until they received the letter from Commissioner Sullivan requesting a retraction.⁴⁴⁷

After a three-day trial,⁴⁴⁸ segregationist Judge Walter Burgyn Jones⁴⁴⁹ "instructed the jury that the challenged statements in the [advertisement] were 'libelous per se'" and that under Alabama law, "a statement that was libelous per se was presumed to be false; the defendant could overcome that presumption only by proving the statement true in all material respects."⁴⁵⁰ As expected, the jury found for plaintiff Sullivan and awarded him the full \$500,000.⁴⁵¹

Four years later, the U.S. Supreme Court reversed.⁴⁵² In an opinion by Justice Brennan, the Court held that a libel suit by public officials required proof of actual malice,⁴⁵³ and that the evidence presented was constitutionally insufficient to

⁴⁴² *See id.* at 34.

⁴⁴³ Gray, *supra* note 432, at 1226.

⁴⁴⁴ *Id.*

⁴⁴⁵ *See* BRANCH, *supra* note 32, at 296, 312, 579–80; WESTIN & MAHONEY, *supra* note 136, at 171.

⁴⁴⁶ *See* GRAY, *supra* note 7, at 162–64; LEWIS, *supra* note 359, at 7.

⁴⁴⁷ Gray, *supra* note 432, at 1227. In his closing argument, Gray explained why his clients never responded to the Commissioner's letter asking for a retraction: "How could these individual defendants retract something—if you'll pardon the expression—they didn't tract?" *Id.*; *accord* Entin, *supra* note 128, at 264.

⁴⁴⁸ LEWIS, *supra* note 359, at 27.

⁴⁴⁹ *See id.* at 25–26.

⁴⁵⁰ *Id.* at 32.

⁴⁵¹ *See id.* at 33. The plaintiff immediately proceeded to levy on the ministers' property, taking their cars, and forcing the sale of Reverend Abernathy's interest in family property in the state. Gray, *supra* note 432, at 1227. After the Supreme Court's reversal, Gray was able to recover for the ministers the proceeds from those sales. *Id.* at 1228; *see also* GRAY, *supra* note 7, at 163. The Supreme Court remanded the case to the Montgomery County Circuit Court, but it was never retried. Gray, *supra* note 432, at 1228.

⁴⁵² *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

⁴⁵³ *See id.* at 279–80. The Court reasoned that:

support the judgment against the defendants.⁴⁵⁴ *New York Times Co. v. Sullivan* is best known as a landmark libel decision; but for civil rights advocates, the decision represents the Supreme Court protecting the financial viability of the movement, as well.⁴⁵⁵ This landmark decision was just one of many court cases that would majorly impact the effectiveness of the movement.

2. Permissions and Injunctions

Dr. King's adversaries learned early on that injunctions, usually issued by segregationist judges, could be a potent weapon against organized protests.⁴⁵⁶ Injunctions placed legal restrictions on the movements' activities in carrying out their nonviolent direct action strategies. Each injunction posed a dilemma for Dr. King and presented hard choices involving both principle and practical aspects. The lawyers provided advice and counsel about the possible paths to pursue.⁴⁵⁷

The choices that Dr. King and his associates made in responding to an injunction determined the assignments for the lawyers. Activists' options included: (1) comply, with no appeal, which required no action by the lawyers; (2) comply and appeal, with lawyers taking the appeal; or (3) violate the injunction and face contempt of court sanctions, with lawyers handling the appeal of the contempt citation (while perhaps also appealing the injunction).⁴⁵⁸

In the early years, responses to injunctions were fairly straightforward. Officials sought and secured injunctions against activists' action, and the leaders either complied without appealing (as in the Montgomery Bus Boycott),⁴⁵⁹ or complied and appealed to get the injunction dissolved (as in the Albany Movement).⁴⁶⁰ In some campaigns, lawyers also participated in the process of

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id.

⁴⁵⁴ *Id.* at 285–88.

⁴⁵⁵ See BRANCH, *supra* note 32, at 579–80; GRAY, *supra* note 7, at 162–63.

⁴⁵⁶ Montgomery officials waited a long time to seek an injunction against the MIA's car pool system. Stopping the car pool earlier could have been a devastating blow to the boycott. See GRAY, *supra* note 7, at 92; THORNTON, *supra* note 27, at 74–75, 91–93. See generally Bayard Rustin, *Montgomery Diary*, LIBERATION, Apr. 1956, at 7, 9 ("The success of the car pool is at the heart of the movement."), reprinted in DAYBREAK OF FREEDOM, *supra* note 32, at 164, 167.

⁴⁵⁷ See *infra* notes 482–483, 491, 495–498 and accompanying text.

⁴⁵⁸ Dr. King chose each of those options with one or more injunctions. In Montgomery (1956) and Chicago (1966), he complied with an injunction without appealing it. See discussion *infra* Sections II.A.2.i (Montgomery), III.B.3.iv (Chicago). In Albany, Georgia (1962) and St. Augustine, Florida (1963–1964), he complied with and appealed the injunction. See discussion *infra* Sections II.A.2.ii (Albany), III.B.3.ii (St. Augustine). In Selma, Alabama (1965), he walked a tightrope and managed to comply. See discussion *infra* Section III.B.3.iii. In Birmingham (1963), he violated the injunction, faced a contempt citation, and appealed the contempt citation to the Supreme Court. See discussion *infra* Section III.B.3.i; see also Walker v. City of Birmingham, 388 U.S. 307, 311–15 (1967). In Memphis (1968), he said that he was prepared to violate an injunction if necessary; but the judge modified the injunction and permitted the planned demonstration to take place. See discussion *infra* Section III.B.3.v.

⁴⁵⁹ See discussion *infra* Section II.A.2.i.

⁴⁶⁰ See discussion *infra* Section II.A.2.ii.

seeking local approvals for the planned direct action activities.⁴⁶¹ As with other assignments, lawyers' efforts to secure necessary approvals started with the Montgomery Bus Boycott and continued throughout Dr. King's career.

i. Montgomery: Permissions and Injunction (1955–1956)

The bus boycott did not involve marches or demonstrations like many of the later movements. The boycott of local buses formed the core strategy to address the discriminatory policies and practices. To enable Black residents to get to school, to work, or to shopping areas without taking a bus, the MIA created an elaborate "car pool" system.⁴⁶² Thousands of Black Montgomeries rode back and forth on a daily basis for many months in donated cars driven by volunteers.⁴⁶³

The City of Montgomery had a franchise process that transit systems were required to follow to operate in the city.⁴⁶⁴ The city bus line that the MIA was boycotting had such a franchise and served the whole city with its bus routes.⁴⁶⁵ Since the MIA established its car pool system without securing a franchise from the city, movement leaders feared that the city would at some point turn to the courts to enjoin the operation of the car pool system.⁴⁶⁶ Such an injunction could have a devastating impact on the movement.⁴⁶⁷

In anticipation of a possible legal challenge to its operation, the MIA preemptively applied for a transit franchise for the car pool system.⁴⁶⁸ In early January 1962, the MIA's leadership asked Fred Gray and Charles Langford to draft and submit an application to operate the car pool as a jitney service.⁴⁶⁹ City officials rejected it on the grounds that the city did not need another transit system.⁴⁷⁰ Later, the MIA tried again, as one last effort to secure the permission that would protect it against a possible injunction.⁴⁷¹ As expected, the city responded the same way it had to the first request.⁴⁷² Those turndowns left the MIA vulnerable to an injunction prohibiting the operation of the car pool, which came soon thereafter.⁴⁷³

⁴⁶¹ See discussion *infra* Sections II.A.2.i, III.B.3.i, III.B.3.vi.

⁴⁶² See BRANCH, *supra* note 32, at 145–46; GARROW, *supra* note 2, at 27, 29; Coleman, Nee & Rubinowitz, *supra* note 34, at 675–76.

⁴⁶³ See sources cited *supra* note 462. Yancey Martin, who was part of the cadre of college-aged drivers that helped sustain the boycott over holiday breaks, recounts his experience: "[W]e saw the transportation end really kinda being the backbone of the movement because folks had to work and they had to have that little money." HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 60 (1977).

⁴⁶⁴ See THORNTON, *supra* note 27, at 74–75; see also GARROW, *supra* note 2, at 58; Kennedy, *supra* note 112, at 1047.

⁴⁶⁵ See GARROW, *supra* note 2, at 59; THORNTON, *supra* note 27, at 56, 604 n.96.

⁴⁶⁶ See Coleman, Nee & Rubinowitz, *supra* note 34, at 676 & 711 n.72.

⁴⁶⁷ See *supra* note 456 and accompanying text.

⁴⁶⁸ See THORNTON, *supra* note 27, at 74–75.

⁴⁶⁹ *Id.* at 74; see also Donald T. Ferron, Notes on MIA Executive Board Meeting (Jan. 23, 1956), in DAYBREAK OF FREEDOM, *supra* note 32, at 121, 123–24.

⁴⁷⁰ Coleman, Nee & Rubinowitz, *supra* note 34, at 677; "All-White" Bus Service Planned, NEWSL. FROM M.I.A. (Montgomery Improvement Ass'n, Montgomery, Ala.), Mar. 8, 1957, at 3, 3, http://www.crmvet.org/docs/mia/570308_mia_newsletter.pdf.

⁴⁷¹ See GARROW, *supra* note 2, at 75.

⁴⁷² See *id.*

⁴⁷³ See *supra* note 456 and accompanying text.

On November 5, 1956, the city filed a lawsuit against the MIA, Dr. King, and other protest leaders in the Circuit Court of Montgomery County to enjoin the operation of the “car pool.”⁴⁷⁴ Judge Eugene Carter, an ardent segregationist,⁴⁷⁵ presided over the case.⁴⁷⁶ In an effort to get the case out of Judge Carter’s hands, Fred Gray and the other MIA lawyers asked the federal district court to enjoin the city from filing or prosecuting any action in state court against the car pool.⁴⁷⁷ Judge Frank Johnson, a frequent ally of civil rights advocates,⁴⁷⁸ rejected the motion as failing to claim any injury beyond that which flows from the enforcement of local ordinances.⁴⁷⁹

In the November 13 circuit court hearing, Fred Gray led the MIA’s legal team, which included three other prominent Black Alabama lawyers—Orzell Billingsley, Peter Hall, and Arthur Shores.⁴⁸⁰ The court’s hearing provided an early example of Dr. King and his associates turning to lawyers to protect and facilitate the movement. Not surprisingly, the lawyers’ efforts to oppose the issuance of an injunction were to no avail. Judge Carter granted the order prohibiting the continuation of the car pool system.⁴⁸¹

At that point, three options presented themselves: (1) comply with the injunction and shut down the car pool system; (2) comply with the injunction, appeal it, and suspend operation of the car pool in the meantime; and (3) violate the injunction as an act of civil disobedience, based on a claim that it was an unjust order. MIA’s lawyers “advised compliance with [the] injunction.”⁴⁸² With a weak case on the merits and a recalcitrant segregationist appellate judiciary, an appeal would have been an exercise in futility.⁴⁸³ Dr. King took their advice.

⁴⁷⁴ GRAY, *supra* note 7, at 92. Fred Gray, lead counsel for the MIA, noted that: “It is interesting that the city had not filed such a lawsuit earlier. If such a case had been filed in December 1955 or January 1956, the Bus Protest might never have garnered the necessary support, financial or otherwise, to sustain itself.” *Id.*

⁴⁷⁵ Kennedy, *supra* note 112, at 1030.

⁴⁷⁶ GRAY, *supra* note 7, at 92.

⁴⁷⁷ KING, *supra* note 7, at 138; Kennedy, *supra* note 112, at 1047.

⁴⁷⁸ See FAIRCLOUGH, *supra* note 21, at 244.

⁴⁷⁹ See *Browder v. City of Montgomery*, 146 F. Supp. 127, 131 (M.D. Ala. 1956) (“The court is of the opinion that the petitioners have not been threatened with any injury other than that incidental to the enforcement of city ordinances, or that this court by issuing the relief prayed for could afford petitioners protection which could not be secured by hearing in the State court proceeding and an appeal to the United States Supreme Court.”).

⁴⁸⁰ GRAY, *supra* note 7, at 92–93; Kennedy, *supra* note 112, at 1030.

⁴⁸¹ Kennedy, *supra* note 112, at 1047 (citing *City of Montgomery v. Montgomery Improvement Ass’n*, No. 31075 (Montgomery Cty. Cir. Ct. Nov. 13, 1956), *reprinted in* 2 *Race Rel. L. Rep.* 123 (1956)). During the hearing on the injunction, word arrived from Washington that the Supreme Court had struck down the segregation laws without a hearing, in a very brief *per curiam* opinion. *Id.* at 1051 (citing *Gayle v. Browder*, 352 U.S. 903 (1956)).

⁴⁸² LEWIS, *supra* note 47, at 80.

⁴⁸³ Even before the judge’s decision, Dr. King seemed to assume that the MIA would obey the expected injunction. In *Stride Toward Freedom*, Dr. King’s account of the boycott, he told of his sense of doom the night before the hearing. KING, *supra* note 7, at 138. He anticipated that the judge would grant the injunction. *Id.* He acknowledged that it was not feasible to ask the thousands of protesters to undergo even greater sacrifice by walking to and from their jobs and schools:

I knew that they had willingly suffered for nearly twelve months, but how could they function at all with the car pool destroyed? Could we ask them to walk back and forth every day to their jobs? And if not, would we then be forced to admit that the protest had

ii. Albany, Georgia: Injunction (1961–1962)

The Albany Movement had extreme challenges on many levels, not the least of which was Dr. King's decision about whether to comply with an injunction. Segregation was deeply embedded in all aspects of social and political life, the police chief had a very effective method of resisting the movement nonviolently, and significant internal tensions plagued the movement.⁴⁸⁴ Even without the court's intervention, activists faced great hardships in trying to accomplish their very broad and ambitious goals.⁴⁸⁵

In July 1962, the Albany Movement finally seemed to be gaining some momentum.⁴⁸⁶ At that point, city officials sought an injunction against the movement's demonstrations from Federal District Judge J. Robert Elliott.⁴⁸⁷ On July 20, just hours before a planned march to city hall, the acknowledged

failed in the end? For the first time in our long struggle together, I almost shrank from appearing before them.

Id. He seemed resigned to complying with the expected injunction and shutting down the transportation system.

As it turned out, the injunction was largely moot as soon as it was issued because the Supreme Court struck down the bus segregation laws the day the local court issued the injunction. *See id.* at 138–40. But that was fortuitous, and Dr. King's thinking before the Court's decision did not seem to include the possibility of violating the expected injunction. Since the Supreme Court decision would become final soon, the MIA shut down the system and carried out makeshift transportation arrangements in the interim. GARROW, *supra* note 2, at 81; *see also* KING, *supra* note 7, at 142; Martin Luther King, Jr., Address to MIA Mass Meeting at Holt Street Baptist Church (Nov. 14, 1956), in 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 424, 425–27; Coleman, Nee & Rubinowitz, *supra* note 34, at 677; *cf.* BRANCH, *supra* note 32, at 194 (stating that boycotters endured the delay until the integration orders reached Montgomery by walking: "In effect, they would struggle through a victory lap.").

The car pool's purpose and scale suggested that it was serving as a transit system, and it was doing so without a city franchise. *See* GRAY, *supra* note 7, at 91–92; KING, *supra* note 7, at 58–59; Coleman, Nee & Rubinowitz, *supra* note 34, at 676–77; *see also* BRANCH, *supra* note 32, at 193 (noting a city witness's testimony in the injunction hearing that "the MIA had deposited \$189,000 in his Montgomery bank, a sum that city lawyers used to ridicule King's contention that the car pool was a voluntary, 'share-a-ride' cooperative."). The MIA's two applications for a franchise showed their awareness of that fact. Moreover, the city's claim that there was no need for an additional transit system seemed borne out by the fact that the bus system had accommodated the Black ridership before the boycott. In fact, Black passengers constituted the majority of the patrons of the system. *See* GARROW, *supra* note 2, at 26; KING, *supra* note 7, at 91–92; JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965, at 62 (25th anniversary ed. 2013). *See generally* BRANCH, *supra* note 32, at 150 (discussing financial strain bus system experienced on account of decreased Black patronage).

⁴⁸⁴ *See supra* notes 402–404, 408 and accompanying text.

⁴⁸⁵ Because the Albany movement was a compilation of various organizations, this meant that there were competing agendas and personalities, making it difficult to have a cohesive and consistent message. Additionally, the police chief had learned from prior movements and schooled his officers in the use of nonviolent tactics for subduing protesters, making it impossible for the movement to garner the media attention that had served it well in the past. *See supra* notes 408–412 and accompanying text.

⁴⁸⁶ WESTIN & MAHONEY, *supra* note 136, at 45; *see also* LEWIS, *supra* note 47, at 159–61.

⁴⁸⁷ GARROW, *supra* note 2, at 206. President Kennedy had appointed Judge Elliott to the district court bench, along with a number of other segregationists in the South. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REGAN 167 (1997); *see also* BRANCH, *supra* note 32, at 609, 699–700. Elliott had been a leader behind the 1948 Dixiecrat revolt from the Democratic Party. UC Davis Sch. of Law, *Remembering Our Roots: Celebrating Dr. Martin Luther King, Jr.*, YOUTUBE (Feb. 4, 2013), <https://youtu.be/fMPRvSnywVU> (keynote address by Clarence B. Jones).

segregationist judge issued a temporary restraining order without notifying Dr. King or Albany Movement leaders.⁴⁸⁸ The order barred Dr. King and other movement supporters from “engaging in ‘unlawful picketing, congregating, or marching in the streets’ and from doing anything else ‘designed to provoke breaches of the peace.’”⁴⁸⁹

This extremely broad injunction prohibited virtually all of the activities that the movement contemplated.⁴⁹⁰ Dr. King’s lawyers advised him that the injunction was almost certainly invalid, because of its sweeping infringement of First Amendment rights of speech and assembly.⁴⁹¹ Initially, Dr. King contemplated violating the injunction because he believed that it was an “unjust law.”⁴⁹² For him, the injunction was a “law that the majority inflicted on the minority that was not binding on itself.”⁴⁹³ Moreover, it did not square with the moral law of the universe.⁴⁹⁴

But Clarence Jones, Dr. King’s lawyer and confidant, implored him to obey the injunction.⁴⁹⁵ He argued that the federal courts had generally been favorable to the Civil Rights Movement and had upheld the constitutional rights of Blacks.⁴⁹⁶ Jones also suggested that Dr. King would lose his moral standing and “his credentials to complain about state governors and various officials throughout the South who had announced their intention to disobey instances of federal court ordered injunctions under the *Brown* decision.”⁴⁹⁷

Ultimately, Dr. King decided to comply with the injunction.⁴⁹⁸ For him, it was critical that this injunction came from a federal judge. He made a sharp distinction

⁴⁸⁸ See LEWIS, *supra* note 47, at 161; MOTLEY, *supra* note 13, at 138.

⁴⁸⁹ WESTIN & MAHONEY, *supra* note 136, at 45; see also GARROW, *supra* note 2, at 206. Judge Elliott reasoned that the protests and the police response to them would deny white people their equal protection rights by depriving them of police officers and other resources. DANIELS, *supra* note 41, at 154.

⁴⁹⁰ The movement planned several marches in Albany to bring attention to segregation and the infringement on Blacks’ rights, which would be compromised if the injunction were sustained. See WESTIN & MAHONEY, *supra* note 136, at 45 (pointing out that obeying the injunction “would halt the Movement’s momentum”); see also FAIRCLOUGH, *supra* note 21, at 103 (noting that Dr. King canceled the impending marches); KUNSTLER, *supra* note 1, at 102 (recalling Dr. King saying, “I don’t mind violating an unjust state injunction, but I won’t violate a federal one”).

⁴⁹¹ WESTIN & MAHONEY, *supra* note 136, at 45. William Kunstler later recalled his belief at the time that the restraining order was unlawful: “I constantly stressed the fact that I considered the injunction illegal. While I did not advise King to violate it, I made it quite clear that I did not think he was bound by it.” KUNSTLER, *supra* note 1, at 102.

⁴⁹² UC Davis Sch. of Law, *supra* note 487; see also GARROW, *supra* note 2, at 207.

⁴⁹³ UC Davis Sch. of Law, *supra* note 487.

⁴⁹⁴ *Id.* Dr. King elaborated on the “just law” question in his Letter from Birmingham Jail. See *infra* note 659 and accompanying text.

⁴⁹⁵ UC Davis Sch. of Law, *supra* note 487. Attorney General Robert Kennedy and Burke Marshall, head of the Civil Rights Division of the Justice Department, also urged Dr. King to obey the injunction. *Id.*; see GARROW, *supra* note 2, at 207.

⁴⁹⁶ UC Davis Sch. of Law, *supra* note 487.

⁴⁹⁷ *Id.*

⁴⁹⁸ FAIRCLOUGH, *supra* note 21, at 103. Clarence Jones recounted, “Eventually, after a heated discussion with me and a continued heated discussion with Attorney General Robert Kennedy, who had made the same point I had made about his undermining and forfeiting his moral credibility by disobeying Judge Elliott’s injunction, he agreed to abide by the injunction.” UC Davis Sch. of Law, *supra* note 487.

between the federal and state courts.⁴⁹⁹ He agreed that federal courts had served as frequent allies in the civil rights struggle, with judges having sufficient independence from local politics and pressures to give the movement a number of important victories.⁵⁰⁰ Dr. King made this distinction notwithstanding his awareness of the presence of a number of segregationists on the Deep South's federal bench during this period, including Judge Elliott.⁵⁰¹ Disobeying the order would also have risked alienating the Justice Department, which was committed to compliance with federal court orders.⁵⁰²

So Dr. King had his lawyers appeal the injunction as violating First Amendment rights of peaceful assembly, freedom of association, and freedom of speech.⁵⁰³ Donald Hollowell and C.B. King sought the assistance of veteran LDF lawyer Constance Baker Motley with the appeal.⁵⁰⁴ Dr. King and his team of lawyers promptly went to Atlanta to ask Judge Elbert Tuttle of the Fifth Circuit Court of Appeals to dissolve the injunction.⁵⁰⁵ Judge Tuttle vacated Judge Elliott's temporary restraining order on July 24, 1962, holding that it violated the First Amendment rights of Dr. King and other movement supporters.⁵⁰⁶

But in a movement that was already reeling from extremely strong and effective resistance, as well as constantly quarreling factions, even the four-day

⁴⁹⁹ Kunstler recalled King saying, "The federal courts have given us our greatest victories and I cannot, in good conscience, declare war on them. Elliott may be a segregationist, but he is still a United States District Judge, and I'll rely on the upper courts to reverse him." KUNSTLER, *supra* note 1, at 102.

⁵⁰⁰ MORRIS, *supra* note 188, at 247; UC Davis Sch. of Law, *supra* note 487. SCLC aide Andrew Young described King's perspective:

It was a federal injunction, and Dr. King felt that the federal courts were our only real ally nationally. They had challenged segregated law schools, dining cars, etc., then the 1954 school decision, and had helped in Montgomery. Breaking a federal court injunction in Albany was a slap in the face of the federal courts that he couldn't bring himself to make.

WESTIN & MAHONEY, *supra* note 136, at 59.

⁵⁰¹ For example, in *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), where a three-judge federal court ruled Montgomery's bus segregation laws unconstitutional, segregationist Judge Seybourn Harris Lynne dissented. He began his dissenting opinion by stating, "Only a profound, philosophical disagreement with the ultimate conclusion of the majority 'that the separate but equal doctrine can no longer be safely followed as a correct statement of the law' would prompt this, my first dissent." *Id.* at 717 (Lynne, J., dissenting).

When Dr. King first found out about the injunction, he called Burke Marshall of the Justice Department and demanded to know why a recent Kennedy appointee was working with city officials to end the movement. GARROW, *supra* note 2, at 206.

Although President Kennedy did not want to appoint segregationists, he appointed segregationists William Harold Cox, J. Robert Elliot, and Pat Mehaffy. GOLDMAN, *supra* note 487, at 167–68. Still, Pat Mehaffy was the only appointee that the administration knew was a segregationist. *Id.* at 168.

⁵⁰² WESTIN & MAHONEY, *supra* note 136, at 45. When Dr. King spoke with Burke Marshall of the Justice Department after the injunction was issued, Marshall instructed Dr. King that he would have to seek a reversal through the appeals process, and that in the meantime he would have to obey the injunction. GARROW, *supra* note 2, at 206.

⁵⁰³ MORRIS, *supra* note 188, at 248; UC Davis Sch. of Law, *supra* note 487. Dr. King also distinguished between local segregation laws, which he challenged, and federal law, which he respected. See WESTIN & MAHONEY, *supra* note 136, at 46.

⁵⁰⁴ DANIELS, *supra* note 41, at 154; MOTLEY, *supra* note 13, at 138–39.

⁵⁰⁵ DANIELS, *supra* note 41, at 154–55; see also MOTLEY, *supra* note 13, at 139. The team also included Clarence Jones and Orzell Billingsley. UC Davis Sch. of Law, *supra* note 487.

⁵⁰⁶ WESTIN & MAHONEY, *supra* note 136, at 46; UC Davis Sch. of Law, *supra* note 487; see also MOTLEY, *supra* note 13, at 138–39.

delay it experienced added to the movement's woes.⁵⁰⁷ The movement never regained its credibility or momentum.⁵⁰⁸

In hindsight, Dr. King viewed his decision not to violate the Albany injunction as a strategic mistake.⁵⁰⁹ That experience became a lesson learned for future campaigns, especially for the next major campaign, in Birmingham, in 1963.⁵¹⁰

3. Fundraising

While fundraising is not a traditional responsibility for lawyers, some of Dr. King's lawyers took on that assignment as well.⁵¹¹ Financial needs ranged from recurring expenses, such as those growing out of encounters with the legal system—lawyers' fees, court costs, bail, and fines—to MIA and SCLC staff salaries, to other frequent expenses like travel.⁵¹² There were also movement-specific expenses. In the early years, creating and maintaining Montgomery's yearlong "car pool" system was the primary example of such a financial challenge.⁵¹³

Dr. King was a consummate fundraiser and held center stage in that domain.⁵¹⁴ However, even his monumental efforts fell short of the movements' overall requirements.⁵¹⁵ In 1962, New York lawyers Harry Wachtel, Clarence Jones, and Theodore Kheel stepped in to help bridge the gap.⁵¹⁶ They founded the Gandhi Society for Human Rights in an effort to provide financial and legal support for the movement.⁵¹⁷ Dr. King served as honorary president, and Clarence Jones filled the roles of general counsel and acting executive director.⁵¹⁸ The society's mission statement defined its role as "legal defense and aid for civil rights cases, educational

⁵⁰⁷ See MORRIS, *supra* note 188, at 248; WESTIN & MAHONEY, *supra* note 136, at 46.

⁵⁰⁸ WESTIN & MAHONEY, *supra* note 136, at 46. See generally FAIRCLOUGH, *supra* note 21, at 105–06 (describing reports that towards the end of July the movement was "running out of steam").

⁵⁰⁹ WESTIN & MAHONEY, *supra* note 136, at 59–60. An SCLC aide reflected on Dr. King's reaction: "But after the Albany campaign collapsed, Dr. King lamented the fact that he had abided by the injunction, and he entered the planning for Birmingham ready to defy even a federal court rather than see the Albany collapse repeated. And if he had allowed himself to be halted in his tracks in Birmingham [from an injunction], it would have become the technique used against the movement everywhere throughout the South." *Id.*

⁵¹⁰ KING, *supra* note 22, at 35.

⁵¹¹ See discussion *supra* Section I.B.5.

⁵¹² See BRANCH, *supra* note 32, at 153, 159, 185–86; FAIRCLOUGH, *supra* note 21, at 96–97, 117, 142–44, 178; see also Interview by Glenn E. Smiley with Martin Luther King, Minister, Dexter Ave. Baptist Church, in Montgomery, Ala. (Mar. 1, 1956), <http://www.thekingcenter.org/archive/document/mlk-interview-glenn-e-smiley>.

⁵¹³ See Coleman, Nee & Rubinowitz, *supra* note 34, at 675, 676 & 710 nn.66 & 69–70.

⁵¹⁴ See, e.g., BRANCH, *supra* note 32, at 149, 254, 300, 321, 352, 381–83, 573–75, 578, 581, 589, 595–96, 641, 683, 803, 805–06, 870; FAIRCLOUGH, *supra* note 21, at 49, 70, 96–97, 256, 287, 345; GARROW, *supra* note 2, at 151, 153, 155, 234, 429, 461–63; LEWIS, *supra* note 47, at 120, 156.

⁵¹⁵ See BRANCH, *supra* note 32, at 299–300, 515, 571; FAIRCLOUGH, *supra* note 21, at 47–48, 142.

⁵¹⁶ See GARROW, *supra* note 2, at 198.

⁵¹⁷ FAIRCLOUGH, *supra* note 21, at 97–98; GARROW, *supra* note 2, at 198.

⁵¹⁸ *Gandhi Society for Human Rights*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_gandhi_society_for_human_rights/index.html (last visited Jan. 18, 2016). The board of directors included, among others, Mordecai Johnson, President Emeritus of Howard University, William Kunstler, special counsel to the American Civil Liberties Union, and Benjamin Mays, President of Morehouse College. *Id.*

materials propagating nonviolent methods and voter registration activities, and financial assistance to other organizations for civil rights projects.”⁵¹⁹

In recognizing both the importance and the cost of legal representation, Dr. King urged that a major focus of the Gandhi Society’s efforts should be breaking barriers to justice through greater access to legal defense, particularly for those engaging in efforts to assert their constitutional rights:

Many people who are poor find themselves in legal actions, and the heavy cost of defense is a crippling difficulty, thus hindering the progress of citizens who may be informed of their rights but lack the means to carry on. Also, there are areas where positive legal steps should be taken in the form of injunctive suits or other actions to remove illegal obstacles, and again where the financial means do not exist to see a project to completion.⁵²⁰

B. Complementary Desegregation Litigation

Starting in the 1930s, one of the prominent strands of civil rights work was constitutional litigation challenging state-imposed segregation laws in the South.⁵²¹ The initial focus was on the exclusion of Blacks from law schools and graduate schools.⁵²² *Brown v. Board of Education*⁵²³ represents the culmination of a litigation campaign to challenge racial exclusion and segregation in all levels of public education.⁵²⁴ Throughout the campaign, the NAACP Legal Defense and Education Fund (LDF) relied almost exclusively on the courts to bring about the changes they were seeking. The LDF’s theory was that the law—state constitutional provisions, state statutes, and local ordinances—was the problem, and the courts could provide the solution. The assumption was that there was no need for mass

⁵¹⁹ *Id.* However, the organization quickly fell on hard times. See discussion *infra* Section III.B.4.

⁵²⁰ Letter from Martin Luther King Jr. to Harry Wachtel (Feb. 12, 1962), in 7 THE PAPERS OF MARTIN LUTHER KING, JR.: TO SAVE THE SOUL OF AMERICA, JANUARY 1961-AUGUST 1962, at 397, 398 (Clayborne Carson & Tenisha Armstrong eds., 2014).

⁵²¹ See generally KLARMAN, *supra* note 13, at 148–52, 160–62 (discussing school equalization cases); KLUGER, *supra* note 13, at 132–37 (discussing Nathan Margold’s strategic vision for the NAACP’s legal drive); MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 21–33 (1987) (examining the legal background of racial discrimination in the 1930s and the Margold Report, which emphasized a direct challenge to segregation on constitutional grounds); Rabin, *supra* note 75, at 215–16 (discussing the NAACP’s litigation campaign plan).

For discussion of central, but less publicized, aspects of civil rights lawyering in the first half of the twentieth century, focused on “racial uplift,” see MACK, *supra* note 161, at 1–11.

⁵²² See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (Equal Protection Clause of the Fourteenth Amendment required that Black student be admitted to publicly-funded law school that restricted access to whites, where separate facility provided for Blacks was inferior in several respects); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (Black student denied admission to the state’s only law school because of her race entitled to secure legal education from a state institution that was equal to that afforded to whites); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (State must offer Blacks facilities for graduate education “substantially equal” to those afforded for whites); see also KLUGER, *supra* note 13, at 185–92, 201–03, 257–68 (examining cases challenging segregated universities); TUSHNET, *supra* note 13, at 121–49 (same).

⁵²³ 347 U.S. 483 (1954).

⁵²⁴ See KLUGER, *supra* note 13, at 293–94; TUSHNET, *supra* note 13, at 150–67.

movements or other strategies such as nonviolent direct action.⁵²⁵ This series of “test cases” became the prototype of a freestanding judicial strategy.⁵²⁶

For activists like Martin Luther King, Jr., the pre-existence of those litigation strategies and the Court’s decision in *Brown* raised important questions about the extent to which, if any, they should consider joining forces with the lawyers who had relied so heavily on the courts. Dr. King had complicated views about the role of the courts in civil rights.⁵²⁷ Ideally, nonviolent direct action would achieve the movement’s objectives, and there would be no need for litigation. However, in the messy real world of social movements, Dr. King saw that nonviolent direct action had a very difficult road to hoe.⁵²⁸ Additional strategies, including litigation, could add power to a movement facing daunting legal and extra-legal opposition.

While *Brown* did not accompany a social movement, it helped create the possibility of coordinated multiple strategies that included similar lawsuits.⁵²⁹ Those lawsuits could use the *Brown* decision as the central precedent for arguing that the racially discriminatory laws being challenged were unconstitutional.⁵³⁰

As a result, Dr. King recognized the important role of litigation strategies in the Civil Rights Movement. At the same time, he expressed great concern about over-reliance on the courts to address problems of segregation and discrimination. His seemingly contradictory statements about the courts suggest his ambivalence about the place of litigation strategies in the Civil Rights Movement.

On the one hand, Dr. King emphasized the usefulness of the courts:

Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles in solving this problem. Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless. . . . The habits, if not the hearts, of people have been and are being altered every day by legislative acts, judicial decisions and executive orders. Let us not be misled by those who argue that segregation cannot be ended by the force of law.⁵³¹

⁵²⁵ The closest thing to extra-legal activism was a boycott by high school students in rural Prince Edward County, Virginia, which developed into one of the four cases consolidated in *Brown*. In April 1951, the students walked out to protest the separate and unequal county schools, and sought representation by civil rights lawyer Oliver Hill. See KLUGER, *supra* note 13, at 464–72, 476–80.

⁵²⁶ See KLARMAN, *supra* note 13, at 378–79; TUSHNET, *supra* note 13, at 126–27.

⁵²⁷ Dr. King’s views on the appropriate role of litigation strategies evolved over his career. See discussion *infra* Section III.A.

⁵²⁸ See KING, *supra* note 22, at 15–38.

⁵²⁹ See Rabin, *supra* note 75, at 218; see also BROWN-NAGIN, *supra* note 142, at 115–23 (examining coordinated strategies that leveraged *Brown* in efforts to end segregation in recreational facilities and public transportation).

⁵³⁰ See discussion *infra* Section II.B.1. The SCLC also made major efforts to secure federal civil rights legislation. For more on those efforts, see FAIRCLOUGH, *supra* note 21, at 134–37, 149–53, 178–79, and GARROW, *supra* note 2, at 267–69.

⁵³¹ MARTIN LUTHER KING, JR., The Ethical Demands for Integration (Dec. 27, 1962), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. 117, 124 (James M. Washington ed., 1986). For similar statements made elsewhere by Dr. King, see MARTIN LUTHER KING, JR., An Address Before the National Press Club (July 19, 1962), in A TESTAMENT OF HOPE, *supra*, at 99, 100–01 [hereinafter KING, Press Club Address]; MARTIN LUTHER KING, JR.,

Acknowledging both the value and the limitations of the courts, Dr. King argued that:

In our nation, under the guidance of the superb legal staff of the NAACP [LDF], we have been able, through the courts, to remove the legal basis of segregation. This is by far one of the most marvelous achievements of our generation. . . . We must not, however, remain satisfied with a court “victory” over our white brothers.⁵³²

But in light of his deep commitment to nonviolent direct action, it is not surprising that Dr. King would define his ideal approach as being in the streets and out of the courts: “Wherever it is possible, we want to avoid court cases in this integration struggle.”⁵³³ When he approved turning to the courts, he did so with great reluctance.⁵³⁴

Nonviolent direct action required mass participation. Mobilizing rank-and-file Blacks was a central theme of Dr. King’s movements, and doing so represented a high form of democracy.⁵³⁵ Court cases risked undermining that thrust: “[W]hen legal contests were the sole form of activity[,] . . . the ordinary Negro was involved as a passive spectator[, and] . . . his energies were unemployed.”⁵³⁶ Using the courts was an elite strategy that relied on legal expertise and procedures that played out in a venue that could not engage the masses. Moreover, because of the complex procedures and technical legal language, movement leaders lost a degree of control to the lawyers once the process moved into the courts.⁵³⁷

Dr. King also had pragmatic concerns. Courts generally proceeded at a very slow pace, which delayed progress and provided opportunities for adversaries to take advantage of the fact that time was on their side.⁵³⁸ Moreover, the slow process

Commencement Address at Lincoln University: The American Dream (June 6, 1961), in *A TESTAMENT OF HOPE*, *supra*, at 208, 213; Martin Luther King, Jr., *The Case Against “Tokenism,”* N.Y. TIMES MAG., Aug. 5, 1962, at 11, *reprinted in A TESTAMENT OF HOPE*, *supra*, at 106, 107.

⁵³² MARTIN LUTHER KING, JR., Give Us the Ballot—We Will Transform the South, Keynote Address at the Prayer Pilgrimage for Freedom (May 17, 1957), in *A TESTAMENT OF HOPE*, *supra* note 531, at 197, 200.

⁵³³ Dr. King made that statement in 1957. See GARROW, *supra* note 2, at 87 & 645 n.4.

⁵³⁴ See discussion *infra* Sections II.B.1–2.

⁵³⁵ See, e.g., Gunnar Jahn, Chairman, Nobel Peace Prize Comm., Award Presentation Speech (Dec. 10, 1946), http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/press.html (discussing the Montgomery Bus Boycott and observing that “[d]uring the morning of December 5, as bus after bus without a single Negro passenger passed his window, [Dr. King] realized that the boycott had proved a hundred percent effective”); see also ESKEW, *supra* note 50, at 230–34.

⁵³⁶ MORRIS, *supra* note 188, at 123. At the same time, filing a case and surviving motions to dismiss and for summary judgment could help sustain a movement by providing hope and inspiration. It could also add to the pressure on adversaries to seek a resolution. See BRANCH, *supra* note 32, at 163; Coleman, Nee & Rubinowitz, *supra* note 34, at 681 & 714 n.107.

⁵³⁷ See, e.g., *infra* Section II.B.1 (discussing the Montgomery Bus Boycott, where the lawsuit filed sought broader relief than the activists’ initial demands); cf. Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 664–69 (2009) (critiquing litigation strategy in the same-sex marriage movement).

⁵³⁸ GARROW, *supra* note 2, at 91–92; King, *supra* note 1, at xxii.

of the courts could sap the energy and enthusiasm of the movement.⁵³⁹ While the Montgomery Bus Boycott extended for over a year, Dr. King's movements usually contemplated months rather than years of direct action. Litigation was more likely to take years, so there was a high probability of direct action and court processes being out of sync, time-wise.

Litigation was also costly, and the expenses incurred in carrying out direct action campaigns often pressed the movements' fundraising capacities to the limit.⁵⁴⁰ Securing resources for litigation would add another burden and financial strain on the movement.⁵⁴¹

However, in his book *Why We Can't Wait*, Dr. King suggested a quite interdependent relationship between court-based strategies and direct action:

Direct action is not a substitute for work in the courts and the halls of government. . . . [P]leading cases before the courts of the land[] does not eliminate the necessity for bringing about the mass dramatization of injustice in front of a city hall. Indeed, direct action and legal action complement one another; when skillfully employed, each becomes more effective.⁵⁴²

Dr. King also emphasized the limitations of the courts and the law and therefore the need for direct-action strategies:

Fortunately, the Negro has been willing to grapple with a creative and powerful force in his struggle for racial justice, namely, nonviolent resistance. This does not mean that a new method has come into being to serve as a substitute for litigation and legislation. Certainly we must continue to work through the courts and legislative channels. But those who adhere to the method of nonviolent direct action recognize that legislation and court orders tend only to declare rights; they can never thoroughly deliver them. Only when the people themselves begin to act are rights on paper given lifeblood. A catalyst is needed to breathe life experience into

⁵³⁹ See generally JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 33 (1978) (discussing costs that attenuate the likelihood of success in using the legal system to achieve social change).

⁵⁴⁰ See discussion *infra* Section II.A.3.

⁵⁴¹ This objection was not so much to the use of the courts as it was to the movement having to bear the financial burden of doing so. See KING, *supra* note 22, at 157 (suggesting that the federal government should take the responsibility for carrying out civil rights litigation, including providing the required resources).

⁵⁴² *Id.* at 33. The idea of joining litigation and nonviolent direct action predated Dr. King's era by at least sixty years. The organizers of *Plessy v. Ferguson*, 163 U.S. 537 (1896), considered boycotting the trains while they pursued their test case challenging the constitutionality of the Louisiana railroad segregation statute. See Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 201–02 (Michael C. Dorf ed., 2004). Louis Martinet, one of the leaders, proposed the joint strategy. See *id.*

a judicial decision by the persistent exercise of the rights until they become usual and ordinary in human contact.⁵⁴³

In short, Dr. King respected the contributions litigators and the courts made but committed himself and his movements to nonviolent direct action. At the same time, his recognition of the power of the courts opened his mind to turning to them as a complementary strategy.

1. The Montgomery Bus Boycott (1955–1957)⁵⁴⁴

Even before Rosa Parks refused a bus driver's order to give up her seat to a white man on December 1, 1955, several of Montgomery's Black leaders had begun searching for a plaintiff to launch a "test case" challenging the constitutionality of the bus segregation laws.⁵⁴⁵ The first such effort failed. An appellate judge dismissed the charge against a teenage girl, Claudette Colvin, for violating the segregation law when she refused to give up her seat to a white rider.⁵⁴⁶ Nevertheless, challenging the constitutionality of bus segregation laws had become part of the Black community's tactical arsenal—if only to be held in reserve in case it was ever necessary to use it.⁵⁴⁷

A possible opportunity for another constitutional challenge appeared when Rosa Parks was arrested. She asked Fred Gray, her friend, frequent lunch partner, and NAACP colleague, to represent her.⁵⁴⁸ At the urging of long-time local civil rights activist E.D. Nixon, Rosa Parks agreed to have her case used "to challenge the constitutionality of [the] bus segregation laws."⁵⁴⁹ Nixon viewed this as the opportunity for which he had been waiting—to combine direct action and litigation

⁵⁴³ KING, Press Club Address, *supra* note 531, at 102.

⁵⁴⁴ This account of the Montgomery Bus Boycott's use of complementary litigation is drawn largely from Coleman, Nee & Rubinowitz, *supra* note 34, and sources cited there.

⁵⁴⁵ See DOUGLAS BRINKLEY, ROSA PARKS 88, 90 (2000); see also GRAY, *supra* note 7, at 43–47; SALMOND, *supra* note 115, at 173; WILLIAMS, *supra* note 483, at 63; David J. Garrow, *The Origins of the Montgomery Bus Boycott*, S. CHANGES, Oct.–Dec. 1985, at 21, reprinted in *THE WALKING CITY: THE MONTGOMERY BUS BOYCOTT, 1955–1956*, at 607, 613 (David J. Garrow ed., 1989).

⁵⁴⁶ See DAYBREAK OF FREEDOM, *supra* note 32, at 77 (noting that the appellate judge's ruling "prevented the lawyers from using Colvin's arrest as a test case to challenge the bus segregation laws"). By some accounts, the circuit solicitor prosecuting the case informed the court that the State was dropping the charge for violating the city bus segregation ordinance after the appellate judge denied Claudette Colvin's motion to dismiss that charge on constitutional grounds, and then set the case for trial. See, e.g., THORNTON, *supra* note 27, at 54. The judge upheld Colvin's conviction for assaulting a police officer when the officer tried to remove her from the bus. See DAYBREAK OF FREEDOM, *supra* note 32, at 77.

⁵⁴⁷ The Colvin case confirmed that Alabama state courts were not a hospitable place to bring bus desegregation litigation. Consequently, Fred Gray and Clifford Durr began to consider filing a suit in federal court, alleging that bus segregation laws violated the Equal Protection clause of the Fourteenth Amendment. GRAY, *supra* note 7, at 70–71; THORNTON, *supra* note 27, at 54–55. That possibility seemed even more promising after NAACP lawyers obtained a Fourth Circuit decision in *Flemming v. South Carolina Electric & Gas Co.*, striking down South Carolina's bus segregation laws, in July 1955. See 224 F.2d 752 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956).

⁵⁴⁸ GRAY, *supra* note 7, at 31, 50; see also THEOHARIS, *supra* note 332, at 34, 60–61, 77.

⁵⁴⁹ DAYBREAK OF FREEDOM, *supra* note 32, at 9; see also BRANCH, *supra* note 32, at 121, 130–31.

to challenge the Jim Crow regime on the buses: “*This is the case. We can boycott the bus lines with this and at the same time go to the Supreme Court.*”⁵⁵⁰

For Fred Gray, Rosa Parks’ arrest provided an early chance to act on his mission to destroy segregation wherever he found it.⁵⁵¹ Gray’s goal was to get the Supreme Court to extend the principle in *Brown* to the segregation of transportation facilities.⁵⁵² In light of the possibility of basing Rosa Parks’ defense on the unconstitutionality of the bus segregation laws, Fred Gray enlisted Thurgood Marshall and Robert Carter in New York, the most experienced civil rights lawyers in the country.⁵⁵³ Gray also recruited local lawyers to work on the case.⁵⁵⁴

As expected, the trial judge rejected the unconstitutionality defense and found Rosa Parks guilty of violating the bus segregation laws.⁵⁵⁵ Gray’s strategy contemplated appeals through the state courts, which would almost certainly affirm the trial court and set the stage for an appeal to the U.S. Supreme Court.⁵⁵⁶ However, a procedural mishap precluded the state appeal, thus ending the case.⁵⁵⁷ While Fred Gray was preparing Rosa Parks’ defense, Dr. King accepted the leadership position at the Montgomery Improvement Association.⁵⁵⁸ As the movement’s leader, his views about the role of litigation became critical.

⁵⁵⁰ GARROW, *supra* note 2, at 14. Notwithstanding Nixon’s call for simultaneous implementation of the two strategies, that did not happen in Montgomery, or in any other movement. *See discussion infra* Sections II.B.1–2, III.A.

⁵⁵¹ *See* GRAY, *supra* note 7, at 51, 74. In fact, matters proceeded in fits and starts, with no constitutional challenge initiated until the following year. *See infra* note 578 and accompanying text.

⁵⁵² *See* GRAY, *supra* note 7, at 76–77.

⁵⁵³ *See id.* at 72–73, 77; THORNTON, *supra* note 27, at 71, 75; Coleman, Nee & Rubinowitz, *supra* note 34, at 682 & 715 n.113; Kennedy, *supra* note 112, at 1031 n.199.

⁵⁵⁴ *See* GRAY, *supra* note 7, at 54, 72; Coleman, Nee & Rubinowitz, *supra* note 34, at 714 n.112.

⁵⁵⁵ Parks was “found guilty of violating Chapter 1, Section 8 of the City Code of Montgomery, Alabama,” *Parks v. City of Montgomery*, 92 So. 2d 683, 684 (Ala. Ct. App. 1957), which made a violation of the state bus segregation statute also a municipal offense. *See discussion supra* Section II.A.1.i.

To secure the Supreme Court decision the protesters were seeking, the lower courts needed to reject the unconstitutionality defense. This approach echoes the lawyers’ strategy more than a half century earlier with their “test case” in *Plessy v. Ferguson*, where Homer Plessy’s lawyer challenged the prosecution as based on an unconstitutional railroad segregation statute. That case made it to the Supreme Court, and became the first decision to affirm the constitutionality of segregation laws. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). *See generally* LOFGREN, *supra* note 144 (assessing the *Plessy* decision in view of its relevant facts and the prevailing doctrines). While Rosa Parks had not planned to refuse to give up her seat in order to challenge the segregation laws, the case seemed to provide an opportunity to bring the question before the Court.

⁵⁵⁶ *See* GRAY, *supra* note 7, at 56, 71.

⁵⁵⁷ *See* Kennedy, *supra* note 112, at 1047. Parks was charged with violating a municipal ordinance, not a state law. The Court of Appeals of Alabama said that prosecutions for such violations were only “quasi criminal” in nature, and were thus governed by the rules that applied to civil, rather than to criminal, appeals. *Parks*, 92 So. 2d at 684. And while the criminal appellate rules dispensed with assignments of error, the civil appellate rules required them. *Id.* at 684–85. Because no errors were assigned in Parks’ appeal, the court of appeals concluded there was nothing for it to review, and affirmed Parks’ conviction. *Id.* at 685.

At that point, Fred Gray and his associates were willing to put desegregation litigation on the back burner because they still believed that the city would agree to changes: “Really what happened is when we talked to the bus company officials and the city officials and they promised that things would be better, we just let them out talk us.” Interview by Christopher Coleman with Fred Gray in Tuskegee, Ala. (Aug. 21, 2001).

⁵⁵⁸ KING, *supra* note 7, at 41–43; *see also* GRAY, *supra* note 7, at 52–53.

The Montgomery Bus Boycott began in the shadow of *Brown*, a year and a half after the first decision and just months after *Brown II*, the remedial decision.⁵⁵⁹ Early on, Dr. King praised and celebrated the *Brown* decision, notwithstanding his consistent philosophical and pragmatic position to never rely exclusively on the courts.⁵⁶⁰ *Brown* was a classic example of that one-dimensional strategy of stand-alone litigation.⁵⁶¹

Dr. King acknowledged several critical benefits of the Court's school desegregation decision: providing legitimacy for the Civil Rights Movement; inspiring Blacks, as well as whites, to join the movement; and making available an important legal precedent that could be useful in future cases that were part of a broader social movement.⁵⁶² In his initial speech before the bus boycott began, Dr. King invoked the *Brown* decision, without naming it, to establish the legitimacy of the movement's enterprise.⁵⁶³ In seeking the moral and political high ground, he urged that: "We are not wrong. . . . [I]f we are wrong, the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong."⁵⁶⁴ Montgomery's Black community was contemplating collective resistance to the previously accepted authority of the city and the bus company, so it was critical to have a way of framing that initiative as right and justified.⁵⁶⁵ Moreover, the path Montgomery's Black community was contemplating was uncharted territory, with great risks individually and collectively. At least one branch of the federal

⁵⁵⁹ *Brown I* was decided in May 1954, 347 U.S. 483 (1954), and *Brown II* in May 1955, 349 U.S. 294 (1955) (mandating school desegregation with "all deliberate speed").

⁵⁶⁰ See GARROW, *supra* note 2, at 78, 87, 91–92; KING, *supra* note 7, at 167–68.

⁵⁶¹ See Coleman, Nee & Rubinowitz, *supra* note 34, at 686 & 718 nn.143–44; Kennedy, *supra* note 112, at 1012.

⁵⁶² See KING, *supra* note 7, at 50, 168; MARTIN LUTHER KING, JR., Facing the Challenge of a New Age, Address Before the First Annual Institute on Non-Violence and Social Change (Dec. 3, 1956), in A TESTAMENT OF HOPE, *supra* note 531, at 135, 137–38; Martin Luther King, Jr., *The Burning Truth in the South*, PROGRESSIVE, May 1960, at 8, reprinted in A TESTAMENT OF HOPE, *supra* note 531, at 94, 95; Martin Luther King, Jr., "Desegregation and the Future," Address Delivered at the Annual Luncheon of the National Committee for Rural Schools (Dec. 15, 1956), in 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 471, 472–75; Martin Luther King, Jr., Address at Golden Anniversary Conference of National Urban League 2–3 (Sept. 6, 1960), <http://www.thekingcenter.org/archive/document/address-mlk-golden-anniversary-conference-national-urban-league>; Martin Luther King, Jr., Address to the National Bar Association 3–5 (Aug. 20, 1959), <http://www.thekingcenter.org/archive/document/address-national-bar-association>.

⁵⁶³ See BRANCH, *supra* note 32, at 140.

⁵⁶⁴ Kennedy, *supra* note 112, at 1000.

⁵⁶⁵ In Dr. King's account of the Montgomery Bus Boycott in *Stride Toward Freedom*, published shortly after the boycott ended, he emphasized the importance of *Brown*:

For all men of good will May 17, 1954, marked a joyous end to the long night of enforced segregation. In unequivocal language the Court affirmed that "separate but equal" facilities are inherently unequal, and that to segregate a child on the basis of his race is to deny that child equal protection of the law. This decision brought hope to millions of disinherited Negroes who had formerly dared only to dream of freedom. It further enhanced the Negro's sense of dignity and gave him even greater determination to achieve justice.

KING, *supra* note 7, at 168.

government, however, seemed to be on their side, making the effort less treacherous and success seemingly more possible.⁵⁶⁶

Notwithstanding the potentially powerful precedent that *Brown* provided, a legal challenge to the bus segregation laws moved to the back burner after the denial of Rosa Parks' appeal.⁵⁶⁷ It remained on the back burner for the first two months of the boycott.⁵⁶⁸ Dr. King showed no interest in pursuing a legal strategy.⁵⁶⁹ In addition, there was very little support among Montgomery's Blacks for an immediate resort to the courts.⁵⁷⁰ Despite the well-publicized precedents of *Brown* and a Fourth Circuit decision striking down South Carolina's bus segregation laws, federal litigation remained an unsure and possibly dangerous tactic.⁵⁷¹ Moreover, going to court would almost certainly have ended any possibility of a successful negotiation of their grievances with local officials, leaving bus conditions unchanged while the suit traveled what could be a long and uncertain journey through the federal courts.⁵⁷² Worse still, even a favorable Supreme Court ruling could not guarantee integration on the city's buses.⁵⁷³

In late January 1956, the City Commission announced that it would no longer negotiate with the MIA until Black riders returned to the buses.⁵⁷⁴ That persuaded

⁵⁶⁶ See GRAY, *supra* note 7, at 71; KING, *supra* note 7, at 131–32; Coleman, Nee & Rubinowitz, *supra* note 34, at 682.

⁵⁶⁷ The scope of the principle articulated by the Court in 1954 was uncertain, because the opinion referred specifically to the “field of public education,” rather than addressing state-imposed segregation more generally. *Brown v. Bd. of Educ.*, 347 U.S. 483, 491, 495 (1954); see Kennedy, *supra* note 112, at 1049–50. But subsequent per curiam decisions showed the Court was prepared to extend the principle much more broadly. Coleman, Nee & Rubinowitz, *supra* note 34, at 684 & 717 nn.132–33; see also cases cited *infra* note 650.

Notwithstanding the risks of uncertainty, Fred Gray and local lawyer Clifford Durr were prepared to proceed with litigation seeking a declaratory judgment or an injunction against the bus segregation laws. See Kennedy, *supra* note 112, at 1047–49. However, the movement's leaders were reluctant to pursue such judicial relief because they actually believed that the white opposition leaders would quickly offer a compromise once they realized “the depth of [the protesters'] dissatisfaction with the situation on the buses.” *Id.* at 1048. Adding to their reluctance was the then-prominent social perception associated with using the courts to resolve disputes—King and the MIA knew “that white Alabama would react to [the filing of a suit] as the social equivalent of atomic warfare.” *Id.* at 1049.

The prevailing tension was caused in part by white southerners viewing the Court's decision in *Brown* as a threat to the southern “way of life.” See Bayard Rustin, Report on Montgomery, Alabama (Mar. 21, 1956), in DAYBREAK OF FREEDOM, *supra* note 32, at 208, 208.

⁵⁶⁸ See *infra* notes 575–579 and accompanying text.

⁵⁶⁹ Dr. King did not seem to discuss the possibility until events on the ground pushed toward consideration of a lawsuit. See *infra* notes 574–578, 595 and accompanying text.

⁵⁷⁰ Coleman, Nee & Rubinowitz, *supra* note 34, at 672; see also THORNTON, *supra* note 27, at 41 (“At a meeting of his Citizens' Coordinating Committee in August [1955], Rufus Lewis sought to persuade the committee to sponsor a federal court suit to seek the integration of the [city's] parks, but the majority of the committee voted instead merely to continue efforts to equalize the park facilities within the framework of segregation.”); Thornton, *supra* note 112, at 229 (“Montgomery's Blacks had not yet developed the faith in the federal court[s] which future years would generate.”).

⁵⁷¹ Coleman, Nee & Rubinowitz, *supra* note 34, at 672.

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ *Id.* at 681 & 714 n.106; see also Thornton, *supra* note 112, at 214 (quoting Montgomery Mayor William A. “Tacky” Gayle as having declared, “When and if the Negro people desire to end the boycott, my door is open to them. But until they are ready to end it, there will be no more discussions”).

On January 22, Mayor Gayle announced that he had struck a deal with three leading Black ministers to end the boycott on the city's proposed terms. The ministers involved were not part of the MIA. The

MIA leaders that the City Commissioners would never agree to any substantial concessions.⁵⁷⁵ The stalemate was one of several factors that led the organization to file the constitutional lawsuit a few days later, despite the initial hesitance towards pursuing litigation. Dr. King cited three reasons for bringing the case: “the intransigence of the city’s commission, the crudeness of the ‘get tough’ policy [intense, unfair, and punitive traffic law enforcement], and the viciousness of the recent bombings.”⁵⁷⁶ The MIA Board’s decision was confirmed when racists bombed Dr. King’s house, causing great fear, substantial damage, but no injuries.⁵⁷⁷

In early February 1956, Fred Gray filed a class action in federal court on behalf of five female plaintiffs and the city’s similarly situated Black residents.⁵⁷⁸ The complaint alleged that the Montgomery city ordinances and Alabama state statutes requiring segregation on common carriers were unconstitutional under the equal protection clause.⁵⁷⁹

As the highly visible lead local counsel, Fred Gray bore the brunt of the severe backlash against the litigation. Local officials and white citizens embarked on an intensive, sustained, and varied campaign to oust Fred Gray from the civil rights picture.⁵⁸⁰ Presumably, they hoped that doing so would also deter other lawyers from participating, thus ending the threat of adverse judicial action.

When Gray first filed *Browder v. Gayle* asking the court to declare the bus segregation statutes unconstitutional, local officials tried to prevent him from

MIA denounced the city’s actions, and announced that it would continue the boycott. In response, Mayor Gayle announced that there would be no more negotiations until Black people returned to the buses. Coleman, Nee & Rubinowitz, *supra* note 34, at 678; *see also* KING, *supra* note 7, at 104–107 (“In obvious indignation, the mayor went on television and denounced the boycott. He threatened that the commission was going to ‘stop pussy-footing around with the boycott.’ The vast majority of white Montgomerians, he declared, did not care if a Negro ever rode the buses again.”).

⁵⁷⁵ Coleman, Nee & Rubinowitz, *supra* note 34, at 681 & 714 n.106; Thornton, *supra* note 112, at 214–15. As Ralph Abernathy, an MIA leader, said:

Our first demand was to have more courtesy on the part of the bus drivers, to eliminate them calling our women names . . . we could not solve the problem because they were not willing to cooperate . . . all they had to do was change the law and make it permissible for black people to ride on the buses under those conditions . . . but that was the most important lesson of the boycott . . . the city leaders were not going to compromise, so consequently we needed a ruling from the U.S. Supreme Court.

WILLIAMS, *supra* note 483, at 85.

⁵⁷⁶ KING, *supra* note 7, at 131.

⁵⁷⁷ Coleman, Nee & Rubinowitz, *supra* note 34, at 714 n.106; *see also* ROBINSON MEMOIR, *supra* note 139, at 135–36. *See generally* GRAY, *supra* note 7, at 67 (discussing the bombing of Dr. King’s home). Taylor Branch emphasizes instead the strains on the MIA’s car pool system, which transported thousands of Blacks each day, as a major precipitating factor in filing the lawsuit. BRANCH, *supra* note 32, at 159.

In addition, Martin Luther King, Jr. had a level of faith in the federal courts that he did not feel about the state courts. *See* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS 109 (1993); KING, *supra* note 7, at 131–32, 175–76, 198.

⁵⁷⁸ *See Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff’d per curiam*, 352 U.S. 903 (1956); Coleman, Nee & Rubinowitz, *supra* note 34, at 681; *see also* Thornton, *supra* note 112, at 215. This was three days after the bombing of Dr. King’s home. Entin, *supra* note 128, at 257.

⁵⁷⁹ *See Browder*, 142 F. Supp. at 710–12.

⁵⁸⁰ *See infra* notes 581–593 and accompanying text.

pursuing the legal challenge.⁵⁸¹ Some officials hinted that if Gray could get his clients to drop the suit, or if he stalled to prevent an actual ruling, he would “have all the legal cases [he] could handle,” allowing Gray to build a substantial practice.⁵⁸² Although these offers came at a time when Gray “had nothing,” he wrote that accepting the offers “would have been contrary to my goal of ‘destroying everything segregated I could find.’”⁵⁸³

After he rejected these offers, white officials made Fred Gray a target of harassment. He had an exemption from the military because he had been a minister—a “boy preacher”—well before he became a lawyer, and he served as assistant pastor at a Montgomery church.⁵⁸⁴ The local draft board reclassified his exempt draft status and issued an induction order.⁵⁸⁵ Gray successfully petitioned the director of the Selective Service System to have the order cancelled, which happened the night before he was to report for duty.⁵⁸⁶

A Montgomery County grand jury also charged Gray with barratry, or maliciously stirring up lawsuits⁵⁸⁷—an offense that could have cost him his law license.⁵⁸⁸ The indictment alleged that Gray fraudulently named Jeanetta Reese as a plaintiff in *Browder v. Gayle* because she allegedly had not agreed to be a plaintiff.⁵⁸⁹ Reese claimed she had no knowledge of the suit, after she was subjected to intense pressure from white authorities.⁵⁹⁰

Gray had fully documented Reese’s agreement to be represented in the case,⁵⁹¹ so the charge against him was ultimately dismissed.⁵⁹² Gray also faced bomb threats, harassing letters and telephone calls, and an attempted stabbing.⁵⁹³ While

⁵⁸¹ GRAY, *supra* note 7, at 73 (“Numerous local, county, state, and federal officials in all three branches of government attempted to prevail upon me not to pursue the case.”).

⁵⁸² *Id.* at 73–74.

⁵⁸³ *Id.* at 74.

⁵⁸⁴ *Id.* at 77–78, 271–72.

⁵⁸⁵ Kennedy, *supra* note 112, at 1028 & n.180; *see also* GRAY, *supra* note 7, at 77 (pointing out that his draft status was reclassified from 4-D to 1-A).

⁵⁸⁶ GRAY, *supra* note 7, at 78.

⁵⁸⁷ Kennedy, *supra* note 112, at 1028 & n.181. *See generally* GRAY, *supra* note 7, at 81–83 (discussing the “politically motivated criminal prosecution”).

⁵⁸⁸ *See* GRAY, *supra* note 7, at 81 (“The state statute under which I was indicted called for automatic disbarment upon conviction.”); *see also* Entin, *supra* note 128, at 257.

⁵⁸⁹ GRAY, *supra* note 7, at 81.

⁵⁹⁰ *Id.*; Kennedy, *supra* note 112, at 1028 n.181; *see also* BRANCH, *supra* note 32, at 167 (pointing out how “visitors of both races trampled a path to [Reese’s] door, urging her to stick to the contrary assurances she had given them”); DAYBREAK OF FREEDOM, *supra* note 32, at 128 (observing that Reese apparently withdrew from the suit after intense pressure from white authorities). Bayard Rustin reported that Reese told him, “I had to do what I did or I wouldn’t be alive today.” Bayard Rustin, *Montgomery Diary*, LIBERATION, Apr. 1956, at 7, 8, *reprinted in* DAYBREAK OF FREEDOM, *supra* note 32, at 164, 166. Rustin also reported, “Although the police had provided no protection for King and Nixon after their houses had been bombed, . . . two squad cars [were] parked before Mrs. Reese’s home[, and] a policeman was patrolling the area with a machine gun.” *Id.*

⁵⁹¹ GRAY, *supra* note 7, at 81.

⁵⁹² *Id.* at 83. As Gray recounts:

Solicitor William Thetford, at the opening of the hearing in state circuit court, recognized that he could not secure a conviction so he asked the court to dismiss the indictment on the ground that the court did not have jurisdiction and that he would refer the matter to the United States Attorney. I never heard anything else on this matter.

Id.

⁵⁹³ *Id.* at 77.

Fred Gray was not deterred by such tactics, he realized that in order to mount a successful constitutional challenge, they would need help from lawyers with greater experience and expertise in civil rights cases. NAACP General Counsel Robert Carter agreed to work with the MIA once they decided to challenge the segregation laws directly.⁵⁹⁴

At that point, the litigation strategy moved center stage in the protest. Dr. King said that “we are now depending on the courts to give the final answer.”⁵⁹⁵ Later, he said that the MIA was “waiting and hoping. Our whole strategy is based on the May 11 trial.”⁵⁹⁶ With this acknowledgement that the boycott could not achieve the MIA’s objectives by itself, Dr. King even considered calling off the boycott.⁵⁹⁷ On June 5, 1956, in a 2-1 decision, a three-judge district court held the state and local bus segregation laws unconstitutional as a denial of equal protection.⁵⁹⁸ Writing for the majority, Judge Rives concluded that the *Brown* decision, followed by per curiam decisions extending it to other public facilities, sounded the death knell for the “separate but equal” doctrine.⁵⁹⁹ With the Court having repudiated *Plessy*, it stood implicitly overruled, and the district court was no longer bound to follow it.⁶⁰⁰

Local officials sought review by the Supreme Court.⁶⁰¹ Because of the increased cooperation between the MIA and the NAACP, Robert Carter prepared the brief opposing Supreme Court review.⁶⁰² The Court accepted the case, but did not schedule oral argument. On November 13, 1956, the Supreme Court affirmed the three-judge district court in a one line per curiam decision.⁶⁰³ The Court thus

⁵⁹⁴ TUSHNET, *supra* note 13, at 302; Coleman, Nee & Rubinowitz, *supra* note 34, at 682 & 715 n.115. The original demands had been modest, limited to incremental changes in the segregation arrangements and better treatment by bus drivers. *Id.* at 678 & 712 n.81, 681–82.

⁵⁹⁵ GARROW, *supra* note 2, at 63.

⁵⁹⁶ *Id.* at 76.

⁵⁹⁷ See THORNTON, *supra* note 27, at 81. Two considerations seem to have motivated Dr. King’s decision to continue the boycott. First, there was uncertainty about the outcome of the lawsuit. Second, Dr. King believed that the Black community was so committed to the boycott that they would not have gotten back on the buses. Coleman, Nee & Rubinowitz, *supra* note 34, at 681.

⁵⁹⁸ *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.), *aff’d per curiam*, 352 U.S. 903 (1956). See generally Kennedy, *supra* note 112, at 1050–51 (discussing the district court’s decision).

⁵⁹⁹ *Browder*, 142 F. Supp. at 716.

⁶⁰⁰ The majority concluded that in light of the decision in *Brown* and the Supreme Court decisions following it “there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction.” *Id.* at 717.

Dissenting Judge Lynne argued that the *Plessy* decision applied precisely to the facts in the case, that the Supreme Court had not overruled *Plessy* with respect to intrastate transportation, and that lower court judges were bound by that decision until the Supreme Court did so. *Id.* at 718–20 (Lynne, J., dissenting).

⁶⁰¹ Coleman, Nee & Rubinowitz, *supra* note 34, at 683; Kennedy, *supra* note 112, at 1051.

⁶⁰² TUSHNET, *supra* note 13, at 304.

⁶⁰³ *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (“The motion to affirm is granted and the judgment is affirmed.” (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955))). This was one of a series of per curiam decisions extending *Brown*’s rationale to other public facilities and laws providing for the segregation of private facilities and services. Coleman, Nee & Rubinowitz, *supra* note 34, at 717 n.133; Kennedy, *supra* note 112, at 1051–52.

overruled *Plessy* and struck down state and local laws mandating segregation on buses.⁶⁰⁴

There is substantial evidence of synergy between the litigation and the boycott.⁶⁰⁵ That coordinated approach seemed to produce more change on the buses than either strategy could have produced on its own. It is likely that neither would have accomplished much on the ground without the other. The boycott faced strong and unyielding resistance, which only grew more entrenched over time.⁶⁰⁶ The litigation helped to sustain the momentum of the protest, and the three-judge district court decision gave the MIA hope that the Supreme Court would follow suit.⁶⁰⁷ The boycott gave the Black community courage that enabled them to return to the buses with dignity and confidence when the Supreme Court affirmed the local court's decision.⁶⁰⁸ Absent the litigation, the boycott may well have failed.⁶⁰⁹ Absent the boycott, the Court's decision may have changed little on the ground.⁶¹⁰

⁶⁰⁴ See Coleman, Nee & Rubinowitz, *supra* note 34, at 684. The Supreme Court denied the defendants' motion for rehearing on December 17, 1956, and the mandate issued on December 20. See DAYBREAK OF FREEDOM, *supra* note 32, at 49.

⁶⁰⁵ See generally Coleman, Nee & Rubinowitz, *supra* note 34, at 675–83 (discussing synergy in Montgomery Bus Boycott).

⁶⁰⁶ See *id.* at 677–80; Martin Luther King, Jr., *Address by MLK at 47th NAACP Annual Convention*, KING CTR. 7 (June 27, 1956), <http://www.thekingcenter.org/archive/document/address-mlk-47th-naacp-annual-convention>.

⁶⁰⁷ See GRAY, *supra* note 7, at 70–71; Coleman, Nee & Rubinowitz, *supra* note 34, at 682, 683 & 716 n.125.

⁶⁰⁸ See KING, *supra* note 7, at 143, 147–51; Coleman, Nee & Rubinowitz, *supra* note 34, at 687–88; Martin Luther King, Jr., *Annual Address by MLK for the Montgomery Improvement Association*, KING CTR. 2 (Dec. 3, 1959), <http://www.thekingcenter.org/archive/document/annual-address-mlk-montgomery-improvement-association>; Martin Luther King, Jr., *A Realistic Look at Race Relations*, KING CTR. 4, 7 (May 17, 1956), <http://www.thekingcenter.org/archive/document/realistic-look-race-relations>.

⁶⁰⁹ As Dr. King later reflected on the lower court's decision and the city's subsequent appeal to the Supreme Court: "The battle was not yet won. We would have to walk and sacrifice for several more months, while the city appealed the case. But at least we could walk with new hope. Now it was only a matter of time." KING, *supra* note 7, at 133; see also M.L. King, Jr., *Statement by the President of the Montgomery Improvement Association*, KING CTR. 1 (Nov. 14, 1956), <http://www.thekingcenter.org/archive/document/statement-president-montgomery-improvement-association-1#> ("These eleven months have not at all been easy. . . . Our feet have often been tired and our automobiles worn, but we have kept going with the faith that in our struggles we had cosmic companionship, and that, at bottom, the universe is on the side of justice. Just yesterday we experienced a revelation of the eternal validity of this faith. It was on this day that the Supreme Court of this nation affirmed that segregation is unconstitutional in public transportation. . . . This decision came to all as a joyous daybreak to end the long night of enforced segregation in public transportation.").

⁶¹⁰ See Martin Luther King, Jr., *We Are Still Walking*, LIBERATION, Dec. 1956, at 6–9, reprinted in 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 445, 445–47; Coleman, Nee & Rubinowitz, *supra* note 34, at 684–89, 692–94, 697; Martin Luther King, Jr., *Address by MLK at 47th NAACP Annual Convention*, KING CTR. 10 (June 27, 1956), <http://www.thekingcenter.org/archive/document/address-mlk-47th-naacp-annual-convention> ("[A]fter the legal battle is won, there is the great problem of lifting the noble precepts of our Constitution from the dusty files of unimplemented court decisions. The problem of implementation will be carried out mainly by the Negro's refusal to cooperate with segregation."); M.L. King, Jr., *Statement by the President of the Montgomery Improvement Association*, KING CTR. 1 (Nov. 14, 1956), <http://www.thekingcenter.org/archive/document/statement-president-montgomery-improvement-association-1#> ("All of us have a basic responsibility to seek to impl[e]ment this noble decision. . . . This is Montgomery's sublime opportunity; we can now transform our jangling discords into meaningful symphonies of spiritual

2. The Albany (Georgia) Movement (1961–1962)⁶¹¹

In light of its effectiveness, the Montgomery experience of joining nonviolent direct action with desegregation litigation seemed to serve as a model for subsequent movements. Yet the joint strategy remained in limbo for half a decade, pending an opportunity and a need to try to take advantage of the additional leverage the courts might provide. In 1962, Martin Luther King, Jr. and activists faced another intransigent local government and turned again to litigation in the hope of revitalizing a faltering movement, breaking a stalemate, and achieving a measure of desegregation.⁶¹²

This time it was in Albany, the southwestern Georgia city discussed earlier.⁶¹³ In late 1961, the local leader of the “Albany Movement” invited Dr. King to the city to help support the floundering effort.⁶¹⁴ Nevertheless, faced with continuing strong and effective resistance and serious internal tensions, the movement stalled.⁶¹⁵ By mid-summer Dr. King and local leaders decided to initiate a broad-based legal challenge to the pervasive segregation of public facilities in the city.⁶¹⁶

On July 25, C.B. King of Albany, Donald Hollowell of Atlanta, and Constance Baker Motley of the NAACP Legal Defense and Education Fund filed *Anderson v. City of Albany* in federal district court.⁶¹⁷ C.B. King was the only Black lawyer in southwest Georgia, which included Albany.⁶¹⁸ He had been actively involved in the

harmony.”). For a comprehensive discussion of “litigation as a social process,” see TUSHNET, *supra* note 521, at 143–166.

⁶¹¹ The years listed represent the movement’s most intense period. Activists continued the struggle well beyond that time. See CARSON, *supra* note 27, at 56, 61–62.

⁶¹² Useful accounts of the Albany Movement include BRANCH, *supra* note 32, at 609–13, 616–17, 627–28; DANIELS, *supra* note 41, at 132–33, 137–39, 141–44, 148–56; GARROW, *supra* note 2, at 204–09; KUNSTLER, *supra* note 1, at 98–131; MORRIS, *supra* note 188, at 247–48; MOTLEY, *supra* note 13, at 138–40.

⁶¹³ See *supra* Sections II.A.1.a.iv, II.A.2.b.

⁶¹⁴ See GARROW, *supra* note 2, at 180; MORRIS, *supra* note 188, at 242–44.

⁶¹⁵ FAIRCLOUGH, *supra* note 21, at 87–91, 100–04; GARROW, *supra* note 2, at 204–05.

⁶¹⁶ GARROW, *supra* note 2, at 208. On July 20, 1962, Albany Mayor Asa Kelley and city attorney Grady Rawls secured an injunction from U.S. District Judge J. Robert Elliott to block the mass demonstrations that Kelley anticipated in the wake of city’s repeated refusals to meet face-to-face with movement leaders. *Id.* at 205–06; see also KUNSTLER, *supra* note 1, at 101 (recalling that Judge Elliott’s “sweeping injunction . . . barred Albany’s Negroes from ‘unlawful picketing, congregating or marching in the streets, and from any act designed to provoke breaches of the peace’”). After Chief Judge Elbert P. Tuttle of the United States Court of Appeals for the Fifth Circuit agreed to hear a motion to vacate Judge Elliott’s injunction, the movement’s attorneys drafted the federal lawsuit while preparing for that hearing. See GARROW, *supra* note 2, at 208 (“In addition to preparing for the hearing, [the movement’s lawyers] drafted two complaints challenging Albany’s segregated city facilities and its policy of arresting peaceful protesters”). William Kunstler described it as “a long overdue federal lawsuit to desegregate all of Albany’s public facilities.” KUNSTLER, *supra* note 1, at 112. After attending the hearing before Judge Tuttle in Atlanta, Dr. King returned to Albany and “told newsmen that henceforth the movement would follow a four-pronged program, with direct action, the new lawsuits, and the ongoing boycott being joined by a voter registration drive.” GARROW, *supra* note 2, at 209.

⁶¹⁷ *Anderson v. City of Albany*, 321 F.2d 649, 650, 653 (5th Cir. 1963). Clarence Jones was also part of the legal team. He, in turn, invited William Kunstler to assist with the Albany litigation. KUNSTLER, *supra* note 1, at 93.

⁶¹⁸ DANIELS, *supra* note 41, at 132.

Albany Movement from the outset.⁶¹⁹ When the movement leaders decided to turn to the courts, C.B. King was the obvious choice as counsel.⁶²⁰ C.B. King had worked extensively with leading Atlanta civil rights lawyer Donald Hollowell before the Albany Movement, so he had enlisted Hollowell's assistance early in the movement.⁶²¹ Hollowell had been serving as LDF's local counsel in Atlanta and the Southeast region.⁶²² Both then brought in LDF staff attorney Constance Baker Motley to work on earlier matters and on the *Anderson* case.⁶²³

The "omnibus" lawsuit sought to enjoin racial discrimination and segregation in city-owned and regulated facilities, including swimming pools, tennis courts, the city library, public auditoriums, and transportation facilities.⁶²⁴ The lawyers structured the case as a class action on behalf of the named plaintiffs and "all other Negro citizens of the City of Albany, Georgia similarly situated."⁶²⁵ They prayed for injunctive relief from enforcement of racial segregation in public facilities, certain private businesses, including transportation and places of public amusement, and the threat of arrest or harassment if a member of the class used these facilities or businesses.⁶²⁶

On February 14, 1963, District Judge Elliot dismissed the complaint.⁶²⁷ He found that the named plaintiffs, including Slater King and Dr. Anderson, were not members of the class they claimed to represent since there was no evidence they were denied the use of those facilities based on their race, or threatened with arrest.⁶²⁸ On appeal, the Fifth Circuit Court of Appeals reversed the lower court on the class action question and reached the merits in a July 26, 1963 opinion.⁶²⁹

⁶¹⁹ MORRIS, *supra* note 188, at 241; *see, e.g.*, FAIRCLOUGH, *supra* note 21, at 100, 103; GARROW, *supra* note 2, at 174, 177–79, 185–86, 196; KUNSTLER, *supra* note 1, at 95–96.

⁶²⁰ For biographical information on C.B. King, *see* BRANCH, *supra* note 32, at 524–25; DANIELS, *supra* note 41, at 132–33, 137, 141, 154–56; KUNSTLER, *supra* note 1, at 105; *see also supra* note 142.

⁶²¹ *See* DANIELS, *supra* note 41, at 132–33. Their joint efforts began with *Anderson v. Courson*, which desegregated polling places in Albany. *See* 203 F. Supp. 806 (M.D. Ga. 1962).

Before filing the desegregation case, King and Hollowell had defended several arrested protesters in the movement. *See* DANIELS, *supra* note 41, at 137; *see also* discussion *supra* Section II.A.1.i.d.

⁶²² MOTLEY, *supra* note 13, at 139.

⁶²³ When city officials secured a temporary restraining order against the movement's demonstrations, King and Hollowell called on Constance Baker Motley for assistance. *See* DANIELS, *supra* note 41, at 154. In her autobiography, Motley said that "Chevene Bowers (C.B.) King of Albany, Georgia, and Donald Hollowell urged me by phone to come down to help with the legal strategy." MOTLEY, *supra* note 13, at 138–39.

⁶²⁴ *See* Kelly v. Page, 335 F.2d 114, 116 (5th Cir. 1964); *Anderson v. City of Albany*, 321 F.2d 649, 650, 653 (5th Cir. 1963).

⁶²⁵ *Anderson v. Kelly*, 32 F.R.D. 355, 356 (M.D. Ga. 1963).

⁶²⁶ *Id.* at 356–57.

⁶²⁷ *Id.* at 355, 358.

⁶²⁸ *See id.*

⁶²⁹ *See Anderson*, 321 F.2d at 653. Judge Tuttle cited a letter city officials wrote to "the Negro leaders of Albany" to conclude that the plaintiffs in the case "represent the Negro citizenship of the city of Albany." *Id.* at 652 ("[T]here is no factual dispute but that the four plaintiffs were members of a class whose interests were the basis of demands made by them on the defendants and which the evidence clearly shows were rejected."). Judge Tuttle also referred to the fact that the plaintiffs made numerous demands on the city to end segregation before filing the lawsuit. *Id.* Moreover, he concluded that plaintiffs need not be arrested or threatened with arrest to represent "the class of Negro citizens who were adversely affected by the State's policy of racial segregation." *Id.* at 653. For these reasons, the court held that it was an error for the trial court to dismiss the complaint on the basis that the plaintiffs did not represent the class. *Id.*

Writing for the 2-1 majority, Judge Elbert Tuttle held that city-mandated segregation of city facilities and public transportation was unconstitutional, citing numerous cases stating that enforced segregation in city facilities is unconstitutional.⁶³⁰ The court rejected the contention that changed conditions, such as the repeal of all segregation ordinances, rendered the lawsuit moot.⁶³¹ Instead, it granted the requested injunctive relief.⁶³²

By the time the Fifth Circuit ruled in the summer of 1963, however, Martin Luther King, Jr. had long since left town, and the movement had lost its visibility.⁶³³ Participants and observers alike viewed the Albany experience largely as a failure from which to learn lessons for later campaigns.⁶³⁴ Those lessons focused on the need for more carefully planned, aggressive nonviolent direct action tactics. The campaigns in Birmingham and Selma exemplified the activists' dramatic changes in approach.⁶³⁵

III. DEPLOYING THE LAWYERS: THE LATER YEARS (1963–1968)

In the early 1960s, Dr. King and SCLC made significant changes in the strategies they used to advance their objectives. After the failure of the Albany, Georgia Movement in 1962, Dr. King and his colleagues took stock, knowing that they could ill afford another dismal outcome. Since nonviolent direct action remained their basic strategy, they searched for ways to make it more effective. The movement's strategy shifted from "persuasive" nonviolence to "coercive" nonviolence.⁶³⁶ Dr. King believed "the notion that ethical appeals and persuasion alone will bring about justice" was fallacious, and although ethical appeals should

Judge Gewin dissented because he felt:

- (1) the opinion is contrary to the established law relating to class actions; (2) the presumption in favor of the findings of fact by the trial court has been disregarded, the clearly erroneous rule has not been followed, and the majority has made a choice of facts from a large volume of testimony where the facts are in conflict; (3) the rules of law with respect to the granting of injunctions have not been followed; and (4) the case is moot.

Id. at 659 (Gewin, J., dissenting). Specifically, he cited case law that said plaintiffs in a class action need to prove their individual rights have been denied. *Id.* The district judge found that this was not the case, and Judge Gewin stated that he wanted to follow this finding, since "findings by a trier of facts will not be disturbed unless clearly erroneous." *Id.* Also, because all the laws had been repealed, Judge Gewin felt the case was moot. *Id.* at 661–62.

⁶³⁰ *Id.* at 654 (majority opinion) ("Since the Supreme Court affirmed the Fourth Circuit case of *Dawson v. Mayor of the City of Baltimore*, 350 U.S. 877, [*aff'g*] 220 F.2d 386, it has been 'obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State.'").

⁶³¹ *Id.* at 656–57.

⁶³² *Id.* at 657. In explaining the need for an injunction, the court said, "What has been adopted can be repealed, and what has been repealed can be re-adopted." *Id.* The Fifth Circuit remanded the case "with directions that an injunction issue consistent with [the court's] opinion." *Id.* at 658.

⁶³³ See generally GARROW, *supra* note 2, at 223–26.

⁶³⁴ See KING, *supra* note 22, at 34–35, 48; DANIELS, *supra* note 41, at 156; FAIRCLOUGH, *supra* note 21, at 106–09; GARROW, *supra* note 2, at 226–29; MORRIS, *supra* note 188, at 248–50.

⁶³⁵ See discussion *infra* Section III.A.

⁶³⁶ On December 5, 1955, Dr. King urged the thousands gathered at Montgomery's Holt Street Baptist Church to approach the protest with caution: "We will be guided by the highest principles of law and order. Our method will be that of persuasion, not coercion." KING, *supra* note 7, at 48. Beginning in the early 1960s, Dr. King's focus shifted towards coercion. See GARROW, *supra* note 22, at 220–21.

be made, “those appeals must be undergirded by some form of constructive coercive power.”⁶³⁷ “If the Negro does not add persistent pressure to his patient plea,” Dr. King added, “he will end up empty-handed.”⁶³⁸ Marches and demonstrations became larger, more numerous, more diverse in their participants, more provocative, and more varied in their distance, duration, and location.⁶³⁹ Other new forms of escalation included violating an injunction and initiating a rent strike.⁶⁴⁰

The strategic changes also meant deploying lawyers in new ways. While lawyers continued to play some of the same roles they had played earlier, they also assumed important new responsibilities. Moreover, they had opportunities to undertake creative initiatives in support of activists’ innovative strategies and tactics.⁶⁴¹ At the same time, Dr. King and his colleagues no longer called on their lawyers to initiate complementary desegregation litigation. They passed up opportunities to pursue legal remedies, even when local laws, policies, or practices were vulnerable to such challenges. The 1963 Birmingham Movement and the Chicago Freedom Movement three years later exemplified this turn away from the dual strategy that marked the Montgomery and Albany movements.⁶⁴²

A. *The Abandonment of Complementary Desegregation Litigation*

Martin Luther King, Jr.’s views about the utility of desegregation litigation evolved over the course of his career. As with other strategic aspects, the turning point seemed to be the Birmingham Movement in 1963.⁶⁴³ With the escalation and increasing effectiveness of nonviolent direct action after Albany, especially in Birmingham (1963) and in Selma (1965), Dr. King and his colleagues saw little need to initiate litigation to advance their objectives.⁶⁴⁴ Moreover, legal strategies became less appealing as the courts’ limitations in implementing decrees grew more apparent.⁶⁴⁵

⁶³⁷ MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 128–29 (1968).

⁶³⁸ *Id.* at 129.

⁶³⁹ See discussion *infra* Sections III.B.1.i–iii, III.B.2, III.B.3.i–v.

⁶⁴⁰ See discussion *infra* Sections III.B.2, III.B.3.i.

⁶⁴¹ See discussion *infra* Section III.B.

⁶⁴² See discussion *supra* Section II.B.

⁶⁴³ See discussion *infra* Section III.B.

⁶⁴⁴ See, e.g., RALPH, *supra* note 62, at 143 (noting that one of Dr. King’s favorite themes was “nonviolence needs some victories”); see also WESTIN & MAHONEY, *supra* note 136, at 54 (“SCLC leaders were less interested in test-case litigation than in holding effective protest marches in Birmingham that spring.”).

⁶⁴⁵ See KLARMAN, *supra* note 13, at 380 (“Court decisions such as *Brown* could significantly alter social practices only if lower courts aggressively implemented them, Congress and the president enforced them, and local officials could be prevented from nullifying them. Each of these conditions depended on educating public opinion, which direct action accomplished better than litigation could. As King stated, ‘Only when the people themselves begin to act are rights on paper given life blood.’”). See generally TUSHNET, *supra* note 13, at 255–56 (“Winning cases . . . accomplished little, at least in the short run.”). However, a number of lawyers who had litigated the desegregation cases remained involved in the “support” mode, because their basic commitment was to the civil rights objectives, not just the litigation strategy. See discussion *infra* Sections III.B.1.i–iii, III.B.3.i–iii, III.B.4.i–ii.

After the Albany Movement, desegregation lawsuits disappeared from the strategic arsenal, although they may have remained on the back burner as an option to consider if necessary. The 1963 Birmingham Movement relied entirely on nonviolent direct action, providing the first clear indication that the joint strategy had begun to fade from the movement's radar.⁶⁴⁶ The Birmingham campaign ignored viable legal claims that would have provided opportunities for desegregation litigation.⁶⁴⁷ In fact, many local segregation laws remained on the books when the Birmingham Movement began. They prohibited Blacks from being served in the same restaurants as whites, attending the same schools, or using the same elevators, water fountains, or parks.⁶⁴⁸ They also outlawed Blacks playing billiards or baseball with whites, or sitting intermixed in a theatre.⁶⁴⁹ Even though recent Supreme Court precedent had shown those types of ordinances highly vulnerable to being overturned, the activists did not file any constitutional challenges.⁶⁵⁰

By 1966, when Dr. King took his movement north to Chicago, he seemed to have completely abandoned the idea of using legal processes along with direct action.⁶⁵¹ That summer the Chicago Freedom Movement—a joint initiative of a coalition of local organizations and SCLC—carried out an open housing campaign to address the extreme segregation and pervasive discrimination in the city's neighborhoods.⁶⁵² While the main focus was on the private housing market, the movement also demanded desegregation of the city's public housing program.⁶⁵³

⁶⁴⁶ See MOTLEY, *supra* note 13, at 135. Discussing the Birmingham Movement, LDF lawyer Constance Baker Motley suggested that Dr. King and his associates “had always undervalued resort to the courts—an indispensable weapon in the struggle—and preferred nonviolent protest demonstrations and marches.” *Id.*

⁶⁴⁷ See *id.*

⁶⁴⁸ See Lee E. Bains, Jr., *Birmingham, 1963: Confrontation over Civil Rights*, in BIRMINGHAM, ALABAMA, 1956–1963: THE BLACK STRUGGLE FOR CIVIL RIGHTS, *supra* note 227, at 150, 165–66.

⁶⁴⁹ See BIRMINGHAM, ALA., GEN. CODE §§ 359, 597, 939 (1944) (repealed 1963).

⁶⁵⁰ In the years following *Brown*, the Court extended the desegregation mandate to many more public facilities, including beaches and bathhouses (*Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam)), golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam)), buses (*Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam)), parks (*New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam)), athletic contests (*State Athletics Comm'n v. Dorsey*, 359 U.S. 533 (1959) (per curiam)), restaurants (*Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam)), city auditoriums (*Schiro v. Bynum*, 375 U.S. 395 (1964) (per curiam)), and courtrooms (*Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam)). See generally Coleman, Nee & Rubinowitz, *supra* note 34, at 682–84.

⁶⁵¹ See generally RALPH, *supra* note 62. Dr. King and his advisers developed a “three-phase battle plan” for Chicago, which concentrated on educating and organizing, focused demonstrations, and “massive” protests. *Id.* at 43–44; see also AYERS & DOHRN, *supra* note 117, at 24–25. Although seemingly unsuccessful at first, Dr. King's nonviolent action strategy in Chicago eventually helped secure the passage of federal fair housing legislation in 1968. See Leonard S. Rubinowitz & Kathryn Shelton, *Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 IND. L. REV. 663, 664 (2008).

⁶⁵² See generally RALPH, *supra* note 62, at 92–130.

⁶⁵³ See *id.* at 152–54; see also ALEXANDER POLIKOFF, *WAITING FOR GAUTREUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* 40 (2006) (“Open housing demands . . . includ[ed] two for the CHA: (1) halt public housing construction in the ghetto until a substantial number of units were started elsewhere; and (2) create a program to vastly increase the supply of low-cost housing on a scattered-site basis.”). See generally ANDERSON & PICKERING, *supra* note 62, at 239–40 (listing the movement's nine demands).

Two opportunities for using the legal system presented themselves in the open housing campaign. First, for racial discrimination in the private housing market, there was legal recourse available under Chicago's 1963 Fair Housing Ordinance, which gave the city's Human Relations Commission enforcement authority.⁶⁵⁴ As Black people encountered discrimination in seeking to buy or rent housing in white neighborhoods, they could have filed complaints with the Commission.

Second, while the city's public housing agency, the Chicago Housing Authority, did not operate under a statute requiring or permitting segregation, its policies and practices had produced a highly segregated program.⁶⁵⁵ That pattern made the program potentially vulnerable to a federal lawsuit challenging racial discrimination in site selection and tenant assignment under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.⁶⁵⁶ The Chicago Freedom Movement did not pursue the potential legal remedies involving either the private market or the public housing program.⁶⁵⁷ Instead, it relied exclusively on a nonviolent, direct-action strategy.⁶⁵⁸

⁶⁵⁴ See CHI., ILL., MUNICIPAL CODE ch. 198.7-B (1963) (current version at CHI., ILL., MUNICIPAL CODE ch. 5-8 (2015)); see also *Chi. Real Estate Bd. v. Chicago*, 224 N.E.2d 793, 797 (Ill. 1967); RALPH, *supra* note 62, at 142 (discussing Commissioner Edward Marciniak's frustration with the Chicago activists who did not first seek redress through the process established by the ordinance).

⁶⁵⁵ See RALPH, *supra* note 62, at 152–54.

⁶⁵⁶ Title VI prohibits discrimination based on race in programs receiving federal funds, such as the public housing program. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2012)).

Independently of the Chicago Freedom Movement's contemporaneous demands for the desegregation of public housing, the ACLU filed a federal suit in the summer of 1966 challenging the Chicago Housing Authority's site selection and tenant assignment policies and practices as being racially discriminatory. See *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969); see also POLIKOFF, *supra* note 653, at 48–49; RALPH, *supra* note 62, at 228; LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 23 (2000). Since there were no explicit segregation policies like those in *Brown v. Board of Education*, 347 U.S. 483 (1954), where segregation was written into state constitutions and statutes, and in *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), where the state statute and local ordinances provided for segregation on buses, the outcome of the ACLU's lawsuit was much more uncertain than in the southern situation.

The Chicago Freedom Movement did not have the kind of visible success that the Birmingham and Selma movements experienced. The decision to avoid legal strategies seems to have resulted more from the doubts about their efficacy than about the effectiveness of nonviolent direct action making them unnecessary. See generally, e.g., MOTLEY, *supra* note 13, at 157 (observing that in Birmingham Dr. King “consciously steered away from legal claims and instead relied on civil disobedience.”).

It turned out that there was a major timing disconnect, as well. The district court did not grant the plaintiffs' summary judgment motion until 1969, long after the Chicago Freedom Movement had ended. See *Gautreaux*, 296 F. Supp. at 907, 914. Moreover, the remedial process continued well into the 21st century. See, e.g., *Gautreaux v. Chi. Hous. Auth.*, 491 F.3d 649, 651 (7th Cir. 2007) (“This appeal presents the latest phase of the long-running litigation over racial discrimination in public housing in Chicago that bears Dorothy Gautreaux's name.”); see also POLIKOFF, *supra* note 653, at 312.

⁶⁵⁷ There is no indication that the Chicago Freedom Movement considered pursuing either of these legal remedies. See ANDERSON & PICKERING, *supra* note 62, at 188–91. See generally GARROW, *supra* note 2, at 431–525 (discussing SCLC campaign in Chicago).

⁶⁵⁸ The activists began with vigils at real estate offices in white neighborhoods where brokers refused to serve Black home seekers. See RALPH, *supra* note 62, at 119–20. Then they moved on to a series of marches into white neighborhoods to protest and dramatize the exclusion of Black families. See *id.* at 122. Even with police protection, neighborhood residents and their supporters met the marchers with violence. See *id.* at 122–23. As Mayor Richard J. Daley witnessed his two major constituencies—working-class whites and Blacks—confronting each other, he grew increasingly concerned about the

Two factors seemed to explain Dr. King and his colleagues forgoing opportunities for deploying a legal strategy, starting in 1963. First, as discussed in Section B, the need for litigation declined as they turned to more aggressive and potentially effective nonviolent direct action tactics.⁶⁵⁹ Second, they became increasingly skeptical about the courts' ability to turn their decisions into progress on the ground.⁶⁶⁰ That concern grew out of their own experience with the courts, as well as the courts' involvement in civil rights, more generally.⁶⁶¹

Dr. King and his associates had never initiated nonviolent direct action and complementary litigation simultaneously, as a carefully planned two-pronged strategy.⁶⁶² Instead, in both Montgomery and Albany, litigation had been a back-up strategy, resorted to reluctantly when a movement was unable to achieve its objectives through nonviolent direct action. They encountered growing resistance and seemingly insurmountable obstacles that made it clear that the original strategy alone was not going to accomplish their goals.⁶⁶³

In Montgomery, the bus boycott and the litigation challenging the bus segregation laws reinforced each other, providing more change than either could have accomplished on its own. While the *Gayle v. Browder* bus desegregation decision and the boycott had important synergistic effects, the stars aligned almost perfectly in that situation. The boycott and the litigation were very much in sync, time wise. The case took less than a year from filing the complaint to a Supreme Court decision, an extremely rare occurrence.⁶⁶⁴ Blacks also sustained the boycott

political fallout from continued demonstrations. *See id.* at 129–30; *see also* discussion *infra* Section III.B.3.iv.

⁶⁵⁹ *See* discussion *infra* Section III.B. In April 1963, a group of eight white Birmingham ministers issued “The White Ministers’ Good Friday Statement.” *See* S. JONATHAN BASS, BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE “LETTER FROM BIRMINGHAM JAIL” app. 2 (2001), for a copy of the statement. They strongly criticized the Birmingham Movement’s use of demonstrations and urged the city’s Black citizens to turn to negotiations and the courts to assert their rights. *See id.* at 235–36. At the time, Dr. King was in jail for violating a state court injunction prohibiting the demonstrations. *See* GARROW, *supra* note 2, at 240–46; *see also infra* Section III.B.3.i. Dr. King wrote a lengthy response to the clergymen, which came to be known as the “Letter from Birmingham Jail.” *See* Letter from Martin Luther King, Jr. to Bishop C.C.J. Carpenter et al. (Apr. 16, 1963), http://mlk-kpp01.stanford.edu:5801/transcription/document_images/undecided/630416-019.pdf. *See generally* FAIRCLOUGH, *supra* note 21, at 123–24; GARROW, *supra* note 2, at 246. The letter set forth a detailed defense of nonviolent direct action, including the use of civil disobedience as a means of challenging “unjust laws.” *See* Letter from Martin Luther King, Jr. to Bishop C.C.J. Carpenter et al., *supra*. It also responded to the call for negotiations, arguing that their adversaries had refused to negotiate in good faith, and that the demonstrations were designed to apply pressure to bring about serious negotiations. *Id.* The letter did not address the ministers’ call for the protesters to use the courts to pursue their rights.

⁶⁶⁰ *See, e.g.*, MLK AUTOBIOGRAPHY, *supra* note 32, at 240 (“Our feeling was that [nonviolent direct action], more than any other [method], was the best way to raise the problems of the Negro people and the injustices of our social order before the court of world opinion, and to require action.”).

⁶⁶¹ *See* THORNTON, *supra* note 27, at 568. *See generally* *Civil Rights Movement*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/Civil-Rights-Movement.aspx> (last visited Oct. 12, 2015).

⁶⁶² The closest they came was the Montgomery movement’s abortive effort to use Rosa Parks’ prosecution as a test case challenging the bus segregation laws. *See* Coleman, Nee & Rubinowitz, *supra* note 34, at 700.

⁶⁶³ *See* discussion *supra* Section II.B.

⁶⁶⁴ *See* Coleman, Nee & Rubinowitz, *supra* note 34, at 681–84. *See generally* GREENBERG, *supra* note 51, at 271. The chronology of the distinct steps in the litigation:

for more than a year, much longer than the intense, visible stages of most of the later campaigns.⁶⁶⁵ That provided an opportunity for the desegregation litigation to reach a resolution through the federal courts while the boycott was ongoing.⁶⁶⁶ Thus, it may have been clear to Dr. King that the Montgomery experience represented a very tenuous model for the future. A strong, lengthy movement, a lawsuit that proceeded through the federal courts at an exceptional pace, an often ineffective adversary, and stunningly fortuitous timing came together in a way that was not likely to be repeated.⁶⁶⁷

Several years later, the Albany, Georgia Movement further exposed the dual strategy's limitations. Unlike in Montgomery, Dr. King was not involved in initiating the Albany Movement. Local activists called on him for assistance when internal tensions and highly effective local resistance caused the movement to falter badly.⁶⁶⁸ The intensive stage of the Albany Movement was shorter than the bus boycott,⁶⁶⁹ and the federal desegregation litigation proceeded at a more typical pace.⁶⁷⁰ This temporal disconnect added to the movement's massive problems. Unlike in Montgomery, the federal litigation was much too little and much too late to save the movement from failure.⁶⁷¹ While the most visible phase of the

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- Filing of case: February 1, 1956
 - District court decision: June 5, 1956
 - U.S. Supreme Court ruling: November 13, 1956

Gayle v. Browder, 352 U.S. 903 (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956); GARROW, *supra* note 2, at 61. For a discussion of the lack of an oral argument or written opinion, see Coleman, Nee & Rubinowitz, *supra* note 34, at 684 & 717 n.133.

⁶⁶⁵ See Coleman, Nee & Rubinowitz, *supra* note 34, at 669, 688–89 (calling the arrest of Rosa Parks on December 1, 1955 “the spark that ignited the . . . boycott,” and explaining that the MIA declared the boycott officially over with the Supreme Court decision on November 13, 1956, but asked the protesters to remain off the buses until the decision became final and effective on December 21). Subsequent campaigns generally did not last as long.

⁶⁶⁶ Moreover, the Supreme Court handed down its decision holding the bus segregation laws unconstitutional on the very day that a local court issued an injunction against the MIA's “car pool.” KING, *supra* note 7, at 139–40. Dr. King considered that alternative transportation system essential to the continuation of the boycott. See *id.* at 57–63. Without the Supreme Court's extremely speedy and timely favorable decision, the bus boycott may have been doomed to fail. See *supra* note 474 and accompanying text; see also Coleman, Nee & Rubinowitz, *supra* note 34, at 684–85.

⁶⁶⁷ Montgomery officials: (1) engaged in a counter-productive prosecution of Dr. King under a boycott statute; (2) approved a resolution based on conversations with ministers not involved in the MIA; and (3) delayed in striking an injunction against the car pool. See *supra* notes 354–356, 474, 574 and accompanying text.

⁶⁶⁸ See FAIRCLOUGH, *supra* note 21, at 88; GARROW, *supra* note 2, at 180. The internal tensions even led to vigorous disagreement about whether to invite Dr. King to Albany. See MORRIS, *supra* note 188, at 243; see also GARROW, *supra* note 2, at 181. Moreover, the local police chief treated demonstrators with a measure of respect as he arrested large numbers of protesters. See GARROW, *supra* note 2, at 216–17. He refused to be provoked into over-reactions that would increase public support for the activists' cause. See *id.*; see also MORRIS, *supra* note 188, at 250.

⁶⁶⁹ The most active part of the Albany Movement lasted approximately nine months, beginning on November 17, 1961, and ending on August 10, 1962. See FAIRCLOUGH, *supra* note 21, at 87, 106. The bus boycott lasted more than a year. See *supra* note 665 and accompanying text.

⁶⁷⁰ For the litigation's procedural history, see Kelly v. Page, 335 F.2d 114 (5th Cir. 1964), and Anderson v. City of Albany, 321 F.2d 649 (5th Cir. 1963).

⁶⁷¹ See GARROW, *supra* note 2, at 208 (“Some people wondered why civil rights forces had been so slow to file suit, but now the movement was finally taking the legal initiative.”). See generally CARSON, *supra* note 27, at 61–62; MORRIS, *supra* note 188, at 246–50.

movement ran from November 1961 to August 1962,⁶⁷² activists did not file the desegregation lawsuit until July 25, 1962.⁶⁷³ The failure of the Albany Movement provided many lessons for later movements, one of which was the serious limitations of the dual strategy of nonviolent direct action and complementary desegregation litigation.⁶⁷⁴ As SCLC moved toward a strategy of relatively short, intense local campaigns, the time frames of actions on the ground and in the courts became increasingly disparate.⁶⁷⁵ The potential for synergy between the two seemed to disappear.

The courts' continued inability to implement their decrees to change entrenched policies and practice, along with the mixed lessons of the Montgomery and Albany movements, decreased the attraction of litigation as a complementary strategy.⁶⁷⁶ In 1965, Dr. King captured these concerns:

The deliberate nature of our legal process is being abused. Legal redress for Negroes entails expensive court actions whose victories are the signal not for the capitulation of segregationists but rather for further bouts with new delaying tactics. . . . The delays inherent in test cases, where the U.S. Supreme Court must ultimately rule, make sadly pertinent the comment of Chief Justice Earl Warren in the school desegregation cases: "Justice delayed is justice denied."⁶⁷⁷

⁶⁷² See FAIRCLOUGH, *supra* note 21, at 87, 106. Though demonstrations continued in Albany throughout the 1960s, they were always on a much smaller scale. See *id.* at 106 (describing the "growing sense of defeat" within the movement after its initial suspension); see also CARSON, *supra* note 27, at 61–62 ("Although the Albany Movement remained in existence through the late 1960s and SNCC continued its activities in Albany for several years, the emotion and sense of hope were never recaptured.").

⁶⁷³ See *Anderson*, 321 F.2d at 653; *Kelly v. Page*, [1964–1965] 9 Race Rel. L. Rep. (Vanderbilt Univ. Sch. of Law) 1115–16 (M.D. Ga. June 27, 1963); see also discussion *supra* Section II.B.2.

⁶⁷⁴ See discussion *supra* Part III.

⁶⁷⁵ See *supra* note 665.

⁶⁷⁶ *Brown* is but one example. The southern states "flagrantly disobeyed" the Supreme Court's order to desegregate public schools. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 52 (2d ed. 2008).

The experience using the courts in Birmingham in the years leading up to the Birmingham Movement also provided grounds for skepticism about the courts' ability to bring change on the ground. The Alabama Christian Movement for Human Rights (ACMHR), Birmingham's civil rights movement led by Reverend Fred Shuttlesworth, had been leading the local struggle against segregation since 1956. ESKEW, *supra* note 50, at 4. See generally MORRIS, *supra* note 188, at 68–73. As part of a larger strategy, they filed lawsuits, starting with a 1957 case against the city to desegregate the buses. See MCWHORTER, *supra* note 50, at 135. Arthur Shores, who was later one of Dr. King's attorneys, filed the suit. See ESKEW, *supra* note 50, at 136. The segregationist Police Commissioner Bull Connor secured a change in the local ordinance to give control to the bus company over seating, which mooted the case. See MCWHORTER, *supra* note 50, at 135–36. The bus company did not change its policy, and ACMHR attempted an unsuccessful boycott soon afterwards. See *id.* at 136–38. ACMHR later sued the city to desegregate the city's public parks, pools, and golf courses. See *id.* at 247. In 1962, a federal judge ruled that all the parks must be open to Blacks. *Id.* Bull Connor immediately closed the parks rather than integrate them. *Id.*

⁶⁷⁷ Martin Luther King, Jr., *Civil Right No. 1: The Right to Vote*, N.Y. TIMES MAG., Mar. 14, 1965, reprinted in A TESTAMENT OF HOPE, *supra* note 531, at 182, 186; see also MLK AUTOBIOGRAPHY, *supra* note 32, at 139 (referring to the "slow court process[es]").

A decade after the Supreme Court decided *Brown*, virtually no desegregation of schools had taken place in the Deep South.⁶⁷⁸ In Chicago in 1966, Martin Luther King, Jr. referred to that fact in rejecting a suggestion that the Chicago Freedom Movement abandon its open housing marches into white neighborhoods in favor of using the legal process provided by the Chicago Fair Housing ordinance.⁶⁷⁹ For Dr. King, the lack of change in school patterns served as a painful reminder of the courts' limited ability to affect deeply entrenched policies and practices.

In August 1966, Chicago Mayor Richard J. Daley brought together representatives of the Chicago Freedom Movement, city officials, and real estate and business leaders to address the movement's demands.⁶⁸⁰ Ironically, one of the city's representatives was William Ming, who served on the Chicago Commission on Human Relations' board.⁶⁸¹ Six years earlier, Ming had been a successful co-lead defense counsel in Dr. King's Alabama perjury trial.⁶⁸² In one of the Summit meetings, Ming suggested that the Chicago Freedom Movement pursue legal remedies for discrimination under the city's 1963 Fair Housing ordinance instead of continuing its marches and demonstrations.⁶⁸³ But Dr. King strongly resisted Ming's suggestion that the ordinance alone could solve Chicago's deeply entrenched, pervasive housing discrimination problem:

I hope that people here don't feel that we are just being recalcitrant, but we do have a little history of disappointment and broken promises, and I certainly wouldn't want to argue with Mr. Ming. Mr. Ming was my lawyer who saved me in court in Alabama from ten years in prison and he's my great counselor, but I would remind him that ten years ago we got a court decision and a law three years ago now that says that segregation is illegal and we now have 5.3% of the children integrated in the South. And Bob Ming is telling me now that the ordinance will do the job. We see a gulf between the promise and the fulfillment.⁶⁸⁴

⁶⁷⁸ Ten years after *Brown* was decided, only 1.2% of Black schoolchildren attended desegregated schools. See ROSENBERG, *supra* note 676, at 50 tbl.2.1, 99–100; see also MORRIS, *supra* note 188, at 28–29 (explaining how Congress repeatedly killed bills intended to facilitate school desegregation in the wake of *Brown*); ROSENBERG, *supra* note 676, at 78 (discussing a document known as the “Southern Manifesto” in which its 101 congressional signatories pledged to reverse *Brown*); FRANCIS M. WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE* 41–48 (1973) (describing governmental resistance to *Brown*).

⁶⁷⁹ See John McKnight, *The Summit Negotiations: Chicago, August 17, 1966—August 26, 1966*, in CHICAGO 1966, *supra* note 62, at 111, 127.

⁶⁸⁰ These sessions came to be referred to as “Summit meetings.” See RALPH, *supra* note 62, at 161.

⁶⁸¹ See *id.* at 158.

⁶⁸² See *supra* Section II.A.1.i.b.

⁶⁸³ See McKnight, *supra* note 679, at 124–25.

⁶⁸⁴ *Id.* at 127. Dr. King continued,

We don't want to fool people any longer; they feel they have been fooled; so we are asking today that Negroes can buy anywhere. When will that be? Tell us, so that we won't fool the people. We need a timetable, something very concrete. We want to know what your implementation is.

With the shift away from initiating constitutional litigation to complement nonviolent direct action, the lawyers were relieved of an assignment they had carried out in the early days of Martin Luther King, Jr.'s career. At the same time, they began to play an even greater role in providing support for nonviolent direct action in both old and new ways.

B. Support for Nonviolent Direct Action

As Martin Luther King, Jr.'s commitment to nonviolent direct action deepened with greater exposure to the underlying ideas and experience, so did the breadth of his vision of possible tactics to employ.⁶⁸⁵ He and his colleagues developed more aggressive and innovative tactics, which proved more effective than the earlier ones. The transition from "nonviolent persuasion" to "coercive nonviolence" had a number of aspects,⁶⁸⁶ including: (1) engaging in confrontational tactics, including violating a court's injunction, which elicited violent responses from public officials and private citizens; (2) increasing the scale—the numbers and range of participants in events and movements; (3) extending the duration of marches and demonstrations; and (4) expanding the sites of activism from local to state and national ones.⁶⁸⁷

Id. The local ordinance provided for the Human Relations Commission as the venue for relief instead of the courts. *See supra* note 654 and accompanying text. Dr. King did not distinguish between the courts and administrative forums in their inability to fulfill the promises that they made.

Moreover, the Chicago Freedom Movement sought systemic reform rather than the case-by-case approach to address housing discrimination that the Human Relations Commission offered. *See RALPH, supra* note 62, at 158. The activists sought to change the deeply embedded policies and practices of real estate brokers operating in white neighborhoods. *See id.* at 114–30.

⁶⁸⁵ Initially, Dr. King's commitment to nonviolence was quite limited. For instance, his bodyguards carried guns. *See YOUNGE, supra* note 55, at 114–15; Adam Winkler, *MLK and His Guns*, HUFFINGTON POST BLOG (Jan. 17, 2011, 11:25 PM), http://www.huffingtonpost.com/adam-winkler/mlk-and-his-guns_b_810132.html. But with time, nonviolence became fundamental to him, both in principle and for pragmatic reasons. *See GARROW, supra* note 2, at 32 ("When he made his debut as president of the MIA at the initial mass meeting, December 5, he did not mention Gandhi or anything directly relating to Mahatma's theory or practice of social change. . . . By Christmas, however, an emerging emphasis on nonviolence was clear. . . . [T]he conscious desire to combine Gandhian precepts with Christian principles was growing in both King and the MIA."); 3 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 137, at 14 ("King had unsuccessfully sought gun permits for his bodyguards, but he eventually decided to get rid of all guns, including his own, after discussing with his wife and others the inconsistency of leading a nonviolent movement while permitting the use of weapons for protection."); *see also* Winkler, *supra* ("Eventually, King gave up any hope of armed self-defense and embraced nonviolence more completely."). *See generally* KING, *supra* note 7, at 72–88 (discussing Dr. King's "pilgrimage to nonviolence"); Martin Luther King, Jr., *Letter from a Birmingham Jail*, MARTIN LUTHER KING, JR. RES. & EDUC. INST. (Apr. 16, 1963), http://mlk-kpp01.stanford.edu:5801/transcription/document_images/undecided/630416-019.pdf (championing the tenets of a nonviolent campaign). Bayard Rustin became Dr. King's mentor on nonviolence after serving as his "Gandhian counselor" during the Montgomery Bus Boycott. *See ANDERSON, supra* note 291, at 69, 185–212; *see also* BRANCH, *supra* note 32, at 250; LEVINE, *supra* note 291, at 93–98, 121–22. Dr. King traveled to India in February 1959, on the encouragement of Rustin and his other advisors, to deepen his understanding of Gandhi's philosophy of nonviolence. *See GARROW, supra* note 2, at 113–14. *See generally* BRANCH, *supra* note 32, at 87 ("[Dr. King] came to describe [Reinhold] Niebuhr as a prime influence upon his life, and Gandhian nonviolence as 'merely a Niebuhrian stratagem of power.'").

⁶⁸⁶ *See GARROW, supra* note 22, at 221.

⁶⁸⁷ *See discussion infra* Sections III.B.1.i–iii, III.B.2, III.B.3.i–vi.

In virtually every movement and event from 1963 on, there was at least one tactic employed that reflected escalation of the nonviolent strategy.⁶⁸⁸ With activists' new tactics came additional assignments and opportunities for the lawyers to contribute. They had some new clients to represent and many new tasks to perform. Their numerous challenges included: (1) appealing Dr. King's and his colleagues' contempt citations for violating a Birmingham injunction; (2) defending Birmingham school children against school officials' effort to expel them for their participation in protests; (3) suing record companies for copyright infringement; (4) defending Dr. King against contempt charges for leading a brief march in Selma; and (5) designing blueprints and arrangements to secure courts' approval of proposed marches in Selma and Memphis.⁶⁸⁹ These were daunting challenges for the lawyers. Many of the legal questions were uncertain. Southern segregationist judges would decide some of them, at least initially. Moreover, these matters had very important implications for the movements and events involved.

1. Defending Dr. King, His Organizations, and the Protesters

Local officials continued to use arrests as a resistance strategy to try to defeat protests. Over time, however, arrests also evolved into a movement tactic.⁶⁹⁰ Activists sometimes tried to fill the jails to raise consciousness about the movement, bring public attention to activists' grievances, and build support for the changes they sought.⁶⁹¹ The use of arrests as a strategic device required decisions about when and why to provoke arrests, who should subject themselves to arrests, and whether to stay in jail or get released on bail. If activists decided on bail rather than "jail, no bail," they needed lawyers to make the bail arrangements, which could also include securing the necessary funds.⁶⁹² As a result, the lawyers represented thousands of protesters jailed in the various campaigns.⁶⁹³

Again, Martin Luther King, Jr. described himself as a "frequenter of jails."⁶⁹⁴ He averaged more than two stints in jail a year during his career.⁶⁹⁵ Still, decisions related to arrests, jail, and bail sometimes posed very difficult dilemmas for Dr. King, personally. On the one hand, it was symbolically important for him to be on the same level with the mass protesters, not above them. If his followers risked exposing themselves to mass arrests, he felt he should do the same.⁶⁹⁶ If his followers chose to stay in jail instead of making bail, he should join them in their

⁶⁸⁸ See discussion *infra* Sections III.B.1.i–iii, III.B.2, III.B.3.i–vi.

⁶⁸⁹ See discussion *infra* Sections III.B.1.i, III.B.3.i, III.B.3.iii, III.B.3.v, III.B.4.ii.

⁶⁹⁰ See GARROW, *supra* note 2, at 382 ("[T]he time had come for King to submit to intentional arrest to give the movement a publicity boost.").

⁶⁹¹ See discussion, *infra* Section III.B.1.iii.

⁶⁹² See, e.g., BELAFONTE WITH SHNAYERSON, *supra* note 326, at 254–65 (describing lawyer Clarence Jones's involvement in raising bail money for the Birmingham movement).

⁶⁹³ See, e.g., GREENBERG, *supra* note 51, at 381 (noting that LDF lawyers and cooperating lawyers in Alabama represented more than 3,400 defendants in the Selma protests).

⁶⁹⁴ King, *supra* note 1, at xxi.

⁶⁹⁵ See BENNETT, *supra* note 7, at 243 (listing Dr. King's "record of arrests"); *FAQs*, KING CTR., <http://www.thekingcenter.org/faqs> (last visited Oct. 7, 2015) (stating that Dr. King was arrested thirty times in his career).

⁶⁹⁶ See, e.g., GARROW, *supra* note 2, at 241–42.

sacrifice and suffering.⁶⁹⁷ On the other hand, any time in jail took him away from other major responsibilities such as strategizing and fundraising.⁶⁹⁸ Dr. King was so central to so many campaigns that his time spent in jail could undermine their overall strategies.⁶⁹⁹

Mass arrests posed both strategic and financial challenges for the movement. While filling the local jails often generated broader support for the movement, it did not always do so.⁷⁰⁰ In the meantime, protesters suffered degrading and humiliating conditions in jail, as well as collateral consequences such as loss of jobs or, in the case of Birmingham, expulsion from school.⁷⁰¹

i. Birmingham: Defending the Children (1963)

For the first time in the Civil Rights Movement, the Birmingham Movement enlisted school children.⁷⁰² As the numbers of Black adults willing to demonstrate declined, leading to the all-important media interest beginning to wane, leaders searched for ways to reinvigorate the movement.⁷⁰³ SCLC leaders persuaded Dr. King that a mass influx of youth was what the movement needed.⁷⁰⁴ Although he had originally opposed using children, Dr. King approved inviting them to a mass rally on May 2, 1963.⁷⁰⁵ Hundreds of youth demonstrated, leading to hundreds of

⁶⁹⁷ MLK AUTOBIOGRAPHY, *supra* note 32, at 157 (“We chose to serve our time because we feel so deeply about the plight of more than seven hundred others who have yet to be tried.”).

⁶⁹⁸ GARROW, *supra* note 2, at 241; *see also* MLK AUTOBIOGRAPHY, *supra* note 32, at 157.

⁶⁹⁹ *See* discussion *infra* Section III.B.3.i.

⁷⁰⁰ *See, e.g., supra* Section II.A.1.i.d, *infra* Sections III.B.1.i–ii (discussing campaigns in Albany, St. Augustine, and Birmingham before the use of children, where filling the jails did not generate broad support but instead hindered the movement by raising the cost of participation).

⁷⁰¹ *See* FAIRCLOUGH, *supra* note 21, at 54; MOTLEY, *supra* note 13, at 158–59; DAN R. WARREN, *IF IT TAKES ALL SUMMER: MARTIN LUTHER KING, THE KKK, AND STATES’ RIGHTS IN ST. AUGUSTINE, 1964*, at 116 (2008); discussion *infra* Section III.B.1.i.

⁷⁰² *See* THORNTON, *supra* note 27, at 310.

⁷⁰³ *See* KUNSTLER, *supra* note 1, at 189.

⁷⁰⁴ *See* BRANCH, *supra* note 32, at 752–55. Dr. King’s colleague James Bevel argued that any child who could become a church member (as young as six) should be allowed to demonstrate. *Id.* at 755. If children were “old enough to decide their eternal destiny,” they were old enough “to march against segregation.” *See id.* At an earlier meeting, when youth who had been attending workshops volunteered for jail, Dr. King repeatedly refused them, saying that jail is no place for a child. *See id.* at 750–51. Some Birmingham movement leaders worried that “school records and lifetime hopes” could be affected, and young lives scarred by what happened in jail. *Id.* at 752–53. Dr. King was also concerned about possible charges of contributing to the delinquency of a minor. *See id.* at 753.

However, Dr. King also realized that the new life the youth could bring was crucial to the movement. *See* MLK AUTOBIOGRAPHY, *supra* note 32, at 206 (“If our drive was to be successful, we must involve the students of the community. Even though we realized that involving teenagers and high school students would bring down upon us a heavy fire of criticism, we felt that we needed this dramatic new dimension.”).

⁷⁰⁵ *See* GARROW, *supra* note 2, at 247. During the rally, Dr. King remained at his hotel, pondering whether to use the children in any marches. *Id.* at 248–49. Other SCLC leaders made the decision without him. *See id.* at 248.

arrests, and new life for the movement.⁷⁰⁶ The success of the march convinced Dr. King to continue using schoolchildren.⁷⁰⁷

As the movement escalated by enlisting children in demonstrations, local officials ratcheted up their resistance tactics, attacking the demonstrators with fire hoses and police dogs,⁷⁰⁸ and using both the jails and the schools to fight back.⁷⁰⁹ As a result, the use of children triggered significant additional responsibilities for the lawyers.⁷¹⁰ Not only did they have larger numbers of demonstrators to defend; they also had to protect their clients' futures.⁷¹¹

The need to protect the students took an unexpected twist when local officials convinced the school board to expel 1,100 students who allegedly had participated in a march.⁷¹² The expulsions took place one week before graduation for the middle school and high school students, and before promotion for the others.⁷¹³ The students' parents voiced their deep concerns about this situation to Dr. King and his colleagues.⁷¹⁴ The leaders turned to LDF lawyers Constance Baker Motley and Leroy Clark with a desperate plea for assistance in preventing the school board from carrying out its expulsion plan.⁷¹⁵

With little time to act, Motley and her colleagues sought to enjoin the expulsion order.⁷¹⁶ They appeared before Federal District Court Judge Clarence W. Allgood, a segregationist Kennedy appointee.⁷¹⁷ The judge denied the lawyers' request for a preliminary injunction, after giving them a lecture in chambers about using children in demonstrations.⁷¹⁸

Judge Elbert Tuttle, chief judge of the Fifth Circuit, agreed to hear their appeal in Atlanta on an extremely expedited basis—later that day.⁷¹⁹ Motley argued that

⁷⁰⁶ See *id.* at 248–49; *cf.* THORNTON, *supra* note 27, at 311 (stating that thousands of “black youngsters . . . committed to the crusade” were “taken into custody”). Estimates of the number of arrests vary, ranging from 600 according to MCWHORTER, *supra* note 50, at 368, to “more than five hundred,” GARROW, *supra* note 2, at 249, and only 274 according to the warden’s arrest records, ESKEW, *supra* note 50, at 296.

⁷⁰⁷ ESKEW, *supra* note 50, at 265; see also KING, *supra* note 22, at 102 (“Looking back, it is clear that the introduction of Birmingham’s children into the campaign was one of the wisest moves we made. It brought a new impact to the crusade, and the impetus that we needed to win the struggle.”).

⁷⁰⁸ THORNTON, *supra* note 27, at 311. Sheriff Bull Connor’s antics appeared on national television and had a significant impact on public opinion. *Id.*; see also GREENBERG, *supra* note 51, at 360. As a result, the Birmingham movement contributed to the passage of the landmark Civil Rights Act of 1964. GREENBERG, *supra* note 51, at 363.

⁷⁰⁹ See GARROW, *supra* note 2, at 248–49; MOTLEY, *supra* note 13, at 135.

⁷¹⁰ See discussion *infra* Section III.B.4.i.

⁷¹¹ Those were the issues that made Dr. King reluctant to permit children to participate in the first place. See *supra* note 704 and sources cited. All protesters faced such risks; but Dr. King felt especially protective of the children.

⁷¹² MOTLEY, *supra* note 13, at 135. For other accounts of this episode, see ESKEW, *supra* note 50, at 308–09, and MCWHORTER, *supra* note 50, at 448–51.

⁷¹³ MOTLEY, *supra* note 13, at 135.

⁷¹⁴ *Id.*

⁷¹⁵ See *id.* at 135–36.

⁷¹⁶ *Id.* at 136. In addition to LDF colleague Leroy Clark, four local lawyers joined her—Arthur Shores, Peter Hall, Orzell Billingsley, and Oscar Adams. *Id.*

⁷¹⁷ *Id.*; see also *Kennedy-Appointed Judges Stall Negroes’ Court Fights*, JET, Nov. 14, 1963, at 6, 6–7.

⁷¹⁸ See MOTLEY, *supra* note 13, at 136.

⁷¹⁹ *Id.* Presumably, Judge Tuttle was willing to proceed so quickly because the end of the school year was rapidly approaching. The lawyers could not get to the court until the evening, but Judge Tuttle

the school board had denied the students due process because it expelled them without notice or hearing.⁷²⁰ The judge issued the requested injunction, pending appeal.⁷²¹ Motley viewed Judge Tuttle's decision as a critical turning point in the Birmingham movement: "I think it is fair to say that this was the most critical point in what we now call the Birmingham campaign. If Judge Tuttle had not held this extraordinary court session, Martin Luther King, Jr. might have gone down in Birmingham. Instead, Tuttle's injunction revitalized King's efforts[,]”⁷²² allowing him to leave Birmingham in a good position to move on to other movements.

ii. St. Augustine (1963–1964)

Organized demonstrations began in St. Augustine, Florida during the summer of 1963. Blacks wanted SCLC's help in order to deal with an extremely segregated city government.⁷²³ Dr. King hoped that demonstrations in St. Augustine would win support for the Civil Rights Act of 1964, which was stalled in a congressional filibuster.⁷²⁴ SCLC discovered St. Augustine's publicity value during an Easter protest on March 28, 1964, which included the arrest of Mrs. Malcolm Peabody, the mother of the Massachusetts governor.⁷²⁵ During Easter week, Mrs. Peabody was one of nearly 300 demonstrators who were arrested.⁷²⁶ Her arrest received front-page news in the *New York Times*.⁷²⁷

Dr. King made his first visit to St. Augustine on May 18, stating that "he and SCLC's 'nonviolent army' were committed to demonstrations in their 'small Birmingham.'" ⁷²⁸ They would march in the town square where slaves were once bought and sold to remind bystanders of the connection between slavery and contemporary segregation, as well as a way to interrupt tourist traffic vital to the city's economy.⁷²⁹ To this end, SCLC planned for a regular schedule of night marches until early June, at which point demonstrations would grow until the "big

agreed to hear the emergency matter at 7:00 p.m. *Id.* Motley, Clark, and Atlanta local counsel Donald Hollowell drew up the papers and appeared before Judge Tuttle. *Id.*

⁷²⁰ *Id.* at 137.

⁷²¹ *Id.* Judge Tuttle also lectured the school board's lawyers about the importance of school authorities' efforts to keep children in school. *Id.*

⁷²² *Id.*

⁷²³ FAIRCLOUGH, *supra* note 21, at 180. Dr. King's autobiography states that "SCLC came to St. Augustine at the request of the local unit which was seeking": (1) a biracial committee to address segregation in the city; (2) "desegregation of public accommodations"; (3) "hiring of [Black] policemen, firemen, and office workers in municipal jobs"; and (4) "dropping of charges against persons peacefully protesting for their constitutional rights." MLK AUTOBIOGRAPHY, *supra* note 32, at 240.

⁷²⁴ See WARREN, *supra* note 701, at 76–78.

⁷²⁵ FAIRCLOUGH, *supra* note 21, at 181. C.T. Vivian and Hosea Williams had organized a week of demonstrations that included the Massachusetts Christian Leadership Conference, and Mrs. Peabody was part of sixty volunteers who were sent to get arrested and stay in jail for at least three days. *Id.*

⁷²⁶ See *id.*

⁷²⁷ *Id.*; see *Mother of Massachusetts Governor Jailed in Florida*, N.Y. TIMES (Apr. 1, 1964), <http://www.nytimes.com/1964/04/01/mother-of-massachusetts-governor-jailed-in-florida.html>.

⁷²⁸ GARROW, *supra* note 2, at 325.

⁷²⁹ See *id.* at 325–26; see also Memorandum from Wyatt Tee Walker to Dr. King, Suggested Approach and Chronology for St. Augustine (n.d.), <http://www.thekingcenter.org/archive/document/suggested-approach-and-chronology-st-augustine>.

push” around June 14.⁷³⁰ Marching in St. Augustine’s darkness through mazes of narrow streets, the marchers would be at their most vulnerable to attacks.⁷³¹

Before Dr. King even arrived in St. Augustine, attorneys for SCLC had begun defending demonstrators who were arrested during protests.⁷³² After the Easter protest, Tobias Simon, John M. Pratt, and William Kunstler filed petitions for writs of habeas corpus in the federal district court in Jacksonville for release of those arrested.⁷³³ They also sought removal of the cases to federal court.⁷³⁴ Federal District Court Judge Bryan Simpson declined to take jurisdiction of the cases.⁷³⁵ He ordered the police to accept appearance bonds rather than the cash bonds they had demanded.⁷³⁶ Requiring the full cash amount of the bond was a way of deterring demonstrators, and Judge Simpson’s order allowed them to pay state court bail bonds that only required 10% face value of the bond to be paid.⁷³⁷

On June 11, Dr. King chose to intensify the campaign by appearing at the whites-only restaurant of Monson Motor Lodge and seeking service.⁷³⁸ When Dr. King was asked to leave, he refused, and the police arrested him.⁷³⁹ Dr. King declined to post bail and was incarcerated on charges of trespassing with malice, conspiracy, and intent to breach the peace.⁷⁴⁰

On July 20, Dr. King’s attorneys returned to the federal district court in Jacksonville to file a lawsuit on behalf of those arrested during the demonstrations in St. Augustine.⁷⁴¹ They asked the court to exercise jurisdiction over the several hundred cases still pending before Judge Charles Mathis Jr. in St. Johns County

⁷³⁰ GARROW, *supra* note 2, at 326.

⁷³¹ FAIRCLOUGH, *supra* note 21, at 184–85. These attacks would demonstrate the true nature of the police and the “inadequacy of local law enforcement.” *Id.* at 185.

⁷³² See WARREN, *supra* note 701, at 66.

⁷³³ *Id.*

⁷³⁴ KUNSTLER, *supra* note 1, at 273. According to William Kunstler, the attorneys sought removal to federal court based on what they had learned from earlier cases:

[W]e had learned during the summer of 1963 that orders remanding removed civil rights cases back to state court might be appealable. Moreover, the Fifth Circuit, which included Florida, had already granted a stay of such remand orders in a Louisiana case . . . five months earlier. It was reasonable to expect that we would get the same treatment in the St. Augustine cases.

Id. See generally 28 U.S.C. § 1443 (2012) (permitting civil actions and criminal prosecutions involving civil rights to be removed to federal court); *id.* § 1447(d) (excepting remands in civil rights cases from bar to appellate review of district court orders remanding removed cases to state court). Kunstler also recounts that Chief Judge Bryan Simpson was intrigued by the removal proceedings the attorneys had instituted, telling Kunstler that this would be the first time he had encountered them, and that he “look[ed] forward to hearing [their] arguments as to why [he] should retain jurisdiction of all these state prosecutions.” KUNSTLER, *supra* note 1, at 273.

⁷³⁵ WARREN, *supra* note 701, at 67.

⁷³⁶ *Id.*

⁷³⁷ *Id.* The lawyers appealed Judge Simpson’s decision against removal of the case to federal court to the Fifth Circuit Court of Appeals in New Orleans. *Id.* On April 5, 1964, Federal Appellate Court Judge Elbert Tuttle “ordered local prosecutions postponed until the appeals court could hear the case.” *Id.*

⁷³⁸ GARROW, *supra* note 2, at 330. Dr. King was accompanied by Ralph Abernathy, Bernard Lee, and seven others. *Id.*

⁷³⁹ *Id.* at 330–31.

⁷⁴⁰ WARREN, *supra* note 701, at 76. Dr. King was initially “locked up in the crowded St. Johns County Jail,” *id.*, but was later moved to the Duvall County Jail in Jacksonville for safety reasons. FAIRCLOUGH, *supra* note 21, at 186. He left jail on June 13 to receive an honorary degree from Yale. *Id.*

⁷⁴¹ WARREN, *supra* note 701, at 166–67.

Court.⁷⁴² Shortly thereafter, Judge Simpson issued a protective order that kept civil rights protesters from being prosecuted in state court, which effectively removed all of the protesters' pending cases to federal court.⁷⁴³ Later, Judge Simpson dismissed the charges against 400 demonstrators.⁷⁴⁴

iii. Poor People's Campaign (1968)

In the mid-1960s, Martin Luther King, Jr. began to shift his focus from racial segregation to addressing economic inequality and widespread poverty.⁷⁴⁵ After Marian Wright Edelman conveyed to Dr. King then-Senator Robert Kennedy's suggestion to "bring the poor to Washington" to educate the public about the widespread existence of poverty, Dr. King embraced this as his major initiative for 1968.⁷⁴⁶ In November 1967, Dr. King announced his plan to SCLC staff members and called it the "Poor People's Campaign."⁷⁴⁷

Campaign organizers envisioned thousands of poor people from urban and rural areas and from different regions of the country going to Washington and setting up a tent city on the mall—which came to be called "Resurrection City."⁷⁴⁸ The protest would be racially and ethnically inclusive, with both poor people of color and poor whites going to Washington.⁷⁴⁹ As always, the movement would be

⁷⁴² *Id.* at 167. Since refusing the attorneys' request to exercise jurisdiction over the cases of those arrested during the Easter protest, Judge Simpson "appeared to have changed his opinion on the quality of justice available to the demonstrators in state courts." *Id.* at 98.

⁷⁴³ *Id.* at 167.

⁷⁴⁴ DAVID R. COLBURN, *RACIAL CHANGE AND COMMUNITY CRISIS: ST. AUGUSTINE, FLORIDA, 1877–1980*, at 134 (1985). Civil rights demonstrators also raised the issue of prison conditions. *See id.* at 126. Prisoners were placed in hot, confined spaces, and demonstrators alleged that police officers had "threatened and mistreated" the prisoners. *Id.* at 126–27. After a hearing, Judge Simpson ordered that officers cease placing prisoners in small, confined areas during high temperatures. *Id.* at 127.

⁷⁴⁵ FAIRCLOUGH, *supra* note 21, at 200; *see also* MCKNIGHT, *supra* note 67, at 4.

⁷⁴⁶ EDELMAN, *supra* note 177, at 109; *see also* HENRY HAMPTON & STEVE FAYER, *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S* 453–54 (1991). The idea was that a visible expression of the concern for the poor might be effective in gaining White House and congressional support for addressing poverty. *See* GARROW, *supra* note 2, at 573–74. His close advisor Stanley Levison proposed modeling the 1932 protest of the Bonus Army of veterans who built shanties on the mall to dramatize the plight of the unemployed during the Great Depression. *See* GREENBERG, *supra* note 51, at 463; MCKNIGHT, *supra* note 67, at 112.

In 1932, several thousand World War I veterans went to Washington to demand early payment of their war bonuses. President Hoover and the Senate rejected their claims, so they "set[] up nine camps across the city to lobby the government." GORDON K. MANTLER, *POWER TO THE POOR: BLACK-BROWN COALITION AND THE FIGHT FOR ECONOMIC JUSTICE, 1960–1974*, at 94 (2013). Within weeks, 20,000 veterans and family members occupied the camps. *See id.* A month later, "federal troops . . . tear-gassed and burned down the camps . . ." *Id.* The veterans did not receive their bonuses for three years; but Levison thought that it was a good model for SCLC to use. *See id.*

⁷⁴⁷ *King's Last March*, AM. RADIOWORKS, <http://americanradioworks.publicradio.org/features/king/b1.html> (last visited Jan. 12, 2016); *Poor People's Campaign*, KING INST. ENCYCLOPEDIA, http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_poor_peoples_campaign/ (last visited Jan. 12, 2016).

⁷⁴⁸ *See* MCKNIGHT, *supra* note 67, at 112.

⁷⁴⁹ *See id.* at 83; *see also* FAIRCLOUGH, *supra* note 21, at 359; GREENBERG, *supra* note 51, at 463.

committed to nonviolence.⁷⁵⁰ The goal was to pressure Congress and federal agencies to commit far greater resources to address the problem of poverty.⁷⁵¹

In mid-March 1968, Dr. King called on LDF Chief Counsel Jack Greenberg to come to Atlanta with some of his colleagues to help plan the campaign.⁷⁵² He wanted LDF's help on two fronts: (1) to defend the protesters against "harassment, arrest, prosecution, and other hostile legal action"; and (2) to get permits for meetings and parades.⁷⁵³ At Dr. King's request, LDF agreed to represent SCLC in the Poor People's Campaign.⁷⁵⁴

During the six-week campaign, there were 567 arrests,⁷⁵⁵ including arrests related to protests and Resurrection City residents' illegal activity.⁷⁵⁶ Organizers expected mass arrests for the protest activities,⁷⁵⁷ and SCLC's Legal Services Committee provided instructions for protesters about arrests. If arrested, they should record information about witnesses and arresting officers.⁷⁵⁸ The

⁷⁵⁰ FAIRCLOUGH, *supra* note 21, at 359; *see also* GREENBERG, *supra* note 51, at 463; MCKNIGHT, *supra* note 67, at 112.

⁷⁵¹ GREENBERG, *supra* note 51, at 466; *see also* MCKNIGHT, *supra* note 67, at 83–84.

⁷⁵² GREENBERG, *supra* note 51, at 463. Leroy Clark, Chuck Jones, Lou Pollak, and Mel Zarr accompanied Greenberg. *Id.*

⁷⁵³ *Id.* Greenberg made clear that if the protesters engaged in civil disobedience, they would be committing a crime. *Id.* at 464. It could be impossible to defend them successfully in that case. *Id.* Dr. King was prepared, as in the past, to plead guilty and serve a sentence if he decided to engage in civil disobedience. *See id.*

Greenberg indicated that LDF could play a role in case of refusal of bail, bail set at excessive levels, appropriateness of charges, and sentencing. *Id.* By April 2, LDF staff lawyers Leroy Clark and Jim Finney had developed a plan to coordinate LDF staff and volunteer lawyers on possible projects for the campaign. *Id.* at 465.

⁷⁵⁴ *Id.* at 465. Just before Dr. King's death, with LDF overseeing all legal aspects of the PPC, they formed the "Legal Services Committee." Amy Nathan Wright, Civil Rights "Unfinished Business": Poverty, Race, and the 1968 Poor People's Campaign 353 (Aug. 2007) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with University of Texas Libraries). In addition to dealing with arrests and permissions, the group served as legal counsel for the PPC committees. *Id.* It provided two to three lawyers for each committee. *Id.* Local lawyers served as counsel. *Id.* Frank D. Reeves, Professor of Law at Howard Law School, chaired the committee. *Id.* at 354. LDF's Leroy Clark served as chief counsel. *Id.* Marion Wright Edelman headed the Legislative Research Committee and assisted the other committees. *Id.* Law students assisted in legal efforts and participated in daily protests "to advise participants of their legal rights," if needed. *Id.*

After Dr. King was assassinated, Ralph Abernathy, his successor, announced that SCLC would proceed with the Poor People's Campaign, and that he wanted LDF to represent it. GREENBERG, *supra* note 51, at 465.

In addition to the responsibilities Dr. King charged LDF with, LDF played a role in shaping SCLC's positions and demands. Marian Wright Edelman was in Washington, having worked the previous year for LDF in Mississippi. *See* HAMPTON & FAYER, *supra* note 746, at 451–53, 478. When the protest began, she realized that position papers were needed that would identify what the movement wanted Congress and the President to do. *See id.* at 478. She gave herself the job of writing those papers. *Id.*

Later in the movement, Marian Wright Edelman worked behind the scenes with government lawyers to reshape the movement's broad and vague demands into a coherent set of priorities. MCKNIGHT, *supra* note 67, at 127; *see also* Wright, *supra*, at 434.

⁷⁵⁵ MCKNIGHT, *supra* note 67, at 130. The majority of the arrests took place during the final week, when Resurrection City was a dangerous place, with intensified violence in the form of beatings and robberies. *See id.*

⁷⁵⁶ GREENBERG, *supra* note 51, at 466; *see also* MCKNIGHT, *supra* note 67, at 130.

⁷⁵⁷ *See* CHARLES FAGER, UNCERTAIN RESURRECTION: THE POOR PEOPLE'S WASHINGTON CAMPAIGN 88 (1969).

⁷⁵⁸ Wright, *supra* note 754, at 430.

instructions informed them of their rights, and assured them that legal counsel would be available to represent them.⁷⁵⁹ Volunteer lawyers represented them, under LDF supervision.⁷⁶⁰ Frank Reeves, who headed the committee, told demonstrators that the official policy was “jail, no bail.”⁷⁶¹ He indicated that penalties could be ninety-day sentences and \$250 fines.⁷⁶²

2. Other Defense Work: Chicago Evictions (1965–1966)

A decade after the Montgomery Bus Boycott, Martin Luther King, Jr. took his movement to Chicago—his first major initiative outside the South.⁷⁶³ He had concluded that systemic racism was not confined to the Deep South, and that his nonviolent philosophy was relevant to the nation as a whole.⁷⁶⁴ What came to be called the Chicago Freedom Movement (CFM) joined SCLC with a coalition of local organizations addressing racial discrimination.⁷⁶⁵ CFM had two major goals. The first and foremost was a fair housing effort that sought to make housing opportunities available for Blacks in white neighborhoods by marching Black and white protesters into white working-class neighborhoods “to dramatize the depth of housing discrimination.”⁷⁶⁶

CFM’s second goal involved an “end the slums” campaign focused on the decaying buildings in low-income Black neighborhoods.⁷⁶⁷ It drew upon an emerging national strategy of organizing Black families in low-income neighborhoods into tenant unions.⁷⁶⁸ The goal was to put pressure on landlords to repair and maintain their apartment buildings.⁷⁶⁹ The tenant unions carried out rent strikes, putting their rent money in escrow accounts to use the money to repair the buildings until landlords made the repairs necessary to make their apartments

⁷⁵⁹ *Id.* The final instruction was to sing on the way to jail, to build camaraderie. *Id.*

⁷⁶⁰ GREENBERG, *supra* note 51, at 466.

⁷⁶¹ FAGER, *supra* note 757, at 89; *see also* Memorandum from Leroy D. Clark, Chief Counsel, NAACP Legal Def. & Educ. Fund, Inc. to Participants, Poor People’s Campaign 2 (June 1968) (on file with author).

⁷⁶² FAGER, *supra* note 757, at 89. Some demonstrators objected to the “jail, no bail” strategy. *See id.*

⁷⁶³ *See* discussion *supra* Section III.A, *infra* Section III.B.3.iv.

⁷⁶⁴ AYERS & DOHRN, *supra* note 117, at 23; RALPH, *supra* note 62, at 29–30.

⁷⁶⁵ The leadership of the Coordinating Council of Community Organizations (CCCO) invited Dr. King to come to Chicago. AYERS & DOHRN, *supra* note 117, at 24. CCCO had focused primarily on the inequality in the Chicago public schools. RALPH, *supra* note 62, at 43, 65–66.

⁷⁶⁶ RALPH, *supra* note 62, at 92; *see also* discussion *infra* Section III.B.3.iv. Chicago was the most racially segregated big city in the United States. AYERS & DOHRN, *supra* note 117, at 25; RALPH, *supra* note 62, at 39.

⁷⁶⁷ Conditions included lack of hot water, leaking roofs, lack of heat in winter, rotting stairs and windows, the absence of locks, and infestation of rats and vermin. AYERS & DOHRN, *supra* note 117, at 26. To draw attention to these conditions, Dr. King moved into a tenement apartment in the Lawndale neighborhood, called “Slumdale” by its residents. *Id.* at 27; RALPH, *supra* note 62, at 55.

⁷⁶⁸ RALPH, *supra* note 62, at 58. The CFM used emerging models of tenant union organizing in New York City. Interview with Gil Cornfield & Gil Feldman, Founding Partners, Cornfield & Feldman LLP, in Chi., Ill. (June 30, 2014) [hereinafter Cornfield & Feldman Interview].

⁷⁶⁹ *See* Cornfield Remarks, *supra* note 92, at 669–71; *see also* ANDERSON & PICKERING, *supra* note 62, at 190–91; AYERS & DOHRN, *supra* note 117, at 25–26; RALPH, *supra* note 62, at 58; Cornfield & Feldman Interview, *supra* note 768.

habitable.⁷⁷⁰ This tactic put the tenants at immediate risk of eviction. In Chicago's Landlord/Tenant court, there was no defense to non-payment of rent.⁷⁷¹ Traditionally, eviction cases involved a brief *pro forma* ritual.⁷⁷² The judge asked the tenants whether they had paid their rent. If they had not, the judge automatically granted the landlord the requested relief.⁷⁷³

Pro bono lawyers, led by law firm partners Gil Cornfield and Gil Feldman, began to defend the tenants.⁷⁷⁴ Their tactic was to turn the brief *pro forma* procedure into a much more complicated one, with mountains of documentation designed to prevent mass evictions and bring the eviction machinery to a standstill.⁷⁷⁵ Defending tenants in eviction court became a massive undertaking. There were so many cases that the NAACP Legal Defense and Education Fund agreed to set up a Chicago office to enlist additional lawyers to take the cases.⁷⁷⁶

Having disrupted the eviction process, Cornfield and Feldman turned to another innovative tactic.⁷⁷⁷ As union lawyers, they borrowed from the labor law context the model of the collective bargaining agreement.⁷⁷⁸ They negotiated a number of agreements with landlords providing for payment of rent in return for commitments to make the repairs required to bring the buildings up to code.⁷⁷⁹

⁷⁷⁰ ANDERSON & PICKERING, *supra* note 62, at 191; AYERS & DOHRN, *supra* note 117, at 25–26; Cornfield & Feldman Interview, *supra* note 768.

⁷⁷¹ In the one case they lost, the lawyers challenged the common law principle of no defense for non-payment of rent as outmoded. See Cornfield Remarks, *supra* note 92, at 674. Ultimately, the Illinois Supreme Court adopted the “warranty of habitability” as an implicit provision in the lease that provided an affirmative defense for non-payment of rent. See *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972). The development of this implicit provision of habitability grew out of the Chicago Freedom Movement. Richard H. Chused, *The Roots of Jack Spring v. Little*, 40 J. MARSHALL L. REV. 395, 398–99 (2007).

⁷⁷² The eviction court judge granted eviction orders nearly instantaneously, taking “about five seconds.” See Cornfield Remarks, *supra* note 92, at 671. A half century later, Chicago’s eviction court still produced rapid evictions unless lawyers were available to represent the tenants. *Lizzie Rosenthal: My Work Matters*, LEGAL ASSISTANCE FOUND. (Dec. 27, 2013), <https://lafchicago.wordpress.com/2013/12/27/my-work-matters-23/> (“I work at LAF because low-income tenants get evicted after a ‘trial’ that lasts three minutes if they don’t have an attorney.”).

⁷⁷³ See Cornfield & Feldman Interview, *supra* note 768.

⁷⁷⁴ See Cornfield Remarks, *supra* note 92, at 672.

⁷⁷⁵ See *Id.* The lawyers “would have people streaming out into the halls [outside the courtroom] for every eviction. The whole process of eviction then and the court proceedings became so jammed, it was impossible to proceed.” *Id.* The lawyers characterized the process as “creative [social] disruption.” *Id.*; see also Morris, *supra* note 221, at 629.

⁷⁷⁶ See Bernadine Dohrn, Founder & Former Dir., Children & Family Justice Ctr., Bluhm Legal Clinic, Nw. Law, Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King’s Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 Nw. J.L. & SOC. POL’Y 667, 674–75 (2016). This process went on every day for months, for most of the time that Dr. King was in Chicago. See *id.* at 673.

⁷⁷⁷ Since they were union lawyers with no experience in landlord-tenant law, they consulted with a landlord-tenant lawyer. See Cornfield Remarks, *supra* note 92, at 673–74.

⁷⁷⁸ See *id.* at 674.

⁷⁷⁹ See *id.* Just as opponents tried to undermine attorney Fred Gray’s participation in the Montgomery Bus Boycott, city officials put pressure on the unions that Cornfield and Feldman represented to get them to cease their participation. There was even an abortive attempt to disbar Cornfield because of his activities in eviction court. *Id.* at 676.

3. Permissions and Injunctions

By the time of the Birmingham Movement, Dr. King had become fully aware of the threat that injunctions posed:

The injunction method has now become the leading instrument of the South to block the direct-action civil-rights drive and to prevent Negro citizens and their white allies from engaging in peaceable assembly, a right guaranteed by the First Amendment. You initiate a nonviolent demonstration. The power structure secures an injunction against you. It can conceivably take two or three years before any disposition of the case is made. The Alabama courts are notorious for “sitting on” cases of this nature. This has been a maliciously effective, pseudo-legal way of breaking the back of legitimate moral protest.⁷⁸⁰

In the later years of the Civil Rights Movement, with SCLC’s escalation of its nonviolent direct action, the injunction scenarios became more complicated. When opponents secured injunctions, non-compliance became an option to consider seriously. In Birmingham, non-compliance was the chosen path.⁷⁸¹ In other situations, SCLC sought major modifications that permitted planned activities to proceed.⁷⁸² In still others, SCLC acted proactively and initiated injunction proceedings to remove public or private obstacles to protests.⁷⁸³

i. Birmingham: Permission and Injunction (1963)

Where local permitting ordinances were available, city officials often used their discretion under them to deny permits, thus thwarting marches and other kinds of demonstrations. The 1963 Birmingham Movement provides a dramatic example of this kind of resistance strategy.⁷⁸⁴ Movement organizers and lawyers applied to the appropriate local official, Commissioner Bull Connor, for a permit to march.⁷⁸⁵

⁷⁸⁰ KING, *supra* note 22, at 68–69; *see also* WESTIN & MAHONEY, *supra* note 136, at 74–75.

⁷⁸¹ *See* discussion *infra* Section III.B.3.i.

⁷⁸² *See* discussion *infra* Sections III.B.3.iii, III.B.3.v.

⁷⁸³ *See* discussion *infra* Section III.B.3.ii.

⁷⁸⁴ *See* WESTIN & MAHONEY, *supra* note 136, at 65–71.

⁷⁸⁵ GREENBERG, *supra* note 51, at 361; WESTIN & MAHONEY, *supra* note 136, at 65–66. Section 1159 of the Birmingham City Code required a permit for public demonstrations, which could be obtained by written application to the city commission stating the demonstration’s purpose, expected size, and location:

It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration,

Connor was a rabid segregationist who ordered extremely aggressive and violent resistance to the protesters.⁷⁸⁶ In response to the activists' application for a permit, Connor replied that they would have to apply to the entire city commission,⁷⁸⁷ a requirement that had never been enforced.⁷⁸⁸ He also made clear that he would strenuously oppose a permit for any civil rights activity.⁷⁸⁹ The permit rejection laid the groundwork for a subsequent injunction prohibiting planned demonstrations.⁷⁹⁰ In response, Martin Luther King, Jr. decided to violate the injunction.⁷⁹¹ In late 1962 and early 1963, LDF staff and other lawyers met with Dr. King in preparation for the Birmingham Movement.⁷⁹² They discussed the state of the law with respect to violations of injunctions.⁷⁹³ The lawyers concluded that disobeying a state court injunction which prohibited planned demonstrations would likely result in a conviction for contempt of court.⁷⁹⁴ They further concluded that it was highly unlikely they would be able to raise the constitutionality of the ordinance on which the injunction was based in the state courts.⁷⁹⁵

Those discussions provided Dr. King with a sense of the legal options. But other factors remained to consider in contemplating violating an injunction, including the likelihood that Birmingham officials would turn to the state courts rather than the federal courts for an injunction.⁷⁹⁶ It was common knowledge that the local judges were staunch segregationists, which could build public support for the activists and increase the chances of U.S. Supreme Court receptivity to their plight.⁷⁹⁷

prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

Walker v. City of Birmingham, 388 U.S. 307, 309 n.1 (1967) (quoting BIRMINGHAM, ALA., GEN. CODE § 1159).

⁷⁸⁶ See ESKEW, *supra* note 50, at 266–68; *see also supra* note 708 and accompanying text (discussing Bull Connor's tactics).

⁷⁸⁷ ESKEW, *supra* note 50, at 224; *see also* GREENBERG, *supra* note 51, at 361; WESTIN & MAHONEY, *supra* note 136, at 66.

⁷⁸⁸ See GREENBERG, *supra* note 51, at 361, 363; WESTIN & MAHONEY, *supra* note 136, at 106.

⁷⁸⁹ WESTIN & MAHONEY, *supra* note 136, at 66.

⁷⁹⁰ See GREENBERG, *supra* note 51, at 361; *see also infra* notes 803–806 and accompanying text.

⁷⁹¹ GREENBERG, *supra* note 51, at 361–62; *see also* discussion *supra* Section III.B.3.

⁷⁹² WESTIN & MAHONEY, *supra* note 136, at 59.

⁷⁹³ GREENBERG, *supra* note 51, at 361. The Supreme Court's 1962 decision in *In re Green* provided hope that protesters who violated an injunction that deprived them of their First Amendment rights could ultimately be vindicated by the Court. *In re Green* involved an attorney seeking review of the denial of requested habeas corpus relief by the Ohio Supreme Court. *See* 369 U.S. 689 (1962). It was in a proceeding that challenged the jurisdiction of the state court that tried to punish him for advising union leaders that the restraining order was invalid and that they should continue picketing. *Id.* at 689–90. The Court reversed and granted the relief. *See id.* at 693.

⁷⁹⁴ WESTIN & MAHONEY, *supra* note 136, at 59.

⁷⁹⁵ *Id.* But the lawyers suggested that the Supreme Court's recent decision in *In re Green* might possibly allow this course of action. *Id.*; *see* 369 U.S. 689 (1962).

⁷⁹⁶ WESTIN & MAHONEY, *supra* note 136, at 60. Birmingham officials would probably have wanted to avoid U.S. District Judge Frank Johnson, of the Middle District of Alabama (including Birmingham), who was generally supportive of civil rights claims. *See id.* at 170.

⁷⁹⁷ *Id.* at 59.

On the other hand, violating court orders—even from state judges—would create tension with the Department of Justice. The Justice Department used injunctions extensively to seek compliance with federal civil rights court decisions and laws.⁷⁹⁸ The agency strongly supported obedience to court orders.⁷⁹⁹ While aware of the risks involved, Dr. King remained committed to violating the court’s injunction heading into the critical Birmingham movement.

On April 3, 1963, the Birmingham protest began with sit-ins at lunch counters in downtown department stores.⁸⁰⁰ Protest organizers planned large-scale demonstrations for Good Friday and Easter Sunday, April 12 and 14, 1963.⁸⁰¹ They selected those dates strategically, with an eye on the symbolic meaning of protesting racial segregation on those holy days.⁸⁰² On Wednesday, April 10, attorneys for the city applied to the state circuit court *ex parte* for a temporary restraining order prohibiting those demonstrations.⁸⁰³ The complaint alleged that the respondents, including Dr. King and his associates (including Wyatt T. Walker, Ralph Abernathy, and A.D. King) had engaged in various demonstrations over the previous week, all of which were “calculated to provoke breaches of the peace in the city.”⁸⁰⁴ That evening the judge signed a broad order prohibiting the activities planned for later that week.⁸⁰⁵ The order was based on a local ordinance that gave the city commission virtually complete discretion on whether to issue a parade permit.⁸⁰⁶

After discussing the order’s implications on the movement, Dr. King and his colleagues concluded that complying with it would be disastrous.⁸⁰⁷ SCLC aide Wyatt Walker reflected the consensus view of the situation:

One option we eliminated was going to court to try to get the injunction dissolved [the traditional legal procedure]. We knew this would tie us up in court at least ten days to two weeks, and even then we might not get it dissolved. We would have a lengthy lawsuit to appeal but no Birmingham campaign. All of our planning and organizing, a year’s effort, would have been in vain, and that was exactly what the city was trying to accomplish by going to court.⁸⁰⁸

⁷⁹⁸ *Id.* at 60.

⁷⁹⁹ *Id.* at 60–61.

⁸⁰⁰ *Id.* at 63–64. The leaders also issued a “Birmingham Manifesto” with three demands: (1) desegregation of facilities such as lunch counters and fitting rooms at department stores; (2) businesses agreeing to employ Blacks on a non-discriminatory basis; and (3) establishing a bi-racial committee to work out a plan for the desegregation of other areas of social life in the city. Demonstrations would continue until local officials and business leaders met these demands. *Id.* at 64.

⁸⁰¹ *See id.* at 68; *see also* ESKEW, *supra* note 50, at 237.

⁸⁰² *See* KING, *supra* note 22, at 69–70.

⁸⁰³ WESTIN & MAHONEY, *supra* note 136, at 69.

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.* at 71.

⁸⁰⁶ GREENBERG, *supra* note 51, at 361, 363; WESTIN & MAHONEY, *supra* note 136, at 74.

⁸⁰⁷ Their lawyers argued that the way the ordinance was administered was probably a violation of the First Amendment. WESTIN & MAHONEY, *supra* note 136, at 73–74.

⁸⁰⁸ *Id.* at 76.

Protest leaders recognized that they faced a complex and critical legal situation, and they turned to the NAACP Legal Defense and Education Fund for assistance.⁸⁰⁹ Constance Baker Motley, LDF's Associate Counsel, answered the leaders' call for help by sending Norman Amaker, who had been working with movement groups in the South since the early 1960s.⁸¹⁰ In Amaker's discussions with local attorneys Orzell Billingsley and Arthur Shores, and with LDF head Jack Greenberg, they took as a given the movement's decision to disobey the court order and go ahead with the Good Friday march.⁸¹¹ The attorneys focused instead on a parallel strategy—challenging the anticipated contempt citation.⁸¹² They anticipated losing initially, but hoped to successfully challenge the constitutionality of the injunction on appeal.⁸¹³

Before the march on Good Friday, Amaker briefed Dr. King and his associates on the legal situation. Amaker explained that if they marched, they would probably be in violation of the injunction and could be convicted of either civil or criminal contempt.⁸¹⁴ But since the ordinance, as implemented, was probably unconstitutional, the injunction was probably invalid. Amaker committed himself and his colleagues to doing whatever they could to support the activists in court.⁸¹⁵

The Good Friday march proceeded.⁸¹⁶ The police arrested Dr. King and the other leaders.⁸¹⁷ Their legal defense team included Arthur Shores and Orzell Billingsley, the two Black Birmingham attorneys who had been involved since the movement's planning stage.⁸¹⁸ The LDF contingent started with Norman Amaker, with staffer Leroy Clark joining him shortly, and top attorneys Jack Greenberg and Constance Baker Motley coming later.⁸¹⁹

On the Monday after Easter, the lawyers filed their application to dissolve the injunction as violating the First and Fourteenth Amendments, being

⁸⁰⁹ *Id.* at 77.

⁸¹⁰ *Id.*

⁸¹¹ Amaker and his colleagues were sensitive to the leaders' skepticism about lawyers: "I knew how a lot of them viewed lawyers as people who were very conservative; who generally tried to hold them back, who would say that they couldn't do anything." *Id.* at 80.

⁸¹² *Id.* at 80–81.

⁸¹³ *Id.* at 81.

⁸¹⁴ *Id.* A criminal contempt conviction carried a maximum sentence of five days, while the civil contempt laws provided for much more severe penalties, and allowed a judge to "jail defendants indefinitely until they 'purged' themselves by apology and recantation." BRANCH, *supra* note 32, at 751–52. After the briefing, Dr. King remarked that "he surely didn't want to spend the rest of his life in jail, but that he would not repudiate what he had announced and call off the march." WESTIN & MAHONEY, *supra* note 136, at 82.

Empty coffers complicated the situation. SCLC did not have enough money for bail. Dr. King faced a dilemma. If he led the march, he would go to jail and his fundraising talents would not be available to secure the needed funds. Still, he decided to march, having faith that they would somehow find the money they needed. BRANCH, *supra* note 32, at 728–29; *see also* FAIRCLOUGH, *supra* note 21, at 122; WESTIN & MAHONEY, *supra* note 136, at 82.

⁸¹⁵ WESTIN & MAHONEY, *supra* note 136, at 81. In hindsight, Amaker thought that it might have helped with the expected appeal to file a motion to dissolve or modify the injunction before the march, but there was not enough time to prepare the motion. *Id.* at 81–82.

⁸¹⁶ FAIRCLOUGH, *supra* note 21, at 121–22.

⁸¹⁷ *Id.* at 122.

⁸¹⁸ WESTIN & MAHONEY, *supra* note 136, at 80, 86.

⁸¹⁹ *Id.* at 89–90.

unconstitutionally vague, and enforcing racial segregation.⁸²⁰ Judge William A. Jenkins limited the issues at trial to the questions of whether the defendants had violated the injunction, and had done so “knowingly.”⁸²¹ He held that the defendants’ conduct, in blatantly violating the order, was punishable as criminal contempt.⁸²² Since the parade permit ordinance was not invalid on its face, the only permissible means for the defendants to challenge a denial of a permit was through a motion to dissolve the injunction.⁸²³ Judge Jenkins fined each of them fifty dollars and sentenced them to five days in jail—the maximum punishment permitted for criminal contempt.⁸²⁴

The Alabama Supreme Court agreed to take the case directly, skipping the intermediate appellate court.⁸²⁵ LDF attorneys had no expectation that the Alabama Supreme Court would reverse the trial court, given the state high court’s record of hostility to civil rights cases.⁸²⁶ When the Alabama high court did indeed reject the activists’ claims, the defendants’ lawyers petitioned for certiorari to the U.S. Supreme Court.⁸²⁷ After the Court accepted this dramatic, high profile case, LDF staff lawyer James Nabrit and consultant Professor Anthony Amsterdam prepared the brief.⁸²⁸ By a 5-4 vote, in *Walker v. City of Birmingham*, the Court upheld the Alabama Supreme Court in an opinion by Justice Stewart.⁸²⁹

Stewart emphasized the decision was limited to the specific facts of the case—the state’s rule of law was long established; the defendants had not made an effort to challenge the validity of the injunction in court before violating it; and they had

⁸²⁰ *Id.* at 90; see also GREENBERG, *supra* note 51, at 362. As supporting documents, they included the city ordinances requiring segregation in various public and private facilities, and affidavits about the arrest of Black patrons for seeking service on a desegregated basis. WESTIN & MAHONEY, *supra* note 136, at 91. As the case worked its way up to the Supreme Court, the movement’s lawyers built on these basic documents, arguments, and evidence. *Id.*

⁸²¹ WESTIN & MAHONEY, *supra* note 136, at 97.

⁸²² *Id.* at 141. While the city had charged the defendants with civil contempt as well, Judge Jenkins dismissed that charge without stating his reasons for doing so. *Id.* Some suggest the practical reason for Judge Jenkins’ ruling was that Birmingham’s business leaders did not want Dr. King “languishing indefinitely in a Birmingham jail, while a national campaign to free him created terrible publicity for the city.” *Id.*

⁸²³ *Id.*; see *Walker v. City of Birmingham*, 181 So. 2d 493, 500 (Ala. 1965), *aff’d*, 388 U.S. 307 (1967). In such a proceeding, the court could determine whether the defendants had attempted to comply with the ordinance and whether officials had acted arbitrarily and capriciously in denying the permit. WESTIN & MAHONEY, *supra* note 136, at 141–42.

As the Alabama Supreme Court pointed out, however, the lawyers’ motions came too late:

It is to be remembered that petitioners are charged with violating a temporary injunction. We are not reviewing a denial of a motion to dissolve or discharge a temporary injunction. Petitioners did not file any motion to vacate the temporary injunction until after the Friday and Sunday parades. Instead, petitioners deliberately defied the order of the court and did engage in and incite others to engage in mass street parades without a permit.

Walker, 181 So. 2d at 500.

⁸²⁴ *Walker*, 181 So. 2d at 498–99; WESTIN & MAHONEY, *supra* note 136, at 142. He permitted their release on bond pending appeal. See *id.*

⁸²⁵ WESTIN & MAHONEY, *supra* note 136, at 150, 157.

⁸²⁶ *Id.* at 157–58.

⁸²⁷ *Id.* at 183, 186.

⁸²⁸ See *id.* at 219.

⁸²⁹ See 388 U.S. 307 (1967).

provided no explanation for that failure.⁸³⁰ And for these reasons, the high court affirmed Alabama's contempt conviction of Dr. King.

⁸³⁰ See *id.* at 318–21. In three lengthy dissents, Chief Justice Warren, Justice Brennan, and Justice Douglas attacked the majority's opinion. Chief Justice Warren emphasized the majority's failure to acknowledge that the injunction incorporated a municipal parade ordinance that vested "totally unfettered discretion" in city officials, thereby making it "patently unconstitutional." *Id.* at 328–29 (Warren, C.J., dissenting). He further emphasized that the precedent upon which the majority opinion relied, *Howat v. Kansas*, 258 U.S. 181 (1922), had been substantially modified by the Court's later decision in *In re Green*, 369 U.S. 689 (1962), which reversed a conviction for contempt of a state injunction because the petitioner was not allowed to present evidence challenging the injunction's validity. *Walker*, 388 U.S. at 331–32 (Warren, C.J., dissenting). The Chief Justice maintained that neither *Howat* nor *United States v. United Mine Workers*, 330 U.S. 258 (1947), cited by the majority, supported its holding, and he concluded that "[w]hatever the scope of [the Court's existing] doctrine, it plainly was not intended to give a State the power to nullify the United States Constitution by the simple process of incorporating its unconstitutional criminal statutes into judicial decrees." *Walker*, 388 U.S. at 333–34 (Warren, C.J., dissenting).

Justice Douglas's dissent focused on the record evidence which clearly established that Judge Jenkins' broad injunction "flouted the First Amendment," and on the state court's lack of jurisdiction to issue the injunction. *Id.* at 334–38 (Douglas, J., dissenting) ("In the present case the collision between this state court decree and the First Amendment is so obvious that no hearing is needed to determine the issue."). He maintained that a state court decree "is 'state' action in the constitutional sense" and argued that the Alabama circuit court lacked jurisdiction to abridge the petitioners' First Amendment rights "peaceably to assemble, and to petition the Government for a redress of grievances" by issuing an unconstitutional injunction: "An ordinance—unconstitutional on its face or patently unconstitutional as applied—is not made sacred by an unconstitutional injunction that enforces it." *Id.* at 335, 337–38.

Justice Brennan began his dissent with the harshest criticism of all the other minority opinions:

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. I cannot believe that this distortion in the hierarchy of values upon which our society has been and must be ordered can have any significance beyond its function as a vehicle to affirm these contempt convictions.

Id. at 338 (Brennan, J., dissenting). While Brennan acknowledged the majority's presumption that states "are free to adopt rules of judicial administration designed to require respect for their courts' orders," he argued that "a valid state interest must give way when it infringes on rights guaranteed by the Federal Constitution." *Id.* at 343–44. Brennan noted that, to ensure that freedoms guaranteed under the First Amendment have the necessary "breathing space to survive," *id.* at 344 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), the Court had formulated rules to give individuals the ability to express themselves "in the face of such restraints, armed with the ability to challenge those restraints if the State seeks to penalize that expression." *Id.* at 345. "Yet by some inscrutable legerdemain," he continued, "these constitutionally secured rights to challenge prior restraints invalid on their face are lost if the State takes the precaution to have some judge append his signature to an *ex parte* order which recites the words of the invalid statute." *Id.* at 346.

Brennan concluded by discussing the practical effect of the majority's holding that the petitioners "should have sought to dissolve the injunction before conducting their processions." *Id.* at 348. He pointed out that requiring even a brief cessation of the protesters' marches could have dealt "a crippling blow" to the petitioners' efforts "to arouse community support for [their] assault on segregation [in Birmingham]." *Id.* at 348–49. Recognizing that the petitioners had strategically scheduled their protests for Good Friday and Easter Sunday, and that it was impossible to know how long it might take to have the injunction dissolved, Brennan argued that "[t]o preach 'respect' for judicial process in this context is to deny the right to speak at all." *Id.* at 349.

ii. St. Augustine: Injunction (1963–1964)

In St. Augustine, SCLC attorneys sought to enjoin public officials from interfering with the demonstrations. After a night march on May 28, 1964, was met with white resistance, demonstrators gathered at a church, where police advised against additional night marches due to insufficient police protection.⁸³¹ Still, the next night hundreds marched again.⁸³² Police told marchers to disperse, and forbade them from marching downtown on any evening in the future.⁸³³

SCLC leader Andrew Young brought a class action lawsuit on behalf of himself and all other Blacks in St. Augustine, seeking a temporary restraining order or injunction against local law enforcement leaders and the mayor.⁸³⁴ Plaintiffs argued that the defendants' orders during the night marches of May 28 and May 29 were unlawful prior restraints on demonstrators' fundamental rights of speech and assembly.⁸³⁵ The defendants had the heavy burden of proving that these rights were lawfully restrained based on a "clear and present danger."⁸³⁶

Federal District Judge Bryan Simpson found that the May 28 and May 29 night marches caused some disorder but did not rise to a clear and present danger.⁸³⁷ Thus, the defendants' interference with the marches was an unlawful restraint on the plaintiffs' fundamental rights, and Judge Simpson granted a preliminary injunction.⁸³⁸ "Law enforcement officials would have to protect, not obstruct, the marchers whenever they conducted such protests in the future."⁸³⁹

Despite Judge Simpson's order to not obstruct the marches, police continued to interfere. On June 24, a group of Klansmen gathered in the park awaiting the demonstrators who were ready to march a few blocks away.⁸⁴⁰ The Klansmen attacked the demonstrators, and when police moved to protect the marchers, the

⁸³¹ Young Findings & Conclusions, *supra* note 58, at 11–12; *see also* GARROW, *supra* note 2, at 327. The Chief of Police was heard saying: "We are declaring martial law. You had no permit for the earlier marches and no permits will be given for other marches." Young Findings & Conclusions, *supra* note 58, at 13.

⁸³² *See* Young Findings & Conclusions, *supra* note 58, at 12–13.

⁸³³ *Id.* at 13.

⁸³⁴ *Id.* at 2–3. The named defendants were L.O. Davis, as Sheriff of St. Johns County, Florida; Virgil Stuart, as Chief of Police of the City of St. Augustine; and Joseph A. Shelley, as Mayor of the City of St. Augustine. *Id.* at 3.

⁸³⁵ *Id.* at 16.

⁸³⁶ *See id.* at 16.

⁸³⁷ *Id.* at 12.

⁸³⁸ *Id.* at 19.

⁸³⁹ GARROW, *supra* note 2, at 330. SCLC attorneys sought further injunctive relief when the City Commission adopted two ordinances that imposed a curfew and prohibited parking on certain streets between certain hours. *See* Young Findings & Conclusions, *supra* note 58, at 13–14. The first ordinance "impose[d] a restriction from 9:00 P.M. to 5:00 A.M. curfew on all persons under the age of 18." *Id.* at 13; *see* St. Augustine, Fla., Ordinance 185-A (June 1, 1964) (repealed June 5, 1964). The second ordinance prohibited parking automobiles between 9:00 P.M. and 5:00 A.M. on forty-two streets in or leading to downtown St. Augustine. Young Findings & Conclusions, *supra* note 58, at 13; *see* St. Augustine, Fla., Ordinance 186-A (June 1, 1964) (repealed June 5, 1964).

Plaintiffs' counsel informed the court that they intended to file an amended complaint seeking injunctive relief against the enforcement of these ordinances because they violated First Amendment rights. Young Findings & Conclusions, *supra* note 58, at 13–14. The City Commission repealed these ordinances, thereby mooted the injunction request. *Id.* at 15.

⁸⁴⁰ *See* GARROW, *supra* note 2, at 334.

Klansmen attacked the police as well.⁸⁴¹ The police then began directing the marchers “back toward the Black residential area,” rather than allowing them to continue on their designated route.⁸⁴² By that time, Florida Governor C. Farris Bryant had issued a county-wide proclamation prohibiting peaceful demonstrations and marches in St. Augustine’s public places after 8:30 p.m.⁸⁴³ Pursuant to the governor’s proclamation, the police ordered the protesters to disband and go home.⁸⁴⁴

Police also appeared to have offered insufficient protection for marchers during demonstrations. For example, when demonstrators “swam at the public beaches in St. Johns County,” they were attacked by white mobs, and the police did not offer aid or assistance.⁸⁴⁵ Attorneys Tobias Simon and Earl Johnson filed a petition for rule to show cause in the federal district court in Jacksonville against the county sheriff and St. Augustine’s police chief and mayor.⁸⁴⁶ The lawyers contended the lack of police protection, the police interference with marches, and the governor’s proclamation violated their constitutional rights, and were a direct and willful disobedience of the court’s previous order.⁸⁴⁷ Judge Simpson quickly instructed Governor Bryant and the police to show cause why they should not be held in contempt of court.⁸⁴⁸

While witnesses such as Florida Attorney General James Kynes testified about the inherent danger of night marches through narrow streets, Simon countered that Blacks had experienced more violence on the beaches in bright daylight.⁸⁴⁹ Attorney General Kynes had no answer for this logical inconsistency.⁸⁵⁰

⁸⁴¹ *Id.*

⁸⁴² *Id.* at 335.

⁸⁴³ See Petition for Rule to Show Cause at 4, *Young v. Davis*, No. 64-133-Civ-J (M.D. Fla. June 22, 1964), <http://civilrights.flagler.edu/cdm/singleitem/collection/p16000coll4/id/1183/rec/8>.

⁸⁴⁴ See *id.*

⁸⁴⁵ *Id.* at 3.

⁸⁴⁶ See *id.* at 1, 5; WARREN, *supra* note 701, at 128.

⁸⁴⁷ Petition for Rule to Show Cause, *supra* note 843, at 4.

⁸⁴⁸ WARREN, *supra* note 701, at 128. During the hearing, an officer testified on behalf of the State to support the governor’s contention that his night march ban was “necessary to maintain law and order,” and that the demonstrators had presented police with sufficient “clear and present danger” to suspend First Amendment rights. *Id.* at 134. The officer averred to the court that his shirt had been torn during an encounter with a demonstrator, and such evidence—if true—would seriously undermine Dr. King’s claim that the demonstrations were peaceful and protected under the First Amendment. *Id.*

Judge Simpson promptly ordered the officer to produce the torn shirt. *Id.* at 135. When the witness claimed that he had sent the shirt to his wife in Tampa for repair, Judge Simpson ordered the court marshals “to proceed immediately to Tampa and retrieve the torn shirt,” without giving the officer’s wife any notice of their impending arrival. *Id.* In response, the State asked Judge Simpson to allow them to confer privately with the officer. *Id.* Tobias Simon, who was representing Dr. King in the hearing, did not object, and Judge Simpson consented. *Id.*

After conferring with the witness, the State alerted Simon and the court that the officer had lied about the shirt. *Id.* Judge Simpson indicated that he intended to hold the witness in criminal contempt for testifying untruthfully in his court. *Id.* But Tobias Simon “made an impassioned plea on King’s behalf that the young man not be punished,” which Judge Simpson ultimately accepted. *Id.*

⁸⁴⁹ Partial Transcript of Hearing at 40–41, *Young v. Davis*, Nos. 64-133-CIV-J, 64-152-CIV-J (M.D. Fla. June 27, 1964), <http://civilrights.flagler.edu/cdm/singleitem/collection/p16000coll4/id/1189/rec/20>.

⁸⁵⁰ *Id.* at 41.

To avoid contempt charges, Governor Bryant agreed that he would “enforce the law more vigorously.”⁸⁵¹ Judge Simpson in turn chose not to hold the governor in contempt, but “set aside his ban on evening” marches.⁸⁵² Tobias Simon subsequently moved to quash his petition seeking to hold Governor Bryant in contempt after he “appointed a four-man ‘emergency bi-racial committee’ ” to restore interracial communication in St. Augustine.⁸⁵³ After the formation of the committee, Dr. King announced he would be ceasing demonstrations for two weeks, as the purpose of their direct action was to bring the case “out in the open” and create dialogue, which had now been achieved.⁸⁵⁴

Despite the creation of a biracial committee, violence persisted in St. Augustine, particularly after the passage of the Civil Rights Act of 1964. Title II of the Act prohibited racial discrimination by “public accommodations,” such as restaurants, theaters, and hotels.⁸⁵⁵ Klan members used picketing and violence to intimidate businesses that might comply with the Act.⁸⁵⁶ William M. Kunstler, Tobias Simon, Jack Greenberg, Leroy D. Clark, Charles S. Ralston, and Ronald Goldfarb filed suit against more than twenty St. Augustine businesses, seeking to enjoin them from further violating the Civil Rights Act by refusing service “solely on the ground of race or color.”⁸⁵⁷ Judge Simpson granted the injunction.⁸⁵⁸

The same plaintiffs also asked the federal district court in Jacksonville to enjoin the Knights of the Ku Klux Klan and the Ancient City Gun Club from “using pickets and threats of violence” to prevent St. Augustine businesses from complying with the Civil Rights Act.⁸⁵⁹ Judge Simpson enjoined the defendants from otherwise threatening St. Augustine businesses with the purpose of limiting or preventing them from offering service to Blacks.⁸⁶⁰

⁸⁵¹ COLBURN, *supra* note 744, at 125.

⁸⁵² *Id.* at 126. Judge Simpson was also likely influenced by the fact he and Governor Bryant had known each other for a while and were on friendly terms, as well as the fact that Governor Bryant had informed Judge Simpson he would “try to establish a biracial committee in St. Augustine.” *See id.*

⁸⁵³ FAIRCLOUGH, *supra* note 21, at 188; *see* WARREN, *supra* note 701, at 153–54.

⁸⁵⁴ WARREN, *supra* note 701, at 153.

⁸⁵⁵ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, § 201, 78 Stat. 241, 243–44 (codified as amended at 42 U.S.C. § 2000a (2012)).

⁸⁵⁶ WARREN, *supra* note 701, at 162. These picket brigades sometimes led to violence against property, and the Motor Lodge was firebombed and suffered significant damage. *Id.* at 164; *see also supra* note 738 and accompanying text. Gangs of whites began roaming the streets, stalking and attacking Blacks. WARREN, *supra* note 701, at 162.

⁸⁵⁷ *Lance v. Plummer*, 353 F.2d 585, 587 (5th Cir. 1965); *see also* WARREN, *supra* note 701, at 167–68.

⁸⁵⁸ *See Plummer*, 353 F.2d at 587; WARREN, *supra* note 701, at 168.

⁸⁵⁹ WARREN, *supra* note 701, at 166–67.

⁸⁶⁰ *See Plummer*, 353 F.2d at 587–88. After Judge Simpson’s rulings, several Black customers could not register at a motel where the manager was a fervent segregationist. *See id.* at 588–89. SCLC lawyers charged the manager with “violating the equal access provision” of the Civil Rights Act in Judge Simpson’s court. COLBURN, *supra* note 744, at 128. An affidavit also swore that Charles Lance Jr., a “volunteer, unsalaried, deputy sheriff” who had followed the Black customers away from the motel upon receiving a “signal” from the motel manager’s wife, was a member of the Ancient City Hunting Club, which subjected him to Judge Simpson’s prior injunction. *Plummer*, 353 F.2d at 588–89. Judge Simpson held Lance in contempt, and further requested that Lance resign from the sheriff’s force. *Id.* at 590; *see also* COLBURN, *supra* note 744, at 129–30. The decision was upheld on appeal, except that Lance was not prohibited from being deputy sheriff so long as he began complying with the court orders. *See Plummer*, 353 F.2d at 592; COLBURN, *supra* note 744, at 130–31.

iii. Selma: Injunction (1965)

In early 1965, civil rights leaders focused on building public support for federal voting rights legislation.⁸⁶¹ As a prime example of extreme disenfranchisement of Black residents, Selma, Alabama became the focal point for this effort.⁸⁶² On March 7, 1965, some 600 marchers began the fifty-five-mile trek from Selma to the state capitol in Montgomery to call on Governor Wallace and the Alabama legislature to enforce voting rights.⁸⁶³ Governor Wallace had issued an order forbidding the march and authorized the head of the state troopers to stop the march, using “whatever measures . . . necessary.”⁸⁶⁴ As the marchers attempted to cross the Edmund Pettus Bridge leading to the highway to Montgomery, state troopers attacked them with clubs, bullwhips, tear gas, and nausea gas.⁸⁶⁵ Dozens of Black people required hospital treatment for their injuries.⁸⁶⁶ Once again, the brutality received national media coverage and produced widespread support for the marchers.⁸⁶⁷ Dr. King was in Atlanta and had missed the march.⁸⁶⁸ In response to the violent resistance, he announced that he would lead a march from Selma to Montgomery within two days.⁸⁶⁹

The next day, SCLC’s lawyers went to federal court to get an injunction restraining the governor and other officials from interfering with the planned peaceful march.⁸⁷⁰ They chose federal rather than state court in the hopes of receiving a sympathetic hearing from Judge Frank Johnson, a frequent ally of civil rights activists.⁸⁷¹ However, Judge Johnson denied the request for an immediate restraining order because some of the defendants had not received notice of the

⁸⁶¹ See GARROW, *supra* note 22, at 31–34.

⁸⁶² Selma was also attractive as a protest site because the Justice Department was in the process of filing suits against local registrars’ offices for their complicity in denying Blacks the franchise. *See id.* at 31. The Justice Department had ample evidence of discrimination: in 1961, out of 15,000 voting age Blacks in Selma, only 156 were registered, and only fourteen of these voters had been registered since 1954. *Id.* The Justice Department had been unsuccessful, however, in challenging the entrenched white power structure. *See id.* at 34.

⁸⁶³ See GARROW, *supra* note 22, at 68, 73; THORNTON, *supra* note 27, at 487; WESTIN & MAHONEY, *supra* note 136, at 176. *See generally Selma to Montgomery March (1965)*, *supra* note 59.

⁸⁶⁴ ABERNATHY, *supra* note 290, at 327; *see also* GARROW, *supra* note 22, at 72.

⁸⁶⁵ GARROW, *supra* note 22, at 74–76.

⁸⁶⁶ *See id.* at 76.

⁸⁶⁷ *See id.* at 78–82. The day after the attack, speakers from Congress “offered harsh condemnations of the tactics and weapons used by the Alabama lawmen, with several aiming their sharpest barbs at Governor Wallace.” *Id.* at 81.

⁸⁶⁸ *See id.* at 73. While there is some debate surrounding Dr. King’s reasons for remaining in Atlanta during the march, he maintained that he stayed in Atlanta because he had to keep his “preaching commitments.” *Id.*

⁸⁶⁹ *Id.* at 76, 78.

⁸⁷⁰ See GREENBERG, *supra* note 51, at 383. Norman Amaker and Steve Ralston prepared the complaint and motion for a temporary restraining order, and then flew to Montgomery, where Fred Gray and Solomon Seay Jr. presented it in federal court. *See Williams v. Wallace*, 240 F. Supp. 100, 102 (M.D. Ala. 1965); GREENBERG, *supra* note 51, at 383; *see also* GRAY, *supra* note 7, at 216 & n.26. Birmingham lawyers Peter Hall, Oscar Adams Jr., and Demetrius Newton, and LDF (New York) lawyers Jack Greenberg, Charles Jones Jr., and James Nabrit III (in addition to Amaker and Ralston) also represented the plaintiffs. *Williams*, 240 F. Supp. at 102; GRAY, *supra* note 7, at 216 n.26.

⁸⁷¹ See GREENBERG, *supra* note 51, at 381–82.

application.⁸⁷² He scheduled a full hearing for several days later and enjoined any further demonstrations until after the hearing.⁸⁷³

The injunction posed a dilemma for Dr. King. He had announced a march for a date before the scheduled hearing.⁸⁷⁴ The Black community was outraged by the brutality and was determined to act. Sympathetic supporters from around the country were coming to Selma to join in the march.⁸⁷⁵ Dr. King felt compelled to lead the march—to put his body on the line as his followers were prepared to do, especially since he had missed the first march.⁸⁷⁶ But the federal courts had continued to play an important role in the Civil Rights Movement’s progress.⁸⁷⁷ Judge Johnson had a record of strong support for civil rights, and violating the injunction could diminish his support.⁸⁷⁸

President Johnson also made a private and public request for Dr. King to postpone the march until after the hearing.⁸⁷⁹ The Justice Department made the same request, since the agency was committed to the enforcement of federal court orders regardless of the parties involved.⁸⁸⁰ DOJ officials expressed confidence that the hearing would lead to an order permitting the march to proceed under reasonable guidelines.⁸⁸¹ In the face of Dr. King’s insistence on proceeding notwithstanding the injunction, a Justice Department intermediary negotiated an arrangement whereby the march would cross the Edmund Pettus Bridge and turn back, and state troopers would not block them unless they tried to go beyond the bridge.⁸⁸²

By the time the march got underway, it included 2,000 Black and white people from around the country.⁸⁸³ Dr. King led them across the bridge to the barricade protected by state troopers and deputies.⁸⁸⁴ He announced that the marchers were

⁸⁷² See *Williams*, 240 F. Supp. at 103; see also GREENBERG, *supra* note 51, at 383. Judge Johnson also ruled that the plaintiffs would not suffer irreparable harm if forced to wait for a full hearing on the matters involved. GREENBERG, *supra* note 51, at 383. See generally FED. R. CIV. P. 65(b)(1).

⁸⁷³ See GARROW, *supra* note 22, at 83–84. The hearing date was two days after the planned march. *Id.* at 84; see also GREENBERG, *supra* note 51, at 385. According to Jack Greenberg, Judge Johnson prohibited the scheduled march “apparently to stabilize the situation and cool things off.” GREENBERG, *supra* note 51, at 383. Fred Gray also reported that Judge Johnson had warned he would “put Martin Luther King under the jail if he disobeyed the order.” *Id.*

⁸⁷⁴ See GARROW, *supra* note 2, at 400–01.

⁸⁷⁵ See *id.* at 399–400 (calling clergy and activists to participate).

⁸⁷⁶ See *id.* at 400–01.

⁸⁷⁷ In addition to the many federal court decisions requiring desegregation, the Supreme Court had overturned a \$500,000 libel judgment against four Black ministers and the *New York Times* in favor of a Montgomery city commissioner a year earlier. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). If the Court had sustained the judgment, it could have bankrupted SCLC. See discussion *supra* Section II.A.1.ii.

⁸⁷⁸ See GREENBERG, *supra* note 51, at 381–82.

⁸⁷⁹ GARROW, *supra* note 2, at 400–01; see also GARROW, *supra* note 22, at 85–86.

⁸⁸⁰ WESTIN & MAHONEY, *supra* note 136, at 172.

⁸⁸¹ *Id.* The initial effectiveness of the Justice Department’s suits against Selma’s various registrar’s offices is debatable, given the ability of the southern segregationists to stymie the legal process. Judge James Hare managed to prolong the Justice Department’s actions by forcing them to file multiple suits and allowing the state solicitor general to thwart federal policy. See generally GARROW, *supra* note 22, at 33–34.

⁸⁸² See GARROW, *supra* note 22, at 86.

⁸⁸³ *Id.*; see also WESTIN & MAHONEY, *supra* note 136, at 174.

⁸⁸⁴ GARROW, *supra* note 22, at 86.

turning back and returning to the church where they had started.⁸⁸⁵ The marchers were confused by that turn of events, but Dr. King proclaimed it a successful demonstration because they had crossed the bridge, as promised.⁸⁸⁶

Dr. King's lawyers, including Harry Wachtel and the LDF's Jack Greenberg, began preparing a defense for the contempt charges that they anticipated.⁸⁸⁷ Even this very limited march could violate Judge Johnson's prohibition on demonstrations before the hearing. Overturning such a conviction would be very difficult in light of Supreme Court precedent.⁸⁸⁸ The hearings before Judge Johnson on SCLC's suit seeking to enjoin Governor Wallace from blocking the march to Montgomery included four and one-half days of testimony from "numerous witnesses."⁸⁸⁹ Judge Johnson had to decide whether in this instance First Amendment rights to protest trumped the state's interest in safety on the highway.⁸⁹⁰ The hearings also considered whether Dr. King had committed contempt even though he had stopped short of the highway to Montgomery.⁸⁹¹ When Dr. King acknowledged to the court the existence of an implicit agreement that he would go no further than the bridge, it was sufficient to free him from the contempt charge.⁸⁹²

The lawyers for the movement presented a detailed plan for the next march.⁸⁹³ It would be a five-day peaceful march to Montgomery, with elaborate arrangements for avoiding interference with traffic and for feeding, bathroom facilities, sleeping, and cleaning up.⁸⁹⁴ Limiting the number of marchers in the narrowest sections of the route could provide further protection for the state's interests without significantly impeding the movement's ability to achieve its objectives.⁸⁹⁵

Arguably, the lawyers' careful plan made it easier for the court to find that protecting the activists' First Amendment interests was compatible with protecting traffic flow and safety on the highway. Judge Johnson authorized the march, giving great deference to the movement's First Amendment right "to protest peacefully and petition one's government for redress of grievance."⁸⁹⁶ The order limited the number of marchers to 300 once they reached the two-lane portion of the highway.⁸⁹⁷ It also directed Governor Wallace and other state officials to protect the marchers, and recognized the President's power to use federal troops for

⁸⁸⁵ See *id.* at 86–87.

⁸⁸⁶ See ABERNATHY, *supra* note 290, at 337–43.

⁸⁸⁷ See WESTIN & MAHONEY, *supra* note 136, at 173.

⁸⁸⁸ See *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (holding that parties may be guilty of contempt for violating a properly issued injunction while the question of its validity is pending in court, even if it is ultimately deemed invalid).

⁸⁸⁹ *Williams v. Wallace*, 240 F. Supp. 100, 103 (M.D. Ala. 1965); see also GARROW, *supra* note 22, at 111–12 (discussing the injunction SCLC sought against Governor Wallace and Sheriff Clark).

⁸⁹⁰ See *Williams*, 240 F. Supp. at 105–06; see also GARROW, *supra* note 22, at 112.

⁸⁹¹ See GREENBERG, *supra* note 51, at 385–87; WESTIN & MAHONEY, *supra* note 136, at 175.

⁸⁹² See WESTIN & MAHONEY, *supra* note 136, at 175–76.

⁸⁹³ GARROW, *supra* note 22, at 112.

⁸⁹⁴ *Id.*; WESTIN & MAHONEY, *supra* note 136, at 176.

⁸⁹⁵ See GARROW, *supra* note 22, at 112.

⁸⁹⁶ WESTIN & MAHONEY, *supra* note 136, at 176.

⁸⁹⁷ See *id.* at 177; see also GARROW, *supra* note 22, at 112. When they arrived outside Montgomery, 20,000 marchers assembled for the entry into the city. WESTIN & MAHONEY, *supra* note 136, at 177.

additional protection.⁸⁹⁸ Meanwhile, President Johnson had announced that he would provide whatever federal presence was necessary to protect the marchers if the district court permitted the march to proceed.⁸⁹⁹ In accordance with the court order, the march culminated with a 25,000-person demonstration on the steps of the state capitol.⁹⁰⁰ In this case, appealing the injunction was a success, but it would not always be Dr. King's chosen path.

iv. Chicago: Injunction (1965–1966)

The next year, in Chicago, Dr. King once again encountered an injunction restricting the direct action strategies and tactics. This time, on advice of counsel, he decided not to violate the injunction.⁹⁰¹ The scenario in Chicago was quite different from the southern movements. As the protesters marched into white neighborhoods to challenge housing discrimination and strive toward an “open city,” neighborhood residents and their supporters attacked them with rocks, bottles, and threats.⁹⁰² Rather than also attacking the protesters, as they had done in cities like Birmingham, the police tried to protect them from private citizens.⁹⁰³

Mayor Richard J. Daley saw these confrontations between protesters and residents as a threat to his tight control of the city.⁹⁰⁴ They also came with a significant cost to him politically. His two main constituencies—working-class whites and Blacks—were doing battle with each other, and neither was satisfied with his response.⁹⁰⁵ As a result, Daley pressed hard for negotiations—to take the issue out of the streets and into the meeting rooms.⁹⁰⁶ The negotiations led to “summit meetings” to work out agreements to address the problem of housing discrimination.⁹⁰⁷ When Mayor Daley asked the activists to stop the marches while they negotiated an agreement, Dr. King and other leaders refused.⁹⁰⁸

⁸⁹⁸ WESTIN & MAHONEY, *supra* note 136, at 176.

⁸⁹⁹ *Id.* at 175; *see also* GARROW, *supra* note 22, at 112, 114–15.

⁹⁰⁰ GARROW, *supra* note 22, at 117; *see also* Roy Reed, *25,000 Go to Alabama's Capitol; Wallace Rebuffs Petitioners; White Rights Worker Is Slain*, N.Y. TIMES (Mar. 25, 1965), <http://www.nytimes.com/learning/general/onthisday/big/0325.html>.

⁹⁰¹ However, there was considerable debate within the Chicago Freedom Movement about whether to violate the injunction. Rubinowitz & Shelton, *supra* note 651, at 683; *see also* FAIRCLOUGH, *supra* note 21, at 302; RALPH, *supra* note 62, at 178–79; WESTIN & MAHONEY, *supra* note 136, at 193–94.

⁹⁰² *See* ANDERSON & PICKERING, *supra* note 62, at 223–24; RALPH, *supra* note 62, at 120–21, 123–24.

⁹⁰³ RALPH, *supra* note 62, at 129, 132–33, 188.

⁹⁰⁴ Rubinowitz & Shelton, *supra* note 651, at 680–81.

⁹⁰⁵ Whites objected to Mayor Daley's letting the demonstrations take place and to having the police protect the marchers. *See* ROGER BILES, *RICHARD J. DALEY: POLITICS, RACE, AND THE GOVERNING OF CHICAGO* 128 (1995). The activists viewed the protection as inadequate. For example, during one march, Dr. King was hit in the head with a rock and knocked to the ground. AYERS & DOHRN, *supra* note 117, at 33. In another march, white demonstrators pushed protesters' cars into a nearby lagoon. Rubinowitz & Shelton, *supra* note 651, at 679 & n.141.

⁹⁰⁶ *See* Rubinowitz & Shelton, *supra* note 651, at 679–82.

⁹⁰⁷ *See id.* at 681–82.

⁹⁰⁸ *See* BILES, *supra* note 905, at 129–32. Throughout the protests, Mayor Daley was concerned with the negative media attention and worked behind the scenes for a compromise that would end the marches. *See id.* at 128–29. *See generally* RALPH, *supra* note 62, at 131–32, 141–42. Daley met with the realtors who insisted on following their clients' wishes, even if that meant discriminating against Black home seekers. *See id.* at 154–55. After the realtors stated that they were unwilling to change their

As the negotiations continued without reaching an agreement, Mayor Daley obtained an *ex parte* injunction in Cook County Circuit Court.⁹⁰⁹ The court imposed a series of restrictions on the marches: no more than one demonstration per day, no marches between 7:30 a.m. and 9 a.m., 4:30 p.m. and 6 p.m., or at night, and no more than 500 marchers at a time.⁹¹⁰ The court also required movement leaders to give the police twenty-four hours written notice of the time and place of each demonstration.⁹¹¹ The leadership of the Chicago Freedom Movement viewed Daley's actions as a betrayal of trust—seeking court intervention at a time when the parties were supposed to be bargaining in good faith for a resolution of the matter.⁹¹² The order significantly reduced the pressure CFM could put on the city through their direct action tactics.⁹¹³

Without indicating whether he would obey the court order, Dr. King issued a press release deeming the city's action “unjust, illegal, and unconstitutional.”⁹¹⁴ He then consulted with his lawyers, including James Nabrit and Norman Amaker, two LDF staffers.⁹¹⁵ They advised Dr. King that the injunction was much less sweeping than the one in Birmingham and was not clearly unconstitutional.⁹¹⁶ As a result, there would be less justification for disobeying it than in Birmingham (the fate of which remained uncertain at that point).⁹¹⁷ Instead, they suggested that the better route would be to contest it in court and seek modifications that would remove some of the most severe restrictions.⁹¹⁸ Dr. King agreed with this approach, so Nabrit and the other lawyers began preparing a motion to dissolve or modify the injunction.⁹¹⁹

Although Dr. King agreed to comply with the injunction, he still wanted to maximize his leverage to secure an acceptable agreement.⁹²⁰ He announced on Sunday, August 21, 1966, his plans to lead a “massive march” the following Sunday into the all-white, notoriously racist western suburb of Cicero.⁹²¹ In the 1950s, a

practices, Daley attempted to meet with and placate Dr. King and the other Chicago Freedom Movement leaders. *See id.* at 156–58; *see also* BILES, *supra* note 905, at 129.

⁹⁰⁹ *See* RALPH, *supra* note 62, at 160; *see also* City of Chicago v. King, 230 N.E.2d 41, 42 (Ill. App. Ct. 1967). For a copy of the city's complaint and motion for an injunction, see J.H. JACKSON, UNHOLY SHADOWS AND FREEDOM'S HOLY LIGHT app. e (1967). Mayor Daley had considerable control of the composition of the local courts through the slating process for judicial elections. *See generally* ADAM COHEN & ELIZABETH TAYLOR, AMERICAN PHARAOH: MAYOR RICHARD J. DALEY 104–05, 290 (2000).

⁹¹⁰ *See* JACKSON, *supra* note 909, at 261–62.

⁹¹¹ King, 230 N.E.2d at 42; *see also* WESTIN & MAHONEY, *supra* note 136, at 193.

⁹¹² RALPH, *supra* note 62, at 161.

⁹¹³ WESTIN & MAHONEY, *supra* note 136, at 193. Before this restriction, protesters marched in large numbers, sometimes over a thousand, through white-only blue-collar neighborhoods where Blacks were particularly unwelcome and encountered violent resistance that made for horrific images in the national media. While white neighborhood residents were still angry, the restrictions limited the impact of the protests. It was easier for police to protect the protesters and more difficult for the movement to garner national attention as victims of white violence. *See generally* BILES, *supra* note 905, at 124–29, 132–33; Rubinowitz & Shelton, *supra* note 651, at 679–80.

⁹¹⁴ WESTIN & MAHONEY, *supra* note 136, at 193.

⁹¹⁵ *Id.* at 194. At the time, Nabrit and Amaker had just recently finished working on the certiorari petition in *Walker v. City of Birmingham*. *Id.*; *see* 388 U.S. 307 (1967).

⁹¹⁶ WESTIN & MAHONEY, *supra* note 136, at 194.

⁹¹⁷ *Id.*

⁹¹⁸ *Id.*

⁹¹⁹ *See id.*

⁹²⁰ *See id.*

⁹²¹ *Id.*

white mob had burned down an apartment building when a Black family moved into the community.⁹²² Since the injunction applied only to the city of Chicago, the planned march would not violate it.⁹²³ The prospect of the Cicero march right on the city's border, with the likelihood of major violence against the demonstrators, provided the mayor with additional incentive to push through an agreement quickly. On August 26, the parties reached what was called the "Summit Agreement," which identified policies and programs designed to address housing discrimination in the city.⁹²⁴

With the agreement in hand, King called off the Cicero march and began winding down his operation in Chicago.⁹²⁵ CFM's critics argued that the agreement lacked specifics and enforcement provisions.⁹²⁶ Since the "Summit Agreement" ended the direct action phase of the movement, there is no way of knowing whether an appeal to dissolve or modify the injunction would have succeeded.

v. Memphis: Injunction (1968)

In Memphis, Dr. King's lawyers succeeded in securing a court order permitting a much-needed march to proceed. It was based on the innovative Selma order from three years earlier.⁹²⁷ In early 1968, Dr. King accepted an invitation to go to Memphis to support striking sanitation workers, just as he had done in so many other cities.⁹²⁸ He did not view this as a major initiative or investment of time for himself or SCLC, and the sanitation workers' demand for better wages fit with Dr. King's increasing focus on class issues.⁹²⁹ Addressing economic inequality was the goal of his planned major effort for that year—the Poor People's Campaign.⁹³⁰ Poor people from various racial and ethnic groups and from different parts of the country would come to Washington, set up a tent city, and lobby Congress to address the problem of poverty in a much more significant way.⁹³¹

When Dr. King agreed to lead a march in downtown Memphis, he did not realize that there were divisions within the movement.⁹³² Most importantly, an organization of young Blacks called the "Invaders" rejected the idea of nonviolence, arguing that the only way to get whites' attention on racial issues was through violence.⁹³³ The march turned into a debacle as some of the young

⁹²² See Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 392–93 (2002) (reviewing STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000)).

⁹²³ WESTIN & MAHONEY, *supra* note 136, at 194.

⁹²⁴ *Id.* at 194–95.

⁹²⁵ *Id.* at 194. That made moot the lawyers' preparations for seeking to dissolve or modify the injunction. *See id.*; *see also* RALPH, *supra* note 62, at 170.

⁹²⁶ *See* RALPH, *supra* note 62, at 196.

⁹²⁷ *See* discussion *supra* Section III.B.3.iii.

⁹²⁸ *See* FAIRCLOUGH, *supra* note 21, at 369–71.

⁹²⁹ *Id.* at 371; *see also* WESTIN & MAHONEY, *supra* note 136, at 262.

⁹³⁰ *See* discussion *supra* Section III.B.1.iii; *see also* BEIFUSS, *supra* note 65, at 15–16, 59, 191.

⁹³¹ *See* discussion *supra* Section III.B.1.iii.

⁹³² FAIRCLOUGH, *supra* note 21, at 374–75 (quoting Dr. King as having reported to the press: "[O]ur intelligence was absolutely nil."); *see also* WESTIN & MAHONEY, *supra* note 136, at 263.

⁹³³ WESTIN & MAHONEY, *supra* note 136, at 262–63.

demonstrators broke windows and looted dozens of stores.⁹³⁴ Dr. King concluded that he had to return to Memphis and show that he could lead a nonviolent march.⁹³⁵ His credibility was at stake, particularly with respect to ensuring a peaceful Poor People's Campaign in Washington later in April.⁹³⁶

As Dr. King anticipated, Memphis Mayor Henry Loeb instructed his city attorney to file for a temporary restraining order in federal district court, reasoning that any such march would be "a threat to public safety."⁹³⁷ The proposed order would prohibit "non-residents of the city acting in concert" from organizing or participating in a street demonstration."⁹³⁸ Dr. King's lawyers anticipated correctly that Judge Bailey Brown would issue the temporary restraining order after the proceeding on April 3, 1968.⁹³⁹

Dr. King expressed his commitment to proceed with the march even if his lawyers were unable to gain permission for it.⁹⁴⁰ He said both privately and publicly that he viewed the federal court order as a violation of his First Amendment rights, and he was prepared to violate it, if necessary, to carry out the planned march on the following Monday.⁹⁴¹ Dr. King was represented in the injunction proceedings by cooperating attorneys for the American Civil Liberties Union (ACLU). Lucius Burch, a respected white local lawyer, led the legal team as a *pro bono* attorney seeking to protect Dr. King's constitutional rights.⁹⁴² As an initial step, Dr. King's lawyers met with the city attorneys in an attempt to negotiate terms under which the march could proceed.⁹⁴³ The city's representatives rejected those overtures, since the city opposed the march under any conditions.⁹⁴⁴

On April 4, Judge Brown held a hearing on Dr. King's motion to dissolve or modify the injunction.⁹⁴⁵ The city argued that the Black community's anger was so high that a march could result in a riot worse than the deadly protests in Watts (Los Angeles) and Detroit.⁹⁴⁶ City officials also feared for Dr. King's life, which a march would put in danger.⁹⁴⁷

⁹³⁴ See FAIRCLOUGH, *supra* note 21, at 373.

⁹³⁵ *Id.* at 375; see also Cody, *supra* note 118, at 702.

⁹³⁶ See FAIRCLOUGH, *supra* note 21, at 375.

⁹³⁷ WESTIN & MAHONEY, *supra* note 136, at 264–65; see also Cody, *supra* note 118, at 702. They asserted federal jurisdiction primarily under diversity of citizenship and secondarily under federal question jurisdiction. Transcript of Hearing at 3, 10, *City of Memphis v. King*, No. C-68-80 (W.D. Tenn. Apr. 3, 1968) [hereinafter *Memphis TRO Hearing*].

⁹³⁸ WESTIN & MAHONEY, *supra* note 136, at 265.

⁹³⁹ *Id.*

⁹⁴⁰ Cody, *supra* note 118, at 703.

⁹⁴¹ WESTIN & MAHONEY, *supra* note 136, at 265–66, 268; see also Cody, *supra* note 118, at 703.

⁹⁴² WESTIN & MAHONEY, *supra* note 136, at 265; see also Cody, *supra* note 118, at 703.

⁹⁴³ WESTIN & MAHONEY, *supra* note 136, at 265.

⁹⁴⁴ *Id.*

⁹⁴⁵ Cody, *supra* note 118, at 703, 707; see also *Opinion & Temporary Injunction at 1*, *City of Memphis v. King*, No. C-68-80 (W.D. Tenn. Apr. 5, 1968), <http://catalog.archives.gov/id/641661>. Chauncey Eskridge, a Black lawyer from Chicago who was one of Dr. King's personal advisors and SCLC's General Counsel, joined the legal team for the hearing. WESTIN & MAHONEY, *supra* note 136, at 269.

⁹⁴⁶ WESTIN & MAHONEY, *supra* note 136, at 269.

⁹⁴⁷ *Id.*; see also *Memphis TRO Hearing*, *supra* note 937, at 9, 55, 58, 60–61; Cody, *supra* note 118, at 702, 707.

In cross-examining police witnesses, Lucius Burch emphasized the duty of the police to protect peaceful demonstrators and to apprehend those attempting to engage in violence.⁹⁴⁸ Allowing threats of violence to justify a ban on marches would undermine First Amendment rights of free speech and assembly.⁹⁴⁹ Burch also focused on the fact that city officials' proposed injunction named only non-residents as defendants.⁹⁵⁰ Local residents, including those who had turned to violence in the previous march, would not be affected by the injunction.⁹⁵¹ Burch argued to the court and to attorneys for the city that the city would be better off with the march being led by Dr. King, who was committed to nonviolence, than by local residents who did not necessarily share that philosophy.⁹⁵²

Dr. King's lawyers' arguments carried the day. Judge Brown decided that the march could proceed as scheduled, respecting the First Amendment rights at issue.⁹⁵³ The lawyers for Dr. King then proposed terms for the judge's order that were designed to ensure that the march would remain nonviolent, including designating the route, the maximum number of marchers abreast, the number and location of parade marshals, and a ban on marchers carrying anything that could be used for destructive purposes.⁹⁵⁴ Thus, rather than violating the original injunction, Dr. King had his lawyers move to dissolve or modify it—the process the Supreme Court majority envisioned in Birmingham's *Walker* case.⁹⁵⁵ In this instance, the court issued the order in such a timely manner that the march could proceed as planned.

On the evening of the hearing, Martin Luther King, Jr. was assassinated.⁹⁵⁶ Judge Brown issued his modified order the next day, with conditions for a peaceful march on April 8.⁹⁵⁷ Coretta Scott King stood in for her husband in the memorial march that day.⁹⁵⁸

⁹⁴⁸ WESTIN & MAHONEY, *supra* note 136, at 269.

⁹⁴⁹ *Id.* at 269–70. Burch also called Rev. James Lawson and Rev. Andrew Young, two of Dr. King's key aides, as his own witnesses. *Id.* at 270. They made forceful presentations about the crucial role of peaceful demonstrations for the Black community. *Id.* Burch recalled them focusing on peaceful demonstrations as “a means of communicating information to people who don't read the newspapers, as a way of getting people together for civil action, and to be a community. It was a magnificent philosophical presentation.” *Id.*

⁹⁵⁰ *See, e.g.,* Memphis TRO Hearing, *supra* note 937, at 84–85. Judge Brown noted none of the named defendants were residents of the state. *Id.* at 3. Presumably, city officials had named only non-residents to support their argument for diversity jurisdiction. *See id.; id.* at 20.

⁹⁵¹ *See id.* at 20–22.

⁹⁵² *See, e.g., id.* at 94–95 (“Now, if it is a fact there is going to be a march, I am going to ask you wouldn't you rather have Dr. Martin Luther King lead that march than a great many other people who might come in and replace him in his absence?”). Lawyers for the city argued that they did not want any march to take place. *See id.* at 59–62. Ultimately, they recognized that their proposed injunction could not ensure that result and that a march led by Dr. King had a better chance of remaining peaceful. *See* Cody Remarks, *supra* note 274, at 685.

⁹⁵³ WESTIN & MAHONEY, *supra* note 136, at 270; *see also* Cody, *supra* note 118, at 707.

⁹⁵⁴ Cody Remarks, *supra* note 274, at 685; *see also* Cody, *supra* note 118, at 707. Dr. King's lawyers borrowed from the court order in the Selma to Montgomery march in formulating the conditions they proposed to the court. *See* Cody Remarks, *supra* note 274, at 685.

⁹⁵⁵ *See* 388 U.S. 307 (1967).

⁹⁵⁶ Cody, *supra* note 118, at 708. A single shot mortally wounded Dr. King as he stood on the balcony of the Lorraine Motel. *See* ABERNATHY, *supra* note 290, at 440.

⁹⁵⁷ WESTIN & MAHONEY, *supra* note 136, at 271.

⁹⁵⁸ *Id.*

vi. Poor People's Campaign: Permission (1968)

Up until almost the very end of his life, Dr. King sought the assistance of his lawyers in an effort to secure required approvals that would enable him to proceed with planned protests. In still another escalation of nonviolent direct action, the Poor People's Campaign was an ambitious and complex movement that would require many levels of permissions from the White House down.⁹⁵⁹ There was significant opposition to the protest in the White House and Congress. President Johnson opposed the idea of a tent city in the shadow of the Washington Monument both because it offended him personally and out of fear of a disaster in his racially tense city.⁹⁶⁰ Attorney General Ramsey Clark persuaded the President that the protesters had the law on their side—the First Amendment—and that denying them legal options would probably result in greater disruption.⁹⁶¹ Segregationists and other conservatives in Congress were also unable to block the protest from proceeding.⁹⁶²

For this extraordinary movement, Dr. King needed new initiatives from his lawyers. A few weeks before his death, Martin Luther King, Jr. called on Jack Greenberg to come to Atlanta with some of his LDF colleagues to participate in the planning process for the Poor People's Campaign.⁹⁶³ Greenberg and Louis Pollak met with Dr. King to discuss the purposes and the logistics of the movement, including the kinds of approvals that would be necessary to build and maintain the proposed "Resurrection City."⁹⁶⁴

When SCLC moved forward after Dr. King's death, it continued to rely on LDF to secure permissions and agreements to proceed. Staffer Leroy Clark played a central role. He served as the "chief liaison" between SCLC and the Justice Department.⁹⁶⁵ "Attorney General Clark waived the requirement[] of march permits for demonstrations [on] Capitol Hill," on the condition that "they were orderly and did not interfere with traffic."⁹⁶⁶ Leroy Clark also led a team of LDF staff lawyers that met with the District of Columbia Corporation Counsel to make arrangements.⁹⁶⁷ Moreover, he negotiated a lease with the National Park Service for a site on the mall for Resurrection City.⁹⁶⁸ A permit from the National Park Service made the space available through the end of June.⁹⁶⁹

⁹⁵⁹ See, e.g., MCKNIGHT, *supra* note 67, at 110–11.

⁹⁶⁰ *Id.* at 110.

⁹⁶¹ See *id.* at 110–11.

⁹⁶² See *id.* at 110.

⁹⁶³ GREENBERG, *supra* note 51, at 463.

⁹⁶⁴ *Id.* at 464.

⁹⁶⁵ MCKNIGHT, *supra* note 67, at 117.

⁹⁶⁶ *Id.* Attorney General Clark also declared some areas off limits because he wanted to avoid possible confrontations between the protesters and concentrations of District of Columbia police. *Id.* at 118.

⁹⁶⁷ GREENBERG, *supra* note 51, at 465.

⁹⁶⁸ *Id.* Clark also recruited volunteer lawyers to represent protesters and arranged for Howard Law School professors to train them. *Id.*

⁹⁶⁹ *Id.* When the government was preparing to shut down Resurrection City in late June, negotiations were required to reduce tensions and the risk of violence. Federal officials met with campaign representatives, including legal counsel Christine Clark, to work out an effective plan. MCKNIGHT, *supra* note 67, at 136. As a result, the closure of Resurrection City proceeded peacefully. See *id.* at 137. LDF's final task involved responding to a bill from the federal government for more than \$70,000 for

4. Fundraising

Nearly empty coffers were a recurring reality for SCLC. As mentioned earlier, lawyers' founded the Gandhi Society in an effort to secure funding on a systematic basis.⁹⁷⁰ However, the organization quickly fell on hard times. In part because of federal inaction in processing the society's application for tax-exempt status that hindered fundraising, Clarence Jones had to secure a \$6,000 loan in early 1964 to cover an overdrawn bank account.⁹⁷¹ Dr. King helped replenish the coffers by donating \$25,000 of his 1964 Nobel Peace Prize.⁹⁷² The Treasury Department granted tax-exempt status in 1965, but financial woes persisted.⁹⁷³

The lawyers' involvement in fund-raising then became ad hoc. In addition to ongoing financial needs, discrete crises and opportunities arose. The year 1963 had an example of each of those situations. Inner circle member Clarence Jones was involved on both occasions.⁹⁷⁴ Making bail for protesters required resources that stretched SCLC's capacities. For example, Birmingham officials ratcheted up the bail to put even greater strains on the movement's budgets,⁹⁷⁵ and the lawyers had to find the funds and make arrangements to bail out large numbers of protesters.⁹⁷⁶

i. Birmingham

In 1963, the Birmingham movement enlisted young students to march and swell the ranks of the demonstrators.⁹⁷⁷ As anticipated, Chief of Police Bull Connor carried out mass arrests of protesters, including hundreds of young students.⁹⁷⁸

"use of equipment, damage to trees, razing the shanties, and so forth." GREENBERG, *supra* note 51, at 466. LDF consulting lawyer Frank Reeves negotiated it down to \$2,197. *Id.*

⁹⁷⁰ See discussion *supra* Section II.A.3.

⁹⁷¹ *Gandhi Society for Human Rights*, *supra* note 518.

⁹⁷² *Id.*; see also GARROW, *supra* note 2, at 368, 698 n.26.

⁹⁷³ *Gandhi Society for Human Rights*, *supra* note 518; see also FAIRCLOUGH, *supra* note 21, at 98 (noting that when the Gandhi Society finally gained tax-exempt status in 1965, the organization was renamed the American Foundation on Nonviolence); GARROW, *supra* note 2, at 542, 562 (discussing SCLC's financial difficulties); Letter from Martin Luther King, Jr. to Leslie Dunbar, Exec. Dir., Marshall Field Found. 1 (Aug. 22, 1966), <http://www.thekingcenter.org/archive/document/letter-mlk-leslie-dunbar#> ("I note in your letter of June 21, 1966 that there was some concern regarding SCLC seeking tax exempt status in order that it could administer the funds to [the Citizenship Education Program] granted by the Marshall Field Foundation. . . . SCLC does have a tax exempt wing, namely, the American Foundation on Nonviolence (AFON). . . . Regarding our financial assets, the total cash in banks at this time comes to \$8,968.23.").

⁹⁷⁴ See discussion *infra* Sections III.B.4.i–ii.

⁹⁷⁵ See JONES & CONNELLY, *supra* note 53, at 196 n.5 ("The city, in its effort to deter the Birmingham campaign, quadrupled the cost of bail, effectively using economic terrorism to prevent the SCLC from honoring its commitments [to bail out protesters]."). St. Augustine officials had pursued similar tactics, raising bail from \$100 to \$1000 for each person arrested. See *St. Augustine Movement*, *supra* note 57.

⁹⁷⁶ See discussion *infra* Section III.B.4.i.

⁹⁷⁷ See FAIRCLOUGH, *supra* note 21, at 124–25; JONES & CONNELLY, *supra* note 53, at 67–76, 196; discussion *supra* Section III.B.1.i.

⁹⁷⁸ KUNSTLER, *supra* note 1, at 189–90. In doing so, Connor again played into the hands of the movement. Massive arrests of young people for engaging in nonviolent protest against racial segregation helped build public support for the movement. See FAIRCLOUGH, *supra* note 21, at 124–27; see also BELAFONTE WITH SHNAYERSON, *supra* note 326, at 259–65; GARROW, *supra* note 22, at 139–41.

Those arrests posed a significant problem for movement leaders. They had assured the students' parents that they would provide the bail money necessary to get them out of jail so they could return to school.⁹⁷⁹ However, as the numbers of students arrested increased and local officials raised the bond requirements, it became clear that the funds available were far short of what was required to get the students out of jail.⁹⁸⁰ The movement found itself in serious danger of renegeing on its promise to the parents—a potential crucial breach of faith.⁹⁸¹

Dr. King's lawyer Clarence Jones enlisted Harry Belafonte, a celebrated singer, actor, civil rights activist, and loyal supporter of Dr. King, to address this critical situation.⁹⁸² Belafonte used his contacts in the office of Governor Nelson Rockefeller of New York to set up a meeting between Jones and a member of the Governor's staff, which led to a meeting with the Governor at one of the Rockefeller family's banks in New York.⁹⁸³ The movement was about to become the beneficiary of the Rockefeller's philanthropy. Since the money—\$100,000—came from a bank, it came in the form of a promissory note.⁹⁸⁴ Jones was reluctant to sign the note, however, since neither he nor SCLC had the funds to repay it.⁹⁸⁵ The Governor insisted that he sign the note, assuring him that it would not be a problem.⁹⁸⁶ When the note arrived, it was stamped "Paid in full," thus turning it into a contribution to the movement.⁹⁸⁷ That enabled the organizers to get the students released on bail and to meet their commitments to the parents whose sons and daughters had taken the risk of joining the protest.⁹⁸⁸

ii. March on Washington

Later that year, at the March on Washington, Clarence Jones pursued another creative tactic that brought significant funds to the SCLC. Just before the event, he copyrighted what became the "I Have a Dream" speech.⁹⁸⁹ He had seen others exploit Dr. King's words in the past, and he hoped to prevent that from happening again.⁹⁹⁰ As staffers were making copies of the speech for delivery to the media, he

⁹⁷⁹ See JONES & CONNELLY, *supra* note 53, at 67.

⁹⁸⁰ *Id.* at 67–68.

⁹⁸¹ *Id.* at 70.

⁹⁸² See BELAFONTE WITH SHNAYERSON, *supra* note 326, at 257–65; see also JONES & CONNELLY, *supra* note 53, at 72.

⁹⁸³ JONES & CONNELLY, *supra* note 53, at 73–76.

⁹⁸⁴ *Id.* at 74–75.

⁹⁸⁵ *Id.* at 75–76. It was especially problematic because it was a "demand note," which meant that the bank could call in the note at any time. See Clayborne Carson, Martin Luther King, Jr. Centennial Professor of History; Founding Dir., Martin Luther King, Jr. Research & Educ. Inst., Stanford Univ., Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King's Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), *in* 10 NW. J.L. & SOC. POL'Y 688, 697 (2016).

⁹⁸⁶ JONES & CONNELLY, *supra* note 53, at 75.

⁹⁸⁷ See BELAFONTE WITH SHNAYERSON, *supra* note 326, at 264–65; JONES & CONNELLY, *supra* note 53, at 76.

⁹⁸⁸ See BELAFONTE WITH SHNAYERSON, *supra* note 326, at 264; JONES & CONNELLY, *supra* note 53, at 70, 76.

⁹⁸⁹ JONES & CONNELLY, *supra* note 53, at 91–92.

⁹⁹⁰ *Id.* at 92.

had them place the common law copyright symbol of the “c” in a circle on every page of every copy that they distributed.⁹⁹¹

Shortly after the march, Jones filed the paperwork to secure formal copyright protection.⁹⁹² He also noticed that record stores in Harlem were blaring recordings of the speech out on to the sidewalks.⁹⁹³ Two companies were selling large quantities of the recording, arguably in violation of the copyright.⁹⁹⁴ Jones filed suit in the District Court for the Southern District of New York, seeking compensation based on a claim of copyright infringement.⁹⁹⁵ While the defendants claimed that Dr. King’s giving the speech to 200,000 people meant that it had entered the public domain, the district court found otherwise.⁹⁹⁶ Giving a speech did not render the copyright invalid, so the court ordered the defendants to pay damages for the infringement.⁹⁹⁷ The money recovered through this litigation provided important resources for SCLC.⁹⁹⁸

CONCLUSION

Leading Martin Luther King, Jr. scholar Professor Clayborne Carson has observed:

[I]t’s also the case that in studying Martin Luther King, one of the things that becomes very clear is that Martin Luther King really needed lawyers. . . .

During his career, as a leader, not only did he need lawyers for incidents of civil disobedience and basically movement activity, he needed lawyers because often, the courts are used as a pretext to stop leaders, using other kinds of laws that have nothing to do with civil rights protest.⁹⁹⁹

The need for lawyers became clear the day Rosa Parks refused to give up her seat on a Montgomery bus in December 1955 and continued until the day of Dr. King’s death in April 1968.¹⁰⁰⁰ The need grew and changed with the evolution of the nonviolent direct action strategy, but the lawyers’ remained a constant presence throughout.

⁹⁹¹ *Id.* at 94.

⁹⁹² *Id.* at 131–34.

⁹⁹³ *Id.* at 138.

⁹⁹⁴ *Id.* at 139.

⁹⁹⁵ See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963); see also JONES & CONNELLY, *supra* note 53, at 140.

⁹⁹⁶ See *Mister Maestro*, 224 F. Supp. at 103, 106–08.

⁹⁹⁷ See *id.* at 108.

⁹⁹⁸ See JONES & CONNELLY, *supra* note 53, at 143.

⁹⁹⁹ Clayborne Carson, Martin Luther King, Jr. Centennial Professor of History; Founding Dir., Martin Luther King, Jr. Research & Educ. Inst., Stanford Univ., Remarks at the Northwestern Law Journal of Law and Social Policy Eighth Annual Symposium: Martin Luther King’s Lawyers: From Montgomery to the March on Washington to Memphis (Oct. 31, 2014), in 10 *Nw. J.L. & Soc. POL’Y* 634, 635 (2016).

¹⁰⁰⁰ See discussion *supra* Sections II.B.1, III.B.3.v.

Several themes stand out about those lawyers. Perhaps most strikingly, Dr. King was able to implement his preference for Black lawyers.¹⁰⁰¹ While Blacks represented a miniscule percentage of the legal profession at mid-century, almost half of the lawyers involved in the movements and events discussed within the Article were Black.¹⁰⁰² They played central roles in many of the most critical challenges that Dr. King and the movements faced. It was Dr. King's fond hope that Black professionals would take their share of responsibility in attacking the profound racial problems of the time.¹⁰⁰³ Black lawyers answered the call.

Overall, the lawyers represented a mix of local practitioners and those coming from the North.¹⁰⁰⁴ Because so much of Dr. King's work was in Alabama—Montgomery, Birmingham, and Selma—several Alabama lawyers served a number of movements.¹⁰⁰⁵ Others, such as some of the lawyers in Georgia, and the lawyers in Chicago and in Memphis, served in a single movement.¹⁰⁰⁶ As a result, many of the lawyers who represented Dr. King did not know each other.¹⁰⁰⁷

In analyzing the deployment of those lawyers, the main focus centers on the ways in which the lawyers' roles tracked the strategic choices that Dr. King and his colleagues made at different times. Since nonviolent direct action was center stage, the lawyers always had a key role to play in supporting that activism—helping to ensure that the marches, demonstrations, and protests could proceed as planned. In the early years, the activists also asked their lawyers to file federal lawsuits challenging the constitutionality of state and federal segregation laws.¹⁰⁰⁸ During this period, Dr. King and his colleagues operated on the assumption that educating their opponents could persuade them to begin to break down the entrenched system of segregation.¹⁰⁰⁹

With the failure of the Albany Movement in 1962, movement leaders reexamined their assumptions and put aside “persuasive nonviolence” strategies in favor of “coercive nonviolence” strategies. As tactics became more aggressive, the movement's lawyers had new and different tasks. Whatever their own strategic preferences may have been, they saw their role as deferring to their clients' choices in both the early years and the later years of the Civil Rights Movement.¹⁰¹⁰ When Dr. King decided to violate an injunction in Birmingham, the lawyers challenged the contempt citation up to the Supreme Court.¹⁰¹¹ When young Birmingham students faced expulsion for participating in the demonstrations there, the lawyers challenged the school board's actions in court.¹⁰¹² When the Chicago Freedom

¹⁰⁰¹ See discussion *supra* Section I.B.2.i.

¹⁰⁰² See discussion *supra* Section I.B.2.i; see also *infra* Appendix.

¹⁰⁰³ See discussion *supra* Sections I.A, I.B.2.i.

¹⁰⁰⁴ See discussion *supra* Sections I.B.1.

¹⁰⁰⁵ See discussion *supra* Sections II.A.1.i.a, II.A.2.i, II.B.1, III.B.1.i, III.B.3.i, III.B.3.iii.

¹⁰⁰⁶ See discussion *supra* Sections II.A.1.i.d, II.A.2.ii, II.B.2, III.B.2, III.B.3.iv–v.

¹⁰⁰⁷ At the October 31, 2014 *Northwestern Journal of Law and Social Policy* symposium on Martin Luther King, Jr.'s Lawyers, lawyers from Chicago, Atlanta, and Memphis met each other for the first time. Even Clarence Jones, the keynote speaker who worked closely with Dr. King from 1960 until his death, did not know those local lawyers.

¹⁰⁰⁸ See discussion *supra* Section II.B.

¹⁰⁰⁹ See generally *supra* note 315 and accompanying text.

¹⁰¹⁰ See *supra* notes 30, 230 and accompanying text.

¹⁰¹¹ See discussion *supra* Section III.B.3.i.

¹⁰¹² See discussion *supra* Section III.B.1.i.

Movement decided to engage in a rent strike to pressure landlords to repair their substandard buildings, the lawyers fought the building owners' attempts to evict their tenants.¹⁰¹³

Dr. King needed lawyers to do what would help support and advance the changing strategies he pursued. That is what they did, for which Martin Luther King, Jr. was extremely grateful.

¹⁰¹³ See discussion *supra* Section III.B.2.

APPENDIX

Martin Luther King, Jr.'s Lawyers

Name	Race	Gender	Local/Northern		Affiliation	Participation
			Local/	Northern		
Abram, Morris	W	M	L		Law firm	Georgia incarceration
Amaker, Norman	B	M	N		LDF - Staff	Recurring
Amsterdam, Anthony G.	W	M	N		LDF - Consultant	Birmingham
Aronson, Henry	W	M	N		LDF - Staff	Mississippi matters
Arrington, Henry	B	M	L		SCLC	Selma
Augustine, Israel M., Jr.	B	M	L		SCLC	Part-time general counsel
Bailey, Walter	B	M	L		Law firm	Memphis
Billingsey, Orzell	B	M	L		Law firm/LDF - Cooperating Attorney	Alabama matters
Brainin, David N.	W	M	N		Law firm	Libel litigation
Bronstein, Alvin J.	W	M	N		Lawyers Constitutional Defense Committee	Selma
Burch, Lucius E., Jr.	W	M	L		Law firm	Memphis
Carter, Robert	B	M	N		NAACP	Montgomery
Caywood, David	W	M	L		Law firm	Memphis
Chestnut, J. L., Jr.	B	M	L		LDF - Cooperating Attorney	Selma
Clark, Christine	B	F	N			Poor People's Campaign
Clark, Leroy	B	M	N		LDF - Staff	Recurring
Clayton, Charles M.	B	M	L			Georgia incarceration
Cody, W.J. Michael	W	M	L		Law firm	Memphis
Conley, Charles S.	B	M	L		Law firm	Libel litigation
Cornfield, Gilbert	W	M	L/N		Law firm	Chicago Freedom Movement
Cotton, Eugene	W	M	N		Law firm	Libel litigation
Crawford, Vernon	B	M	L		LDF - Cooperating Attorney	Libel litigation
Delany, Hubert	B	M	N		Law firm	Alabama perjury trial
Durr, Clifford	W	M	L		Law firm	Montgomery
Edelman, Marian Wright	B	F	N		LDF - Staff	Poor People's Campaign
Eskridge, Chauncey	B	M	N		Law firm/SCLC	Recurring
Feldman, Gil	W	M	L/N		Law firm	Chicago Freedom Movement
Finney, James	B	M	N		LDF - Staff	Poor People's Campaign
Goldfarb, Ronald	W	M	L			St. Augustine
Gray, Fred	B	M	L		MIA/LDF - Cooperating Attorney	Alabama matters
Greenberg, Jack	W	M	N		LDF - Staff	Recurring
Hall, Peter	B	M	L		Law firm/LDF - Cooperating Attorney	Alabama matters
Harris, Raymond S.		M	N			Libel litigation

Name	Race	Gender	Local/Northern		Affiliation	Participation
			Local	Northern		
Hollowell, Donald	B	M	L		Law firm	Georgia incarceration; Albany
Holt, Leo	B	M	L/N		Law firm	Chicago Freedom Movement
Jelin, Stephen J.	W	M	N		Law firm	Libel litigation
Johnson, Earl	B	M	L		LDF - Cooperating Attorney	St. Augustine
Jones, Chuck	B	M	L		LDF - Staff	Selma
Jones, Clarence	B	M	N		Inner Circle	Recurring
Kheel, Theodore	W	M	N		Law firm	Gandhi Society; Birmingham
King, C.B.	B	M	L		LDF - Cooperating Attorney	Albany
Kinoy, Arthur	W	M	N		Law firm	Montgomery
Kunstler, William M.	W	M	N		Law firm/ACLU	Recurring
Langford, Charles	B	M	L		MIA leader	Alabama matters
Levison, Stanley	W	M	N		Inner Circle	Recurring
Lubell, David G.	W	M	N		Law firm	Libel litigation
Lucas, Louis	W	M	L		Law firm	Memphis
Markham, Charles B.	W	M	N		Law firm	Libel litigation
Marshall, Thurgood	B	M	N		LDF - Staff	Montgomery
Ming, William Robert	B	M	N		Law firm	Alabama perjury trial
Moore, Howard, Jr.	B	M	L		Law firm	Albany
Morgan, Charles	W	M	L		ACLU	Memphis
Motley, Constance Baker	B	F	N		LDF - Staff	Recurring
Nabrit, James M., III	B	M	N		LDF - Staff	Birmingham; Selma
Newman, Charles	W	M	L		Law firm	Memphis
Pierce, Samuel R., Jr.	B	M	N		Law firm	Libel litigation
Pollak, Louis	W	M	N		LDF - Consultant	Recurring
Pratt, John (Jack)	W	M	N		National Council of Churches	St. Augustine
Ralston, Charles Stephen	W	M	N		LDF - Staff	Birmingham; St. Augustine; Selma
Rachlin, Carl	W	M	N		CORE	Albany
Reeves, Frank D.	B	M	N		Howard University School of Law	Albany; March on Washington; Poor People's Campaign
Rogers, William P.	W	M	N		Law firm	Libel litigation
Russell, Joseph B.	W	M	N		Law firm	Libel litigation
Seay, S.S., Jr.	B	M	L		LDF - Cooperating Attorney	Alabama matters
Shores, Arthur	B	M	L		Law firm/LDF - Cooperating Attorney	Alabama matters
Simon, Tobias	W	M	L		LDF - Cooperating Attorney	St. Augustine
Spiegel, Benjamin	W	M	N		Law firm	Libel litigation
Wachtel, Harry	W	M	N		Inner Circle	Recurring

Name	Race	Gender	Local/Northern		Affiliation	Participation
			Local	Northern		
Wachtel, I.H.		M	N		Law firm	Libel litigation
Ward, Horace T.	B	M	L		Law firm	Georgia incarceration; Albany
Watt, Richard F.	W	M	N		Law firm	Libel litigation; Chicago Freedom Movement
Weinstein, Jack B.	W	M	N		LDF - Consultant	
Wofford, Harris	W	M	N		Law firm	Georgia incarceration
Zarr, Melvyn	W	M	N		LDF - Staff	Poor People's Campaign

Total Lawyers: 74

Race
 Black: 35
 White: 36
 Unknown: 3

Gender
 Female: 3
 Male: 71

Local/Northern
 Local: 29
 Northern: 42
 Local/Northern: 3