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David Luban
University of Maryland

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DIFFERENCE MADE LEGAL: THE COURT AND DR. KING

*David Luban**

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

— *Robert Cover*¹

No fact that is a cause is for that very reason historical. It becomes historical posthumously, as it were, through events that may be separated from it by thousands of years. A historian who takes this as his point of departure stops telling the sequence of events like the beads of a rosary. Instead, he grasps the constellation which his own era has formed with a definite earlier one. Thus he establishes a conception of the present as the “time of the now” which is shot through with chips of Messianic time.

— *Walter Benjamin*²

Legal argument is a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear by recounting its circumstances of origin and assigning its place in history. I shall call such a historical placement of legal materials a *political narrative*. A string of precedents, a legislative history, an examination of framers’ intent are all political narratives. To the victor goes also the right to recite what I shall call the *local narrative* constituting “the facts of the case at hand,” and, following on these two rights, the additional right to pronounce the correspondence or mirroring of each narrative in the other that renders further argument unnecessary.

* Professor of Law, University of Maryland. B.A. 1970, University of Chicago; M.A. (Philosophy) 1973, M.Phil. (Philosophy) 1973, Ph.D. (Philosophy) 1974, Yale. — Ed. For their help in trying to bring earlier drafts of this Article under some semblance of control, I would like to thank David Bogen, Paul Kahn, Judith Lichtenberg, Richard Pildes, Peter Quint, Sara Vance, Robert Wachbroit, Steven Winter, and Gordon Young.

1. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

2. W. BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 255, 265 (H. Arendt ed. 1968). The phrase “time of the now” translates “*Jetztzeit*,” and refers (Benjamin’s editor tells us) to the mystical “standing now,” the moment in which (to quote *Henry IV* Part 1, Act v, sc. 4, ll. 82-83) “time, that takes survey of all the world, must have a stop.” Cf. W. BENJAMIN, *supra*, at 263 n.*.

By “correspondence” and “mirroring” I mean that legal argument aims to show that *these facts* precisely exemplify the political problem that *this body of law* was intended to solve and, conversely, that the history of this body of law precisely prefigures the problem that led to the present litigation. To legitimize legal argument it is essential that the political and local narratives mirror each other precisely. For if an advocate or a judge were to admit that the legislative history or the precedents in a case were ambiguous, or that the facts before the court failed to square with past political narratives in important respects, the argument would lose its aura of authority and invite a self-proliferating skepticism rather than conviction. It is to avoid this deflationary loss of aura that political and local narratives must dovetail in an improbable mutual correspondence that legitimizes both the favored conclusion and the political narrative that embeds it.

Thus the framers of past law are endowed with a weak prophetic power of anticipating today’s controversies, for a legal argument not only invokes and applies the political history but also sanctifies and canonizes their judgment. And the everyday business described in local narratives is charged with the meaningfulness of recurrence or even predestination, for the facts of a case are not merely recited but also brought under the jurisdiction of a political narrative that reveals the case as a reenactment of an archetypal piece of the community’s history.

When you control the power of recounting history, you have therefore won a legal argument, for a legal argument is nothing but the confluence of a political narrative culminating in a proposition of law (which, as Cover suggests in my epigraph, attains meaning only when it is embedded in such a narrative) and a local narrative of events surrounding the lives of the litigants. Forcing these two narratives into correspondence imparts whatever power of conviction legal argumentation possesses.

This accounts for an experience that most lawyers have had, namely reading a majority appellate opinion and at first blush finding it thoroughly convincing, its arguments flowing inevitably from the precedents and the facts; then reading a dissenting opinion and finding it equally compelling. When we closely compare the two, we find that the authors have recounted a carefully edited selection of the facts of the case — what I have called a local narrative — together with a precedential or constitutional or legislative history (a political narrative) contrived to exhibit an (illusory?) correspondence with the local narrative. As Benjamin puts it in the passage I have taken as my second epigraph, the author of a legal argument “grasps the constellation

which his own era has formed with a definite earlier one," and out of that constellation radiates the authority and conviction of the argument.³

Historical time, Benjamin tells us elsewhere, is neither homogeneous nor empty.⁴ To recount a history is to align certain moments with each other so that the later moments reenact the earlier and recreate them as their precursors, in just the way that today's fashion suddenly and rather mysteriously attunes itself to the sensibility of an earlier time, using its styles as a trope through which we understand our own orientation to the world.⁵ Historical time is a structure of such pairings, mirrorings, affinities, backward causations, "constellations" formed by distinct epochs and episodes. (Since Watergate, journalists inevitably have abbreviated political scandals by coinages ending with the "-gate" suffix. Koreagate and Billygate and *Contragate* reenact Watergate and recreate it as their precursor.) Political narrative and local narrative, past and present, press into alignment and are cemented together, as the jurist-storyteller literally narrates them into equivalence. The legal doctrine of *stare decisis* is nothing more than a formalist expression of the more fundamental juristic act of narrative imagination by which distinct historical episodes are fused into political equivalence.

Holmes was therefore wrong: The life of the law is neither logic nor experience, but narrative and the only partially civilized struggle for the power it conveys. To put the point in slightly different terms, legal argument is at bottom neither analytic nor empirical, but rather historical. The life of the law is not a vision of the future but a vision of the past; its passions are unleashed, to use Benjamin's words, "by the image of enslaved ancestors rather than that of liberated grandchildren."⁶

We are all familiar with the struggle for the privilege of recounting our large-scale political narratives. To take one example, liberals and Christian fundamentalists currently contend for the privilege of recounting the history of the establishment clause: was it, as the liberal would have it, a chapter in the effort to expunge the madness of religious war from civilization by expelling religion from politics; or was it, as some fundamentalists would have it, part of the saga of dissident

3. W. BENJAMIN, *supra* note 2, at 265.

4. *Id.* at 263.

5. "The French Revolution viewed itself as Rome reincarnate. It evoked ancient Rome the way fashion evokes costumes of the past. Fashion has a flair for the topical, no matter where it stirs in the thickets of long ago; it is a tiger's leap into the past." *Id.* at 263.

6. *Id.* at 263.

Christian sects, consolidating their right to prevent any one sect from triumphing over the others in what was nevertheless an officially God-fearing republic?⁷ To the victor of the struggle go the spoils: the right to (re)tell the history of the establishment clause, including the self-referential (indeed, viciously circular) right to (re)tell the history of that very struggle. And from that right will flow the further right to determine the future course of American institutions. The civil rights movement and the forces of segregation waged such a struggle over the narrative history of the equal protection clause. Similarly, antebellum abolitionists strove vainly for the historian's scepter that would have allowed them to tell an anti-slavery history of the Constitution itself.⁸ There is nothing mysterious about such battles: they are the stuff of doctrinal legal history.

Equally important is the parallel power over local narratives, the power of the victor to build whatever facts he or she wishes into the fabric of legal decisions by (re)interpreting the record.⁹ Just as in the case of political narratives, losers endure not only the material burdens of defeat, but also the ignominy of helplessly witnessing their own past edited, their own voices silenced in the attempt to tell that past.¹⁰ And thus the fight of those voices that have been silenced by the law — and those obviously include not only the voices of miscreants and justifi-

7. This is not merely a fundamentalist view; the idea that the establishment clause allows the government to support religion provided that it does so without preference among sects has been propounded by influential conservatives, including William Bennett, Edwin Meese, and Chief Justice Rehnquist. L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* xi-xiii (1986).

8. See generally R. COVER, *JUSTICE ACCUSED* (1975). The reader may note that by recounting these three episodes — abolitionism, civil rights, and secularism — as though they formed a series, I am myself offering a meaning-giving and hence controversial political narrative. To accept this narrative is to accept that the liberal view of the establishment clause is like the civil rights movement's view of the equal protection clause and the abolitionists' view of the Constitution as a whole: all of them manifest a repeated pattern according to which the meaning of the constitution lies in its promotion of cosmopolitanism — Jeffersonian enlightenment — over a backward sectarianism and particularism or racism. Anyone who accepts my series has already taken a large step toward accepting the value judgment toward which it is tacking, namely that the fundamentalist view of the establishment clause is as unenlightened and uncivilized as race segregation and slavery. *Caveat lector!* — political narrative *is* moral argument.

9. As Judge Posner astutely remarks, the facts of appellate cases are usually too distorted for forensic purposes to ground sensible judgments of how the world really is. R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (forthcoming).

10. In Nietzsche's words, "the text finally disappeared under the interpretation." F. NIETZSCHE, *BEYOND GOOD AND EVIL* 49 (Kaufman trans. 1966). Benjamin cautions the historical materialist historian thus:

Whoever has emerged victorious participates to this day in the triumphal procession in which the present rulers step over those who are lying prostrate. According to traditional practice, the spoils are carried along in the procession. They are called cultural treasures, and a historical materialist views them with cautious detachment. For without exception the cultural treasures have an origin which he cannot contemplate without horror.

W. BENJAMIN, *supra* note 2, at 258.

bly unsuccessful litigants, but also the voices of racial minorities, of women, of homosexuals, of the poor — is, as Benjamin put it, “the fight for the oppressed past.”¹¹

It is a fight that can be joined (though not won) by resuscitating those voices and coming to understand how they organize legal materials, how they embed these materials in narratives, how they mirror local narratives in political narratives. It is a fight that requires in addition some understanding of the forensic limitations of these narratives — ultimately, of whether they subvert their own power to convince.

My aim in this essay is to contrast two legal retellings of the same event: a set of demonstrations sponsored by the Southern Christian Leadership Conference in Birmingham, Alabama in 1963 that led to the arrest and incarceration of Martin Luther King, Jr. One is the Supreme Court majority opinion in *Walker v. City of Birmingham*, sustaining King’s conviction;¹² the other, King’s own defense of his actions in his *Letter from Birmingham Jail*.¹³ I wish to show how the self-same event entails radically different legal consequences when it appears in different narratives, one the Supreme Court’s official voice, the other the excluded voice of one of the defendants whose condemnation the Supreme Court affirmed. In each, I shall be focusing on aspects usually thought of as literary or “rhetorical”: the structure of narrative, the voice, the range of allusion, the questions that the authors intended to invoke and — equally importantly — those they hoped or had to forestall. If “rhetorical” is meant to indicate conviction through narrative rather than logical procedures, I accept the label; if “rhetorical” is meant to contrast with legitimate argumentation, I reject it. For I have been claiming so far that legal argument gains legitimacy just to the extent that it is able to ground the authority of its own narratives. The criticisms I shall offer of both the Court’s opinion and King’s *Letter* are criticisms of narrative vision as much as logical coherence.

Walker and King’s *Letter* explicitly raise the theme of the legitimacy of political authority and thus of disobedience to authority. The

11. W. BENJAMIN, *supra* note 2, at 265.

12. 388 U.S. 307 (1967) (criminal contempt conviction of King and other demonstrators for violating injunction not invalidated by likely unconstitutionality of injunction).

13. M.L. KING, *Letter from Birmingham Jail*, in WHY WE CAN’T WAIT 77 (1963) [hereinafter KING, *Letter*]. Since much of my essay consists of a close reading of the *Walker* opinion and King’s *Letter*, a reader may be well advised to read through them first; neither is especially lengthy. Indeed, since much of my argument at the beginning and end of the present essay is drawn from W. BENJAMIN, *supra* note 2, I shall have the temerity to suggest reading these as well (they amount to only 11 pages).

themes of narrative and authority are related in that the state's claim to its citizens' unconditional obedience presupposes that officials' narratives, local as well as political, occupy a privileged, canonical status. Why should that be?¹⁴ Previously, I have spoken as though the winner of a legal argument gets to recount its central narratives. But of course that is not true, if by "winner" we mean "winning litigant." In each and every case a government official, a judge, preempts the historian's scepter. Can *this* particular piece of victor's history provide its own validation? This is the deep question raised in *Walker*, and part of my project is to suggest that the answer is no.

Legal narrative and legal authority, then, form two of the themes I shall be exploring. These two themes together point us to a third, one that in any event arises directly from a reading of King's *Letter*. Throughout history, narrative and normative authority have been successfully fused in just one canonical case; it is the only one in which the bare recounting of events grounds its own authenticity and the normative authority of the narrator. I am speaking, of course, of holy scriptures, theogonies. As we shall see, Martin Luther King's *Letter* embeds the Birmingham demonstrations in a biblical narrative that adds immeasurably to the power of his argument by invoking scriptural history.

In addition to his numerous biblical allusions, King offers secular political narratives and arguments, and these form a more obvious point of comparison with the *Walker* opinion. But one of the conjectures I shall be exploring is that even purely secular arguments are able to connect normative authority with narrative only by adopting an essentially religious or theological stance toward their narrative materials, and I shall suggest that *Walker* parallels the biblical portions of King's *Letter* fully as much as it does the secular.

Let me illustrate what I mean by "secular arguments adopting an essentially theological stance." In his interesting book *Constitutional Faith*,¹⁵ Sanford Levinson investigates some of the ways in which Americans — citizens and judges alike — invest the (secular) Constitution with religious or divine properties. Madison described constitutions as "political scriptures"; Jefferson referred to the Philadelphia Convention as "an assembly of demigods"; Washington asked that "the Constitution be sacredly maintained"; Lincoln spoke of "rever-

14. This is the question that preoccupies Cover, *supra* note 1. His answer is that it shouldn't be, that even the narrative interpretations of the law offered by the United States Supreme Court have no special claims to validity. *Id.* at 28; see also S. LEVINSON, *CONSTITUTIONAL FAITH* 27-53 (1988). It will be obvious to readers of Cover's essay that it has decisively influenced my own argument throughout the present Article.

15. S. LEVINSON, *supra* note 14.

ence for the laws" as the "political religion of the nation."¹⁶ These metaphors were not meant figuratively; they were grounded in Madison's insight that the "complicated form of [the American] political system . . . requires a more than common reverence for authority,"¹⁷ a reverence that demands a transference of religious sentiments to the Constitution.

This, moreover, is not the only example of comprehending secular political institutions through religious categories, for Levinson convincingly demonstrates that major political debates about the Constitution involve positions that correspond directly with familiar religious controversies. Thus, for example, the current debate between constitutional textualists, who claim that constitutional truth lies wholly within the document's "four corners," and constitutional common lawyers, who claim that judicial opinions interpreting the Constitution are just as much constitutional law as the document itself, corresponds to a familiar argument between Luther and the Catholic Church about whether Church commentary forms part of the meaning of Holy Writ.¹⁸ If Levinson is correct, the existence of a "protestant/catholic" split in constitutional interpretation may be explained by the fact that the Constitution has become an essentially religious object.

I shall be exploring the thesis that authoritative narratives more generally — and specifically the *Walker* opinion and King's *Letter*, including its distinctively secular portions — are best understood through theological categories. Therein may lie their power, but also their danger: faith unites, but it also divides. It moves mountains, but a moving mountain can crush those who live on its slopes and in its path. (To make my own position clear from the outset: I am deeply dismayed and fearful of the incursions by organized religion into our national politics; at the same time, however, I am persuaded that politics may best be understood — and worthwhile political action furthered — when we realize that even in its secular guise political action is through-and-through theological in character. I turn to these questions explicitly in the concluding pages of this essay.)

Thus a deep connection exists among three apparently disparate themes arising from *Walker* and King's *Letter*: the narration of history, the foundation of authority, and the treacherous confluence of religion and politics. There is a fourth theme as well, of course, and

16. Quoted in *id.* at 10, 14.

17. Quoted in *id.* at 10.

18. *Id.* at 18-53. Levinson, following Thomas Grey, points out that similar controversies over the status of commentary on holy writ have occurred in Islam and Judaism as well as Christianity. *Id.* at 19. See Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 7 (1984).

that is how we are best to understand the civil rights movement. It is a movement whose aims were at once secular and religious: it aimed to achieve equal rights, but also to redeem America from its racism. The movement was in many ways utopian, and in many ways it failed in both of its tasks. Yet it undeniably achieved remarkable successes as well, and in a sense the civil rights movement has become an icon and exemplar of grassroots organizing for progressive social change. In the concluding sections of this essay I shall explore the successes and failures of the movement by linking these to the other themes I have just catalogued (narrative, authority, and the nexus between religion and politics).

Why do I choose these events and these two retellings of them? All were famous in their day, but they go largely unnoticed now. Since I have borrowed so much already from Benjamin's *Theses on the Philosophy of History* (the greatest work on the philosophy of history known by me), I shall borrow once more. "To articulate the past historically," Benjamin writes, "means to seize hold of a memory as it flashes up at a moment of danger."¹⁹ The image is striking: we are to think of the unconscious mind pitching in to save us from a sudden threat by reminding us of something we had otherwise forgotten (a name, a telephone number, where we mislaid the key, whatever). We do not traffick in history for its own sake, according to Benjamin, but because a particular moment of the past is of use in a particular present situation. (They are, to return to my earlier image, mirrored in each other.)

In my view, we live in terrible danger today. The danger, quite simply, is that we are on the verge of becoming an irredeemably racist society: a society in which the possibilities celebrated in Martin Luther King's "I have a dream" oration — "all of God's children — black men and white men, Jews and Gentiles, Protestants and Catholics — will be able to join hands and sing in the words of the old Negro spiritual, 'Free at last, free at last; thank God Almighty, we are free at last.'" — are finally foreclosed.²⁰ Today we are faced with statistical indicators of residential segregation almost as high as they were before mass desegregation began — residential segregation, moreover, that appears to be based on race alone, rather than on matters of economics.²¹ We confront a staggering degree of emiseration

19. W. BENJAMIN, *supra* note 2, at 257.

20. For the crucial passages of this speech, see D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 283-84 (1986).

21. On the statistical indicators of segregation, see R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA 141 (1987) (on a 100 point scale, residential segregation in the twenty-five U.S. cities with the largest black population averaged 88 in 1960

among poor blacks, including abbreviated life expectancies unheard of in so-called first world countries and mortality rates vastly greater than those among whites,²² and we find a terrifying lack of political interest in these problems among whites. Today we face an unremit-

and 81 in 1980). Denton and Massey have recently found that blacks (and black Puerto Ricans) alone among American ethnic groups remain at extraordinarily high levels of residential segregation regardless of improvement in income. Denton & Massey, *Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation*, 69 Soc. Sci. Q. 797, 813-14 (1988).

22. R. FARLEY & W. ALLEN, *supra* note 21, provides a wealth of horrendous detail concerning the emiseration of black Americans. Analyzing census data, they find that black male life expectancy is six years less than white male, while black female life expectancy is five years less than white female. *Id.* at 57. The 1950 mortality rate among black females was 172% that of white females; it has decreased, but in 1983 it was still 150% that of white females. The mortality rate of black men has increased from 143% that of white men in 1950 to 146% that of white men in 1983. *Id.* at 42-43. As for life expectancies: the life expectancy of black males in America is 64 years, which is comparable to average male life expectancy in Brazil, Colombia, Hungary, Malaysia, Mexico, North and South Korea, Poland, the Soviet Union, and Syria — but an average of nine years less than in the First World countries of Australia, Canada, France, Italy, Japan, Netherlands, Spain, the United Kingdom, and West Germany. Similarly, American black women have an average life expectancy of 72 years, which is an average of six and two-thirds years less than women in the First World countries and comparable to that of women in Mexico, North and South Korea, Rumania, the Soviet Union, Sri Lanka, and Venezuela. For American black life expectancies, see *id.* at 53; for foreign life expectancies, see BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988 at 800.

Canvassing a number of sources, Alan Hutchison has provided a grim, even terrifying, summary of the emergency conditions under which we live. Omitting his citations, I quote it in full:

Percentage of black children who live below the poverty line: 47.3.

Percentage of nonblack Americans who say that there should be a law against interracial marriage: 28.

Percentage of nonblack Americans who say that blacks "should not push themselves where they are not wanted": 58.

Chance that a white male in the U.S. will be murdered in a given year: 1 in 9927.

Chance that a black male in the U.S. will be murdered in a given year: 1 in 1539.

Percentage of black high school graduates over 16 who are unemployed: 18.3.

Percentage of white high school dropouts under 25 who are unemployed: 15.2.

Percentage of blacks unemployed in 1984: 17.2.

Percentage of whites unemployed in 1984: 7.2.

Percentage increase in ratio of black to white unemployment rates between 1965 and 1984: 20.

Percentage of elected officials who were black in 1985: 1.2.

Percentage of black families below poverty level: 32.4.

Percentage of white families at poverty level: 9.7.

Ratio of male black children dying in first year of life to male white children dying in first year of life: 1.8 to 1.

Percentage of persons in New Orleans who are black: 50.

Percentage of qualified applicants for police in New Orleans who are black: 40.

Percentage of police officers in New Orleans who are black: 2.

Chance of an American being in state prison on any given day: 1 in 800.

Chance of a black male American being in state prison on any given day: 1 in 33.

Median income for all black families in 1983: \$14,506.

Median income for all white families in 1983: \$25,757.

Median income of black families as a percentage of that of white families in 1970: 61.

Median income of black families as a percentage of that of white families in 1983: 56.

Percentage increase in black unemployment rate from 1972-1982: 82.

Percentage increase in white unemployment rate from 1972-1982: 69.

Hutchison, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 662-64 (1987) (citations omitted).

ting tide of white ill will toward blacks, and this past term the Supreme Court has affirmatively allied itself with the politics of white resentment.²³ As the Court metamorphoses into an enemy of King's dream, it is worth recollecting an earlier clash between that dream and the Court's authority. For we live, additionally, in a society in which challenges to what might be called "the authority of authority" — the self-justifying legitimacy of official action — seem (to me at least) remarkably tepid and increasingly fragile. Finally, ours is an epoch in which religion and religious frenzy have erupted furiously into politics nationally as well as internationally. For what it is worth, the following essay is the memory that flashes up to me at this moment of danger.

Apparently I am not alone in my recollection. Within the last two years, two Pulitzer Prize-winning biographies of Martin Luther King have been published and received with interest and acclaim, and PBS aired a six-hour series on the history of the civil rights movement.²⁴ It

23. Numerous analyses of the 1988 presidential election pointed to so-called "white collars" — white areas surrounding black ghettos — as the decisive Republican enclaves. Juan Williams has argued persuasively that every domestic election issue pressed by Ronald Reagan and George Bush coded some race-related issue:

[Reagan] made the litmus test for court nominees that they "interpret the law not legislate" — strong code words for those whites still stung by the desegregation ordered by activist courts.

Where Reagan used the "welfare queen" collecting checks in her Cadillac to appeal to white racial hostilities in the 1980 campaign, his heir, George Bush, used Willie Horton, the wild-eyed black man who raped a suburban white woman. Where Reagan attacked "big government" for raising taxes to create new social programs (to aid blacks), Bush attacks the American Civil Liberties Union for defending criminals, appealing to the white perception that blacks are responsible for virtually all violent crime.

Williams, *Divided We Fell: Race and the '88 Election*, Wash. Post, Nov. 20, 1988, at D1, col. 4. Election demographics amply bear out the racial analysis of the result. On the increase of explicit white racism in a typical American high school, see Welsh, *A Lesson in Racism*, Wash. Post, Mar. 5, 1989, at C1, col. 1. For an analysis of data up to 1983, see H. SCHUMAN, C. STEEH & L. BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 193-97* (1985) (attitudinal survey data shows that white commitment to equality in principle is high, but white commitment to practical implementation of this principle is well below fifty percent for all major issues except public accommodations).

The Court's anti-affirmative action decisions are *Jett v. Dallas Indep. School Dist.*, 109 S.Ct. 2702 (1989) (municipality may not be held liable for its employees' violations of § 1981 under a *respondeat superior* theory; § 1983 provides the exclusive federal damage remedy for the violation of rights guaranteed by § 1981 when the claim is pressed against a state actor); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (white city employees who had failed to intervene in earlier employment discrimination proceedings resulting in the entering of consent decrees held not precluded from bringing suit challenging promotion decisions made pursuant to those decrees); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (statistical evidence of low proportion of nonwhites in higher level positions and high proportion of nonwhites in lower level positions held not to establish prima facie case of disparate impact violating Title VII); *City of Richmond v. J.A. Croson, Co.*, 109 S. Ct. 706 (1989) (Richmond, Virginia's 30% minority set-aside program held to be neither justified by sufficiently compelling governmental interests nor sufficiently narrowly drawn to remedy effects of past discrimination).

24. The biographies are D. GARROW, *supra* note 20 and T. BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988); the PBS series was *Eyes on the Prize* (PBS 1986).

is hardly surprising that in a time of racial crisis the memory of King and the 1954-1968 civil rights movement resonates with renewed strength. For this movement, many of the accomplishments of which are threatened in our contemporary political climate, stands in need of redemption in just the way that it redeemed the failed promises of the civil rights amendments to the Constitution.

I. PROJECT CONFRONTATION

In January 1963, the Southern Christian Leadership Conference (SCLC) held a retreat in Georgia to discuss strategy for a concerted attack on segregation in Birmingham, Alabama.²⁵ Project C — for “confrontation” — would consist of demonstrations and boycotts of Birmingham’s downtown businesses during the normally busy Easter shopping season.

Birmingham itself had recently begun to display some sentiment for change in its segregationist ways. A group of whites headed by the Chamber of Commerce president campaigned to alter Birmingham’s municipal government by abolishing the offices of the three segregationist commissioners (including the notoriously racist Commissioner of Public Safety, Theophilus Eugene “Bull” Connor) who then ran the city. The voters agreed to move to a mayoral system, and in a special election Connor was defeated by a more moderate segregationist named Albert Boutwell. Connor went to court to demand that he be allowed to finish his term of office as Commissioner of Public Safety;²⁶ and while this matter was pending Birmingham was governed by what was in effect two city governments, each passing its own laws and conducting city business after its own fashion; municipal checks were signed by both Connor and Boutwell. Some Birmingham whites hoped that SCLC would cancel the Easter demonstrations in order to give the new government a chance to show what it could do; but the SCLC leadership — which had previously cancelled demonstrations to allow the run-off election between Connor and Boutwell to proceed without the pressure of demonstrations — went ahead with Project C.

A Birmingham city ordinance required the demonstrators to obtain a parade permit from the city commission. On April 3, Mrs. Lola Hendricks, representing the demonstrators, approached Connor to re-

25. My account of these events is drawn from T. BRANCH, *supra* note 24, at 688-747; D. GARROW, *supra* note 20, at 225-67; M.L. KING, *supra* note 13; J. WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-65*, at 181-89 (1987); and especially A. WESTIN & B. MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* (1974), as well as from the *Walker* opinion.

26. See *Connor v. State*, 153 So. 2d 787 (Ala. 1963); see also *Reid v. City of Birmingham*, 150 So. 2d 735 (Ala. 1963).

quest a permit; Connor replied "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail." On April 5 — one week before Good Friday — Connor replied to a second, telegraphic, request for a parade permit with another refusal. The demonstrators proceeded with their protests.

Project C included plans for the Reverend Martin Luther King, Jr., to place himself in a position to be arrested on Good Friday, April 12. Late Wednesday evening, April 10, Connor obtained an *ex parte* injunction from Alabama Circuit Court Judge W.A. Jenkins, Jr., forbidding civil rights leaders, including all the leaders of Project C, from taking part in or encouraging demonstrations. The injunction was served at 1 A.M. on Thursday, and the SCLC leadership debated how to respond to it. King feared that complying with the injunction would deflate the protest, as had happened the previous summer in Albany, Georgia. He went ahead with the planned demonstration the following day, and was arrested; a second demonstration took place on Easter Sunday, April 14. Subsequently Judge Jenkins found several of the demonstrators guilty of criminal contempt and sentenced each of them (including King) to five days in jail and a \$50 fine.²⁷ It is this conviction that the *Walker* Court upheld.

This ends the sequence of events recounted in *Walker* and King's *Letter*. But the larger chronicle of the Birmingham campaign did not end with King's arrest. Subsequently the demonstrators embarked on a strategy of marches by school children, leading to literally thousands of arrests. As the demonstrations continued, Bull Connor upped the level of official response, ordering that fire hoses and police dogs be turned on the demonstrators. Television news horrified its audiences with the spectacle of children bowled over by hoses that hit with enough force to rip the bark off trees. White moderates and the SCLC leadership undertook negotiations that led to a settlement announced on May 10. On May 11, the Ku Klux Klan staged a rally; after the meeting, the motel at which King had been staying and the home of his brother were bombed. Crowds of angry blacks rioted, and eventually President Kennedy sent in federal troops.²⁸ A month later, Alabama Governor George Wallace personally blocked the entrance of a University of Alabama building to prevent the entrance of two black students whose admission had been ordered by a federal court. Evidently this was the last straw. That same day, President Kennedy spoke on national television to announce that he was seeking compre-

27. For an account of the trial, see A. WESTIN & B. MAHONEY, *supra* note 25, at 95-126, 141-42.

28. T. BRANCH, *supra* note 24, at 756-802.

hensive civil rights legislation that eventually became the Civil Rights Act of 1964. The summer ended with the March on Washington at which King delivered his "I have a dream" oration; in a sense, the civil rights act and the march were the culminating events of Project C.

But let us return to King's original April arrest. While King was in jail, eight white clergymen — significantly, they were liberals who had publicly opposed Governor George Wallace's "Segregation Forever!" speech²⁹ took out a full-page advertisement in the *Birmingham News* denouncing the demonstrators' actions. King responded from his cell, writing in the newspaper's margins until he was able to obtain paper; after he was permitted visitors, King's manuscript was typed by his friends and returned to him in jail for revisions. His *Letter from Birmingham Jail* attracted little attention at first.³⁰ It was eventually printed by the American Friends Service Committee and reprinted in numerous periodicals; it is perhaps the most famous document to emerge from the civil rights movement.³¹

At their contempt hearing, the civil rights leaders averred that the parade permit ordinance and Judge Jenkins' *ex parte* injunction were unconstitutional; the judge, however, refused to consider the issue, since the demonstrators had never attempted to get the injunction dissolved. Eventually the United States Supreme Court agreed that the ordinance on which the injunction rested was unconstitutional.³² Nevertheless, the Court in *Walker* declined to overturn the demonstrators' convictions for criminal contempt, holding that even a constitutionally questionable court order must be obeyed — the so-called "*Mine Workers* rule" derived from *United States v. United Mine Workers*.³³

Point and counterpoint: King's *Letter* has become one of the great classics in the literature of civil disobedience, both for its philosophy and for the soul-stirring magnificence of its language. No one has called Potter Stewart's *Walker* opinion a classic (in what might be called the literature of civil obedience), but its status as a Supreme Court precedent makes it the functional equivalent of a "classic."³⁴ Both *Walker* and the *Letter* address an ancient question, a question that more than any other defines the very subject of legal philosophy:

29. *Id.* at 738.

30. *Id.* at 744.

31. For a detailed account of the letter's composition, see *id.* at 737-45.

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

33. 330 U.S. 258 (1947).

34. Roughly: a classic is a piece you can't ignore when you write in the canon.

that, of course, is the question of whether we lie under an obligation to obey unjust legal directives, including directives ordering our punishment for disobeying other unjust directives. All political philosophy, from Plato's *Apology* and *Crito* on, is driven by this question; all our political hopes and aspirations are contained in the descriptive and argumentative materials we use to answer it. It is those materials that form our topic.³⁵

II. The *Walker* Decision

A. *The Narrative of Authority*

How does one describe a legally significant event? There is, I hazard, no such thing as an absolutely neutral description of the facts — “writing degree zero”³⁶ — and one's choice of focus, of beginning and end, and of voice may already contain the answers to crucial questions.

The Court's *Walker* opinion adopts the voice and viewpoint of governmental authority and recites a simple story of authority vindicated. As we shall see, authority is the protagonist, the subject of the narrative, and the narrative itself is simple and straightforward. Authority takes prudent (if possibly excessive) precautions to protect the community against danger. Well-meaning but shortsighted demonstrators recklessly bypass those precautions. All of authority's worst fears are subsequently confirmed. Then the demonstrators attempt to avoid legal accountability for their actions. Needless to say — and after such a narrative, it is indeed needless to say — the Court declines to assist them in this enterprise.

Stewart's opinion begins (without introduction) with unnamed “city officials” going to court to obtain their injunction; in this narrative, therefore, an official act is the initiating event, and city officials are its protagonists. Stewart provides no background or context for the demonstrations or the demonstrators' motives; nor does he provide any clue to the segregationist history and predilections of Birmingham

35. There is, to be sure, this difference between the questions raised by *Walker* and King's *Letter*: *Walker* is concerned with the obligation to obey unconstitutional directives (whether or not they are just), whereas King is concerned with the obligation to obey unjust directives (whether or not they are constitutional). Yet clearly the inquiries are close to each other in spirit, and there may be significant substantive overlap as well: an unconstitutional directive is at least *prima facie* unjust since it amounts to an illegitimate exercise of authority, and an unjust directive may run afoul of the constitutional principles of due process and equal protection.

36. Writing degree zero: “a colourless writing The new neutral writing takes its place in the midst of all those ejaculations and judgments, without becoming involved in any of them; it consists precisely in their absence. . . . it deliberately foregoes any elegance or ornament” R. BARTHES, *WRITING DEGREE ZERO AND ELEMENTS OF SEMIOLOGY* 76-78 (A. Lavers & C. Smith trans. 1967).

or of Bull Connor; nor does he allude to the fact that the lame duck commissioners were in their last three days of office after having been voted out in what amounted to a referendum on their racial policies. He merely quotes the allegations by "officials of Birmingham" that the demonstrations were "calculated to provoke breaches of the peace,' 'threaten[ed] the safety, peace and tranquility of the City,' and placed 'an undue burden and strain upon the manpower of the Police Department.'"³⁷

He then devotes three paragraphs to insinuations that as events subsequently unfolded these official fears were fully confirmed. In the first of these paragraphs, he quotes an angry complaint by one of the petitioners that in past demonstrations state courts had favored local law enforcement, and "if the police couldn't handle it, the mob would,"³⁸ thus suggesting that even the demonstrators understood the potential dangers of such confrontations.³⁹ The next paragraph notes that on Good Friday "a large crowd gathered," the onlookers "clapping, and hollering, and [w]hooping." Members of this crowd "spilled" out into the street.⁴⁰

Stewart's third descriptive paragraph portrays the Easter Sunday demonstration in the following terms: "Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred. Members of the crowd threw rocks that injured a newspaperman and damaged a police motorcycle."⁴¹ The reference to a crowd overflowing onto the sidewalks, like the earlier reference to a crowd

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

38. 388 U.S. at 310.

39. As they surely did: less than two years before, the Freedom Riders were brutally beaten when their bus arrived at the Birmingham terminal, after the Birmingham police had agreed to give the Ku Klux Klan fifteen uninterrupted minutes to assault the riders. T. BRANCH, *supra* note 24, at 420. Such circumstances raise in a graphic way, however, the question of why the demonstrations should be halted rather than monitored and protected. King raises this question explicitly:

In your statement you assert that our actions, even though peaceful, must be condemned because they precipitate violence. But is this a logical assertion? Isn't this like condemning a robbed man because his possession of money precipitated the evil act of robbery? Isn't this like condemning Socrates because his unswerving commitment to truth and his philosophical inquiries precipitated the act by the misguided populace in which they made him drink hemlock? Isn't this like condemning Jesus because his unique God-consciousness and never-ceasing devotion to God's will precipitated the evil act of crucifixion?

KING, *Letter, supra* note 13, at 85.

40. 388 U.S. at 310-11.

41. 388 U.S. at 311. Note the construction "Violence occurred." By making "violence" the subject of the sentence Stewart obviates the necessity of attributing the violence, though in the next sentence he explains that "members of the crowd," not the demonstrators, threw rocks. As Justice Brennan's dissenting opinion points out, there were only three rock-throwers, and the rock-throwing occurred after (in anger at?) the arrest of King, Shuttlesworth, and Walker. 388 U.S. at 341 (Brennan, J., dissenting).

spilling out into the street, is intended to buttress the Court's subsequent argument validating "the strong interest of state and local governments in regulating the use of their streets and other public places" since "the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern."⁴²

The three paragraphs also introduce a second theme: the willfulness of the demonstrators. The demonstrators distributed a statement "declaring their intention to disobey the injunction";⁴³ they "announced that '[i]njunction or no injunction we are going to march tomorrow';"⁴⁴ "calls for volunteers to 'walk' and go to jail were made."⁴⁵ And the angry complaint that state courts favored anti-demonstration local law enforcement suggests that the demonstrators had little respect for state courts.

Thus, the Court's exposition of facts has consisted so far of a theme — the city officials' justifiable concerns about the forthcoming demonstrations — a second theme — the demonstrators' defiant intentions — and a tragic climax, the vindication of authority as its fears were born out in the event by whooping and hollering crowds spilling into the street and by violence. The Court immediately lays this sonata-form exposition next to the rule of law that an "injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be"⁴⁶

Only then does the Court frame its legal issue:

We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms.⁴⁷

Framed this way, the legal question is of course self-answering; but it also provokes from the Court a further description of the facts of the

42. 388 U.S. at 315-16. As we shall see, the very fact that the Court found it necessary to make this argument points to a fundamental problem with the Court's opinion.

43. 388 U.S. at 310.

44. 388 U.S. at 310.

45. 388 U.S. at 311.

46. 388 U.S. at 314 (quoting *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922)). Note the rhythmic concatenation of formulaic legalisms piled one on top of the other. Rhetorically, this serves the function of infusing the conclusion with a sense of syllogistic inevitability. (What are all those carefully catalogued legalisms doing there unless they are minor premises of a deductive application of some rule of law presumably known by the Court? Therefore the conclusion must be right.)

47. 388 U.S. at 315.

case that is worthy of note. According to the Court, the petitioners had not made “any attempt to secure a parade permit in accordance with [the injunction’s] terms”; they “did not apply for a permit either to the commission itself or to any commissioner after the injunction issued.”⁴⁸ Now in fact, Mrs. Lola Hendricks, a member of the petitioners’ organization, had attempted to obtain a parade permit *before* the injunction issued, and had been threatened with jail by Bull Connor (who also turned down a second request). Inasmuch as it was Connor and the other commissioners who obtained the injunction, it is plain enough that they were not about to issue the parade permit the next day, and so the Court is clearly insisting on a formality for formality’s sake alone. The Court mentions the Hendricks incident, but stresses that Mrs. Hendricks was “*not* a petitioner in this case.”⁴⁹ This was literally true, but the Court is being a bit cute at this point by ignoring the fact that she represented the petitioners’ organization and sought the permit on the organization’s behalf. This fact evidently has no relevance, and so it disappears from the narrative — it is of a piece with the remarkable absence of civil rights organizations and the civil rights movement from Stewart’s *dramatis personae*. The very existence of political collectivities other than governmental authority is missing from the Court’s narrative vocabulary — only government and individuals (sometimes acting alone, sometimes whooping it up in unstructured mobs) form a part of *Walker’s* ontology.

In any event, Connor “had . . . made clear that he was without power to grant the permit alone, since the issuance of such permits was the responsibility of the entire city commission.”⁵⁰ Now Chief Justice Warren alluded in his dissenting opinion to claims made by the petitioners that “parade permits had uniformly been issued for all other groups by the city clerk on the request of the traffic bureau of the police department, which was under Commissioner Connor’s direction. The requirement that the approval of the full Commission be obtained was applied only to this one group.”⁵¹ Nevertheless, Connor “had made clear” his incapacity to act; note the success-verb construction, which carries with it the twin implications that what Connor said was true, and that — because he had made it clear — the demonstrators were on notice of its truth.

The Court then turns to its legal arguments. First, it insists that

48. 388 U.S. at 315, 318.

49. 388 U.S. at 317 n.9 (emphasis in original).

50. 388 U.S. at 317-18.

51. 388 U.S. at 326 (Warren, C.J., dissenting); see also A. WESTIN & B. MAHONEY, *supra* note 25, at 105-06, 121 (detailing the petitioners’ arguments presented at trial).

although the Birmingham statute and the *ex parte* injunction both raise "substantial constitutional issues," neither "was transparently invalid or had only a frivolous pretense to validity."⁵² This is because "the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern,"⁵³ and (as we have seen) problems of traffic and disorder actually arose during the Birmingham demonstrations.

Because the statute and injunction were not transparently invalid, the Court argues, the demonstrators should have proceeded immediately to court to test them.

There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. . . . It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims.⁵⁴

For, and this is both the Court's ultimate argument and final paragraph,

in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.⁵⁵

Here the Court echoes Felix Frankfurter's concurring opinion in *United Mine Workers*:

Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

. . . .

52. 388 U.S. at 315, 316.

53. 388 U.S. at 316.

54. 388 U.S. at 318-19. In fact, the petitioners did not have two days since the injunction was not served until the day before the scheduled demonstration. (Though they knew all day Wednesday that Connor was preparing to obtain an injunction. T. BRANCH, *supra* note 24, at 727.) Norman Amaker, one of the movement's lawyers, recalls "that there was never any serious discussion of counseling the leaders to go into court to seek relief prior to the Good Friday march. Going into court would have required foregoing the weekend marches . . ." A. WESTIN & B. MAHONEY, *supra* note 25, at 80.

55. 388 U.S. at 320-21 (footnote omitted).

. . . There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.⁵⁶

There was a certain irony in Frankfurter's statement, an irony that moves us from the local history of the Birmingham events recounted in *Walker* to the political history encapsulated in the *Mine Workers* rule. *Howat*,⁵⁷ the Court's principal precedent in *Walker*, was a labor injunction case (as was *United Mine Workers* itself), and it is clear from *Walker*'s reliance on *Howat* that the Court's political history assimilates Judge Jenkins' injunction against the Birmingham march to past uses of injunctions in labor disputes.

The labor injunction was a tool of union busting in the late nineteenth and early twentieth centuries. The parallels with Project C are clear: labor unions, like the civil rights demonstrators, sought to launch coordinated demonstrations and actions against their employers. Like Bull Connor, the employers would turn to sympathetic judges in order to enjoin these demonstrations and thereby to defuse the movement. The classic study of the labor injunction, launching a devastating attack on it, was co-authored by none other than Frankfurter.⁵⁸ Though the *Walker* majority fails to mention the fact, Chief Justice Warren's dissenting opinion alludes to the unsavory political history encoded in *Howat* and *United Mine Workers* (and cites Frankfurter's book).⁵⁹ It is a political history of judicial power pressed or manipulated into service by entrenched interests in order to stifle social change. And indeed, it is a political history to which *Walker* subsequently contributed: in the year following the decision, at least fifty-four injunctions were employed by university administrators against the student movement, and — in another ironic historical twist — *Walker* was used to buttress labor injunctions in sectors not covered by the federal anti-injunction laws that Frankfurter had been instrumental in creating.⁶⁰ *Walker*'s political narrative conceals and extends a secret history of judicial authority ("secret," of course, because the Court elects to leave unmentioned the history of the use of injunctions

56. *United States v. United Mineworkers*, 330 U.S. 258, 309-10, 312 (1947) (Frankfurter, J., concurring).

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

58. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930). Later, the injunction device would be pressed into service by opponents of the Progressive movement in order to prevent the enforcement of Progressive legislation. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* 1-4 (1978).

59. *Walker*, 388 U.S. at 330-31 (Warren, C.J., dissenting).

60. A. WESTIN & B. MAHONEY, *supra* note 25, at 277-78. The statistic on university injunctions is from Note, *Equity on the Campus: The Limits of Injunctive Regulation of University Protest*, 80 YALE L.J. 987, 987 (1971).

registered in *Howat*).⁶¹ It is that history that we must now explore.

B. *The Republic of Laws and "Transparent Invalidity"*

The rhetorical structure of the Court's opinion suggests that it is making something like the following argument:

(1) The city officials' concerns about traffic and rowdiness were born out in fact, and so, *a fortiori*, they were reasonable concerns.

(2) Because their concerns were reasonable, the injunction (and the statute upon which it was based), though arguably unconstitutional, was not *transparently* unconstitutional (the court was not, in Frankfurter's words, "*obviously* traveling outside its orbit").

(3) Had the injunction been transparently unconstitutional, the demonstrators would perhaps have been within their rights to disobey.

(4) However, on the assumption that its unconstitutionality was debatable, the only legitimate course for the demonstrators to follow was to test it in court.

(5) The rule of law instructing them to this effect was clear, and they were on notice of it.

(6) Since the demonstrators did not attempt to test the injunction's constitutionality in court, they can be punished for disobeying it.

Even the various dissenters appear to accept the validity of this argument, disagreeing not with its jurisprudence but with steps (2) or (5). Thus, Chief Justice Warren believes that the statute "is patently unconstitutional on its face,"⁶² Justice Douglas agrees that it is "unconstitutional on its face or patently unconstitutional as applied,"⁶³ and Justice Brennan, though he insists that his opinion does not deal with the merits of the constitutional claim, accepts the contention "that the ordinance and injunction are in fact facially unconstitutional."⁶⁴ Similarly, the various dissenters contest the applicability of *Howat*, though to different extents. Warren believes that it was weak-

61. Another political narrative the *Walker* Court buries by exercising its victor's prerogative of assigning the meaning it chooses to past events lies in its use of previous Court opinions. The Court describes the *Howat* rule, 258 U.S. at 189-90, *quoted supra* text accompanying note 46, as "consistent with the rule of law followed by the federal courts," and cites a string of cases in support of this claim. *Walker*, 388 U.S. at 314 & n.5. But in fact two of the cases cited — *Ex parte Rowland*, 104 U.S. 604 (1881), and *In re Ayers*, 123 U.S. 443 (1887) — stand for precisely the opposite proposition. *Howat* requires obedience to invalid orders on pain of contempt, whereas *Rowland* and *Ayers*, like the related cases *In re Sawyer*, 124 U.S. 200 (1888), and *Ex parte Fisk*, 113 U.S. 713 (1885), hold that disobedience of an invalid court order cannot be punished as contempt. (For clear statements of this holding, see *Fisk*, 113 U.S. at 718, and *Rowland*, 104 U.S. at 612.)

62. *Walker*, 388 U.S. at 328 (Warren, C.J., dissenting).

63. 388 U.S. at 338 (Douglas, J., dissenting).

64. 388 U.S. at 342 (Brennan, J., dissenting).

ened by subsequent decisions,⁶⁵ Douglas stresses that its rule makes an exception when “‘the question of jurisdiction’ is ‘frivolous and not substantial’ ”⁶⁶ hence, when the ordinance is “unconstitutional on its face or patently unconstitutional as applied”; and Brennan accepts *Howat* as a “premise,” arguing that the interest it underwrites can be outweighed.⁶⁷

Clearly, however, the heart of the Court’s treatise on civil obedience lies in the jurisprudential premise of its argument, with which even the dissenters appear to agree. I repeat it for emphasis: (3) *Had the injunction been transparently unconstitutional, the demonstrators would perhaps have been within their rights to disobey.* (4) *However, on the assumption that its unconstitutionality was debatable, the only legitimate course for the demonstrators to follow was to test its constitutionality in court.*

Now the Court never actually *says* that if the injunction’s unconstitutionality had been transparent the demonstrators would have been free to disobey it; as we shall see the Court’s rhetorical stance did not permit it to say such a thing. But Stewart devotes almost a third of his opinion to demonstrating that the statute and injunction were not “transparently invalid,” none of which would be relevant unless transparent invalidity might affect the outcome of the case.

This is a point worth emphasizing, because it points to a remarkable incoherence in the opinion (as well as Frankfurter’s *Mine Workers* concurrence). Remember that the Court’s decisive argument rests on the familiar maxim that no one can be a judge in his own case. The statute and injunction may have been unconstitutional, but that is for a court to decide, not for the demonstrators to judge on their own.

If this argument holds at all, it holds regardless of whether the statute and injunction were “transparently invalid.” For even then, if it is left to the demonstrators to determine transparent invalidity, they are acting as judges in their own case. Since the Court will not permit anyone to be judge in his own case, the Court had no need to insist that the statute and injunction were not transparently invalid; it had no need to recite a set of facts designed to underscore that the statute and injunction were not transparently invalid. In fact, it had no need for most of its opinion.

The opinion is a remarkable instance of protesting too much. The

65. 388 U.S. at 332 & n.9 (Warren, C.J., dissenting) (citing *In re Green*, 369 U.S. 689 (1962)).

66. 388 U.S. at 337 (Douglas, J., dissenting) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947)).

67. 388 U.S. at 343-44 (Brennan, J., dissenting).

Court's fervent desire to prove a point (that the statute and injunction were not transparently invalid), even though the Court's argument renders that point irrelevant, points to an abiding and deeply buried anxiety — a kind of Banquo's ghost — that the Court dared not acknowledge but that it could not help addressing.

The anxiety arises from the political narratives that give meaning to American constitutionalism. The very notion of the rule of law and not of men, which goes back as far as Plato,⁶⁸ implies a limit to what authority can do, and thus contains within it the concept of *ultra vires* action. Moreover, the theory of popular sovereignty says that when governmental authority runs out the actual exercise of sovereignty devolves back to the people.⁶⁹ Finally, the idea that law must be public, and publicly comprehensible, implies that there must be some point at which ordinary citizens can know that an action is *ultra vires* and thus that the power to disobey has devolved upon them. That is the point of transparent unconstitutionality to which the Court refers. The concept of transparent unconstitutionality, and the right to disobey transparently unconstitutional injunctions, is thus a linchpin of the legitimacy of American government: take it away and you must abandon the rule of law, or popular sovereignty, or the publicity of law.

The Court cannot quite bring itself to acknowledge this point, however, for a very good reason: an open acknowledgment that we are entitled to disobey transparently unconstitutional injunctions would invite us to judge constitutionality for ourselves, thereby undermining the authority of the courts. Clearly it is this possibility that the *Walker* Court is most concerned to foreclose. The political narratives underlying the authority of American courts vest ultimate power — including the ultimate power of understanding the law — not in the courts but in the citizenry, and insists that courts' authority is bounded. In *Walker*, however, the Court confronted the question of who is to determine the bounds of judicial authority.

Now it may be that the logic of self-reference compels the Supreme Court to insist on its own ultimate authority to answer this question. After all, the Court cannot deny its authority to determine the bounds of judicial authority unless it possesses the very authority it is denying. The Court would become enmeshed in a form of the Liar Paradox, almost as though it had said, "Our own rulings about our authority, including this one, lack legitimacy." The Court can deny its jurisdiction over many matters, but it cannot deny its jurisdiction over ques-

68. PLATO, LAWS *715d. *But cf.* PLATO, STATESMAN *294a-297b, for his doubts about the efficacy of the rule of law.

69. Thus also the ninth and tenth amendments to the Constitution.

tions of its own jurisdiction, particularly since no higher court exists to which it can defer.

But neither logic nor law compelled the Court to insist that *Judge Jenkins* possessed the authority to determine the bounds of his constitutional authority. He was wrong about the constitutionality of his injunction and this was transparent to the demonstrators; they were willing to gamble that the Supreme Court would back their judgment by affirming the political narratives underlying American constitutionalism.

To see why the Court nevertheless felt compelled to deny them the opportunity to take that gamble, recall Levinson's distinction between a "catholic" mode of interpretation, according to which the Church — or here the Supreme Court⁷⁰ — is the dispenser of ultimate interpretation, and a "protestant" mode, in which the individual, or at any rate the community, is the ultimate interpreter. It would be gravely perilous for the Supreme Court to accept a "protestant" popular judgment that Judge Jenkins had exceeded the bounds of his constitutional authority. That would highlight the uncomfortable fact that the Supreme Court too can exceed the bounds of its constitutional authority, and to stress this would invite a protestant reformation reaching all the way to Rome. For although the logic of self-reference precludes the Court from denying its own authority to adjudicate its authority, nothing precludes *others* from denying that authority, any more than the fact that on logical grounds *I* cannot say, "I am an inveterate liar" precludes others from saying that I am an inveterate liar. To put it another way, the fact that the Court must necessarily adopt the catholic mode of interpretation shows nothing more than that it is the Court; it is entitled to insist on the catholic mode of interpretation, however, only on the question-begging catholic assumption that the choice is the Court's to make.⁷¹ Perhaps for this

70. Both are meanings of the Latin *curia*.

71. This is not to deny that eventually — at the subsequent contempt hearing — a court and not "the people" will decide whether "the people" were right in their judgment that the injunction was invalid, nor is it to deny that the validity or invalidity of the injunction will be determined by the court in the "catholic" manner, looking at prior cases as well as the constitutional text. Thus, had the *Walker* Court chosen to hold that one cannot be punished for violating an unconstitutional injunction, the courts would still retain the authority of adjudicating the injunction's constitutionality. The argument here indicates, however, that we may not be able to find a cogent reason to believe that the retention by the courts of this ultimate authority is consistent with the liberal and anti-authoritarian ("protestant") premises of American constitutionalism (the rule of law, popular sovereignty, the publicity of law). The Court itself has raised the possibility that Congress ("the peoples'" virtual representative) retains interpretive authority. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (see especially the dissent of Harlan, J.). (This footnote was added as a result of a conversation with Peter Quint, to whom I am also indebted for the reference to *Katzenbach*.)

reason the Court clings desperately and tenaciously to the catholic mode “all the way down” to Judge Jenkins’ court (a theological stance harkening back to institutionalized religion at its most authoritarian). And thus it must simultaneously invoke the right to disobey transparently unconstitutional injunctions and foreclose the possibility that citizens might exercise independent judgment of the right’s predicate.

The *Walker* opinion fulfills this self-undermining twin need. Instead of the history of publicity, of popular sovereignty, and of limited official authority, the court’s political narrative yokes the Constitution to the history of the labor injunction — of union busting. Its fundamental effect is to convert the notion of a transparently unconstitutional injunction into a kind of half-chimerical ideal. It is not quite mythical, for we can imagine that even the Court would find transparently unconstitutional an injunction saying “It is hereby ordered that the Constitution of the United States of America is suspended.”⁷² But in *Walker* the Court comes close to saying that anything less extreme — anything that authority takes the slightest care to disguise, thereby presenting a litigable issue — is not *transparently* unconstitutional.

After all, in *Walker* we are confronted with an injunction that could hardly have been more irregular: it was issued *ex parte*, with less than a day available for appeal, at the behest of commissioners who had lost their mandate.⁷³ It would irreparably damage the demonstrators — a standard legal reason for not granting an injunction — by causing their moment to pass,⁷⁴ and it was based on an extraordinarily broadly worded statute granting the commissioners virtually unfettered power of prior restraint, inasmuch as mere “convenience” was

72. Nor is this a wholly fictitious scenario: *Cooper v. Aaron*, 358 U.S. 1 (1958), an opinion that every Justice signed individually for emphasis, was provoked by Arkansas Governor Orville Faubus’ declaration that the Supreme Court’s *Brown* decision was not binding.

73. In other cases the Court recognized the validity of the first two of these reasons: in *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court backed off from *Walker* by insisting that injunctions restraining the exercise of first amendment rights cannot be issued *ex parte* unless it is impossible to notify the opposing parties in time to allow them to be heard; and in *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court had recognized that a speedy hearing and appeal are constitutionally required in a different first amendment context, namely censorship proceedings against a movie.

74. For three reasons: first, demonstrators gathered from around the country cannot tarry indefinitely in Birmingham while waiting for the courts to rule on the injunction’s validity; second, the religious symbolism of holding the demonstrations on Good Friday and Easter Sunday was important, and those days come but once a year; third, the demonstrations were intended to target downtown businesses during the extra-busy Easter shopping season, and that season is relatively short. See A. WESTIN & B. MAHONEY, *supra* note 25, at 76. Moreover, the Court itself later recognized that when complying with a court order would do irreparable damage because it would subsequently be impossible to “unring the bell,” one could defy the order without facing conviction for contempt if the order was invalid. *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

included as a ground for denying parade permits.⁷⁵ Nevertheless, the Court insists (what the dissenters deny) that this injunction is not transparently invalid.

The message could hardly be made more plain: provided that authority exerts the slightest effort to trick out its injunction in the trappings of legality, the injunction is not transparently unconstitutional and the citizen's power to defy it with impunity evaporates. *Walker* virtually issues instructions to judges and other officials about how to insulate an injunction from the possibility of being legitimately disobeyed. On the assumption that judges and other officials will follow these instructions in the future, the Court thus simultaneously presupposes and denies the jurisprudential premise of constitutionalism — that a citizen may disobey a transparently invalid injunction.

I will borrow some suggestive terminology from Jacques Derrida, and describe the notion that citizens may legitimately disobey a transparently invalid injunction as a “dangerous supplement” to the Court's actual argument: though the argument presupposes that citizens may legitimately disobey a transparently invalid injunction, this presupposition must remain unstated, for its acknowledgment within the argument would undermine the argument's claims to authority (by undermining the Court's rhetorical strategy of taking only authority's word seriously).⁷⁶ The “dangerous supplement” props the argument up but cannot actually appear within it.

C. *The Naked Assertion of Judicial Authority*

I have spoken only of the transparent invalidity of Judge Jenkins' injunction, not of the underlying statute, though the Court and dissenters discuss both. That is because the *Walker* opinion really concerns only the former, and indeed a key legal issue revolves around its asymmetrical treatment of injunctions and statutes, hence of judges and legislatures.

75. Indeed, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Court found this ordinance to be unconstitutional. Oddly enough, this opinion too was authored by Justice Stewart, who noted that the ordinance conferred on the City Commission “virtually unbridled and absolute power to prohibit any ‘parade,’ ‘procession,’ or ‘demonstration’ on the city's streets or public ways,” so that it “fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” Strikingly, Stewart cited numerous decisions that “have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.” *Shuttlesworth*, 394 U.S. at 150-51 (footnotes omitted).

76. J. DERRIDA, *OF GRAMMATOLOGY* 144-64 (G. Spivak trans. 1976); J. DERRIDA, *Plato's Pharmakon*, in *DISSEMINATION* 156-71 (B. Johnson trans. 1981).

As Chief Justice Warren emphasizes in his dissent, one cannot be punished for violating an unconstitutional statute, and indeed it may be impossible to gain standing to test the statute in court unless one disobeys it.⁷⁷ Yet the *Walker* decision holds that the demonstrators can be punished for contempt when they violate an unconstitutional injunction. Evidently the authority of courts matters in a way that the authority of legislatures does not. Why?

The answer cannot be because of any constitutional superiority of the judicial process over the legislative process. For the issue in *Walker* is whether the petitioners can test an *unconstitutional* court order by disobeying it; the unconstitutionality of the order is one of the givens of the problem, and the difference in the processes by which an unconstitutional order issues therefore drops out of consideration. Unconstitutionality is unconstitutionality. The Court treats court orders as different in *kind* from legislative enactments, whereas the judicial and legislative processes differ only in degree (of accuracy, responsiveness, law-abidingness, whatever).

Indeed, what is most apparent in *Walker* is the Court's anxiety to uphold judicial authority as such, as though it were civilization's final, frail barrier against a lurking catastrophe.⁷⁸ Hence the Court's final sentence: "But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."⁷⁹ If I am right, the Supreme Court wanted to preclude the very possibility of testing the validity of injunctions by disobeying them because it viewed injunctions as utterly different in kind from statutes, as final barriers against civil anarchy. Frankfurter says this explicitly in the passage we quoted above: "the very existence of a court" — hence, its existence as such, regardless of its legitimacy — "presupposes its power to entertain a controversy There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."⁸⁰ A restraining order is a last ditch attempt to stop something from happening, to pull the plug on an impending event, and the Court appar-

77. *Walker v. City of Birmingham*, 388 U.S. 307, 327 (1967) (Warren, C.J., dissenting).

78. Similar concerns emerge in cases about judicial tort immunity. The most notable is *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the Court found that a trial judge who had ordered a teenager sterilized at the *ex parte* request of the teenager's mother was immune from tort liability. Indeed, it is only in the most bizarre of circumstances that judicial immunity dissolves. See, e.g., *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) (upholding punitive damages against a traffic judge who had ordered a street vendor brought into his courtroom in manacles because he had sold the judge a bad cup of coffee).

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

80. *United States v. United Mine Workers*, 330 U.S. 258, 310, 312 (1947).

ently believed that there must be some device that enables the authorities to pull the plug on an impending event.

This, I am convinced, is the heart of the *Walker* decision. The Court saw itself confronting a challenge to the judiciary's ultimate authority, the authority to stop events from getting out of hand; the Court was willing to go to almost any length in order to uphold that authority. As we have seen, ample grounds existed for the Court to find for the petitioners in a decision narrowly tailored to the facts: the *ex parte* hearing, its timing, the fact that Bull Connor had been voted out of office, his treatment of Mrs. Hendricks, his history of racism (known to the Court from prior cases),⁸¹ not to mention the well-known commitment of the SCLC to nonviolence. Each could have provided a convenient hook for a favorable decision.⁸² The fact that the Court did not rest content with allowing even a narrow exception to the inviolability of court orders shows that it feared even the slightest diminution of judicial ability to stop events.

This is particularly striking in view of the Supreme Court's general support for the civil rights movement and civil rights demonstrations in the years preceding *Walker*.⁸³ In hindsight, *Walker* (together with the *Adderley* decision handed down seven months before⁸⁴) in fact marks a turning point in the Court's attitude, away from the civil rights movement and in the direction of greater emphasis on civil order. In his dissenting opinion, Justice Brennan lets us know why: "We cannot permit fears of 'riots' and 'civil disobedience' generated by slogans like 'Black Power' to divert our attention from what is here at stake"⁸⁵ *Walker* was decided in 1966, when the nonviolent civil rights movement was metamorphosing into greater militance and the country had witnessed riots in Watts and Harlem spread elsewhere; by 1966, the slogan "Burn, baby, burn!" had raised the fear of self-fueling riots. The Court saw itself confronting a very real possibility of losing its grip.⁸⁶

81. In his dissent, Chief Justice Warren cites five cases and two governmental reports that take official notice of "[t]he attitude of the city administration in general and of its Public Safety Commissioner in particular" *Walker*, 388 U.S. at 325 n.1 (Warren, C.J., dissenting).

82. Westin and Mahoney argue that the Court should have found in favor of King in an opinion narrowly tailored to the exceptional facts. A. WESTIN & B. MAHONEY, *supra* note 25, at 286-89.

83. See, e.g., *Cox v. Louisiana*, 379 U.S. 559 (1965) (protecting demonstrators from state suppression); *Fields v. South Carolina*, 375 U.S. 44 (1963) (same); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same).

84. *Adderley v. Florida*, 385 U.S. 39 (1966) was the first Supreme Court case in the 1960s upholding the convictions of nonviolent demonstrators. A. WESTIN & B. MAHONEY, *supra* note 25, at 205.

85. *Walker*, 388 U.S. at 349 (Brennan, J., dissenting).

86. This is a major theme in A. WESTIN & B. MAHONEY, *supra* note 25.

This perhaps makes the Court's response more comprehensible; it does nothing to render it justifiable. The entire question of the legitimacy of judicial authority remains begged, and begged to its depths. Authority "needs" to be able to stop social protest from getting out of hand. It "needs" to be able to freeze the status quo in emergency situations, even by unconstitutional means. Why is that? To be sure, violence is an intrinsically terrible thing; but the Supreme Court of the United States did not base the "need" to stop matters from getting out of hand on grounds of pacifism, for the United States government is in no respect pacifist.⁸⁷ The status quo is itself always maintained by violence, and never more so than in the case of Jim Crow.⁸⁸ The ultimate question remains: Why should courts be able legitimately to reserve the power to preserve an unjust status quo of which they are a part, even for a single second, by means that exceed their authority?⁸⁹ (This, too, after all, is an example of being a judge in one's own case.)

87. An important case prefiguring *Walker* that runs contrary to my general line of argument here is *United States v. Shipp*, 203 U.S. 563 (1906). In that case, the Supreme Court issued an order preventing the execution of Johnson, a black man convicted of raping a white woman, pending appeal. A lynch-mob gathered at the jail and Shipp, the sheriff guarding the prisoner, joined forces with the mob to carry out the lynching. Shipp was convicted of contempt of court. He argued that the Supreme Court had no jurisdiction for its order, and therefore that he could not be punished for contemning it. The Court rejected this argument in a discussion that links the necessity of preventing violence with the question-begging assertion of the Court's "catholic" authority to determine the limits of its own authority: "Until its judgment declining jurisdiction should be announced, it [*i.e.*, the Supreme Court] had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition . . ." *Shipp*, 203 U.S. at 573.

Shipp appears to illustrate the necessity of some social mechanism to "pull the plug" on events that threaten to get out of hand, leading to incidents as appalling as the lynching of Johnson. But why should it be judicial authority? Why not the sheriff? In *Shipp*, of course, the answer is that the sheriff was part of the mob. But must it therefore be a judge? We can imagine judges who also fail to do their job for the same reasons as the sheriff; we could imagine the Supreme Court, or any other authority, failing to do its job for racist reasons. The argument from the need for a social mechanism to freeze events in their tracks to the vindication of judicial authority is thus a complete *non sequitur*. To see this clearly, consider a case cognate to *Shipp*: Johnson is unjustly convicted, and the unjust conviction is upheld by the Supreme Court. Now events are threatening to get out of hand: Johnson is about to be executed. What is needed, clearly, is some social mechanism to "pull the plug" on these events. Since all the authorities are united in their determination to execute Johnson unjustly, the task falls to a mob of Johnson's supporters, who rescue him dramatically from jail. Here the need for a social mechanism to freeze events in their tracks, in order to stop unjust violence, vindicates mob rebellion against judicial authority, just as in *Shipp* it vindicates judicial authority itself.

88. The history of violence employed to maintain Jim Crow goes all the way back to the dissolution of Reconstruction. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1875) (denying federal authority to punish private individuals for forcibly breaking up a black political meeting and thereby hindering the exercise by blacks of the right to vote). For an eloquent reminder that law rests on violence, see Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

89. In his *Letter*, King writes: "I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice . . ." KING, *Letter*, *supra* note 13, at 87. The debate over whether the highest legal value is order or justice is an old one; I have sketched arguments about this issue in ancient Greek literature, and argued that the pursuit of order at the expense of justice is faulty. See Luban, *Some*

To freeze the status quo inevitably does more than delay social protest. It destroys it. Social protest is always a miraculous phenomenon; it is irrational for an individual to participate in collective action for social change even when the collective action is itself rational; whether or not the action occurs will never turn on the participation of a single individual, so for each individual it makes more sense to leave the risks and labor to others than to participate.⁹⁰ Since this is true for all individuals, social protest is almost always stillborn, suffocated by cords of inertia, mistrust, and self-interest. Moreover, because members of victimized groups typically live in environments with little economic security, it may be more rational for them to emphasize the short run over the long, and thus consent to a substantial level of oppression that nevertheless offers a livelihood, rather than choosing the risky path of seeking structural change.⁹¹

Social protest can occur only when individuals are stirred in their souls, stirred to act in a way that is not individually rational. For years, or decades, even centuries, the routine of oppression proceeds uninterrupted. Then, inexplicably, at certain privileged moments the curtain lifts and political action flames into existence. At a rally in Manila, or a shipyard strike in Gdansk, or a public funeral in Beijing, or a segregated bus in Montgomery, something unpredictable happens to interrupt the timid calculations of individual rationality. In Benjamin's words,

Where thinking suddenly stops in a configuration pregnant with tensions, it gives that configuration a shock, by which it crystallizes into a monad. . . . In this structure [the historical materialist] recognizes the sign of a Messianic cessation of happening He takes cognizance of it in order to blast a specific era out of the homogeneous course of his-

Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus, and Plato, 54 TENN. L. REV. 279 (1987).

90. This argument was explored initially in M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971). See also R. HARDIN, *COLLECTIVE ACTION* (1982). This argument is applied to the analysis of revolutionary social change in Buchanan, *Revolutionary Motivation and Rationality*, 9 PHIL. & PUB. AFFS. 59 (1979). But see G. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 266-79 (1986), for an argument that revolutionary participation can be rational. On the relationship between collective action problems and the legal system, see D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 364-91 (1988).

91. See J. COHEN & J. ROGERS, *RULES OF THE GAME: AMERICAN POLITICS AND THE CENTRAL AMERICA MOVEMENT* (1986) (a succinct statement of the obstacles facing social protest movements in America); J. COHEN & J. ROGERS, *ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY* 47-87 (1983); Przeworski, *Proletariat into a Class: The Process of Class Formation from Karl Kautsky's The Class Struggle to Recent Controversies*, 7 POL. & SOC. 343 (1977); Przeworski, *Material Bases of Consent: Economics and Politics in a Hegemonic System*, 1 POL. POWER & SOC. THEORY 21 (1980); Przeworski, *Social Democracy as a Historical Phenomenon*, NEW LEFT REV., July-Aug. 1980, at 27; Przeworski & Wallerstein, *The Structure of Class Conflict in Democratic Capitalist Societies*, 76 AM. POL. SCI. REV. 215 (1982).

tory⁹²

But if that moment — “shot through,” as Benjamin says, “with chips of Messianic time”⁹³ passes, if the momentum of social protest is interrupted, the miracle will no longer occur. The protestors lose their faith, or they must return to their families and jobs, or the media go home, or the instant of dialectical sympathy between the protestors and the larger community, which would draw the larger community into the movement, evaporates. Wyatt Walker recollected: “One option we eliminated was going to court to try to get the injunction dissolved. 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.”⁹⁴ Bull Connor and Judge Jenkins understood that for a protest movement delay means death. Authority *always* understands that for a protest movement, delay means death. The Supreme Court of the United States understood it. In the *Walker* decision, the Court imposed, so far as it was able, a death sentence on social protest. By what right did the Court cast its vote for existent injustice over social change? Why is a court’s claim to authority greater than that of the civil rights movement?

One answer, of course, is that judges are democratically elected or chosen by democratically elected representatives. But this is scarcely a decisive argument, for two reasons: first, in many cases (and notably the case of blacks in the South of 1963) the protest movement has had no part in the democratic process (and the process is itself stacked against oppressed people); and second, the question turns on *unconstitutional* injunctions issued by democratically elected judges.

Ultimately, the *Walker* Court reserved for the judiciary the authority to stifle social protest by any means, constitutional or not. Its assertion of authority is naked, unsupported by anything other than the assertion itself.

And, to underscore the argument of the preceding section, let me repeat that the assertion is an incoherent one, undercutting the premises of liberal democracy — the narrative of American political history — on which judicial authority ostensibly rests: by granting courts the right to exceed the limits of their own authority, the Court must abandon the notion of the rule of law, or popular sovereignty, or publicity.

92. W. BENJAMIN, *supra* note 2, at 264-65.

93. *Id.* at 265.

94. *Quoted in* A. WESTIN & B. MAHONEY, *supra* note 25, at 76.

It may be objected that I have misread the *Walker* Court's emphasis: its main focus is not the vexed issue of transparent unconstitutionality. Rather, the Court's point is a simpler and less controversial one, namely that the demonstrators wrongly made no effort to get the injunction dissolved even though they had enough time to attempt to do so. After all, the *Walker* Court writes that "[t]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."⁹⁵ This suggests that had the demonstrators challenged the injunction, *Walker* might have been decided differently. That, at any rate, is how the Court subsequently understood *Walker*.⁹⁶ This latter reading of the case implies that the *Walker* Court was not concerned, as I have been arguing, to make it as difficult as possible for demonstrators to disobey injunctions, even unconstitutional injunctions; rather, the Court was concerned merely to ensure that before disobeying the injunction the demonstrators must first exhaust judicial remedies.

Now I do not wish to deny that this is a possible reading of *Walker* even though it ignores the third of the opinion devoted to proving that the injunction was not transparently invalid; but it is a superficial reading, for the seemingly minimal, seemingly reasonable request to seek dissolution of an unconstitutional court order before violating it is itself offensive or even immoral unless the larger questions we have been considering about the legitimacy of judicial authority can be answered.

This may be seen clearly if we reflect on hypothetical cases in which a local court issues a degrading, debasing, and transparently unconstitutional order to a group. Part of the humiliation such an order inflicts on its recipients lies precisely in the need to go to another court to obtain authorization to disobey; the lower court humiliates the recipients by compelling them to offer gestures of respect and obedience to the judicial system. Suppose, for example, that a Jewish group wishes to stage a protest march and is ordered by a judge to wear yellow Star of David armbands, ostensibly for the purpose of

95. *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967).

96. See *United States v. Ryan*, 402 U.S. 530, 532 n.4 (1971) ("Our holding [in *Walker*] that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage."); see also *Donovan v. City of Dallas*, 377 U.S. 408, 414 (1964); *Maness v. Meyers*, 419 U.S. 449 (1975). The lesson of these cases, according to Wright, is that "the validity of an order can be challenged in a contempt proceeding for violation of the order only if there was no opportunity for effective review of the order before it was violated." C. WRIGHT, *LAW OF FEDERAL COURTS* 88 (4th ed. 1983).

identification to help police keep the traffic orderly. Much of the offensiveness of the order lies precisely in making the group go through a charade of deference — by seeking to dissolve an order that is so obviously unconstitutional, and so obviously intended as a mere racial harassment — before violating it. Nor is the example much more outrageous than the actual Birmingham injunction, which issued under circumstances in which it could hardly have been clearer that it was a mere racial harassment.

Another hypothetical example will illustrate the point. Suppose that the Birmingham Ku Klux Klan had publicly issued its own mock “injunction” to prevent the Project C march, announcing, however, that it would be willing to “dissolve” its “injunction” provided that the demonstrators publicly applied to the Imperial Wizard in writing. Here it is obvious that the Klan’s offer to “dissolve” the mock “injunction” heightens, rather than diminishes, the outrageousness of the “injunction” itself. And it is also obvious that this is because the Klan has no authority to issue such morally debasing commands in the first place.

The only difference between this and the *Walker* Court’s insistence that the demonstrators apply to a court to dissolve Judge Jenkins’ unconstitutional injunction before disobeying it must lie in the fact that the court system has the authority that the Klan so obviously lacks. And thus, to explain why the demonstrators should not simply adjudge Judge Jenkins’ order transparently unconstitutional and disobey (intending to accept their punishment if their judgment was wrong), we need to explain why Judge Jenkins had the authority to compel them to jump through additional judicial hoops merely by issuing an unconstitutional order. The seemingly minimal, seemingly reasonable request to seek dissolution of the injunction before disobeying it is neither minimal nor reasonable unless it can be grounded in an account of why judicial authority to issue unconstitutional injunctions deserves respect in the first place.⁹⁷

Thus, the Court cannot evade the deeper questions of judicial authority, and its “dangerous supplement,” that we have been exploring. To conclude our examination of *Walker*, let us see how, finally, the Court answers them.

97. Not only is the bare fact of acceding to a racially harassing order in and of itself an injury to the demonstrators, it is also likely to destroy their effectiveness by undermining their confidence in their own leaders’ commitment and courage. Thus, even on the *Maness v. Meyers* “unring the bell” test, *see supra* note 74, the request to seek dissolution of the injunction before disobeying it is far from minimal.

D. *"The Civilizing Hand of Law, Which Alone Can Give . . ."*

"But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."⁹⁸

This, the Court's final sentence, contains an ironic grammatical ambiguity introduced by its most important word: "alone." It can be read as the assertion that the civilizing hand of law is *necessary* to give abiding meaning to constitutional freedom — rather clearly what the Court intended — or that the civilizing hand of law is *sufficient* to give abiding meaning to constitutional freedom.

Double meanings like this — Freud called them "parapraxes" — are almost enough to make one believe in psychoanalysis. The Court probably did not intend to say that law can give abiding meaning to constitutional freedom all by itself: but in addition to being a grammatical reading of the sentence, it is a conclusion to which the Court is inevitably driven by the logic of its own argument. For if the civilizing hand of the law — judicial and governmental process — is not sufficient to give abiding meaning to constitutional freedom, the Court has no business insisting that long-suffering citizens defer their attempts at self-help. Government's claim to exclusive authority is grounded in part on its ability to do the job, to keep its promises. It is precisely the ability of government to fulfill the constitutional promise of equality that the civil rights movement doubted. As King wrote in the *Letter*: "For years now I have heard the word 'Wait!' It rings in the ear of every Negro with piercing familiarity. This 'Wait' has almost always meant 'Never.'"⁹⁹ The Court must do more than warn that if judicial processes are bypassed anarchy might result (which is probably false and, in any event, beside the point, inasmuch as the demonstrators were willing to accept the punishment for contempt had the injunction ultimately been found valid, and were therefore scarcely attempting to bypass judicial processes). In addition, the Court must reassure us that King is wrong, that "the civilizing hand of law" is in and of itself sufficient to produce abiding freedom.¹⁰⁰

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

99. KING, *Letter*, *supra* note 13, at 83.

100. This is the defining belief of "Legal Centralism," the almost-universally accepted dogma of legal professionals. Legal Centralism has been defined as "a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of 'hierarchic control' to other, lesser normative orderings such as the family, the corporation, the business network." Galanter, *Justice in Many Rooms*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 161 (Cappelletti ed. 1981) (footnotes deleted). See also Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1070-72. For an illuminating recent discussion, see Gordon, *Without the Law II*

The problem, of course, is that this is untrue, even monstrously untrue. Without the will and willingness of the people it governs, courts and governmental authority more generally are helpless. Segregation was a decisive case in point, for one hundred years of the “civilizing hand of law” had yielded black people little beyond Jim Crow.¹⁰¹ Alexander Bickel argues persuasively that the South might actually have resisted court-ordered integration successfully but for southern officials’ tactical blunders of loosing extreme brutality on black children in front of news cameras, which mobilized northern support for the civil rights struggle.¹⁰² Had the southern leadership responded more coolly, the civilizing hand of law would have been helpless. Indeed, as late as 1969 President Nixon could still refer to those who wanted to see *Brown v. Board of Education* enforced as “extremists.”¹⁰³ The fact that such a statement could pass as sane political discourse testifies to the lack of progress in school integration even after sixteen years, and thus to the Court’s thoroughgoing inability to “give abiding meaning to constitutional freedom” alone. And, as a more general point, the very idea that legal institutions by themselves — that is, regardless of extra-institutional social behavior — can guarantee freedom, or anything else for that matter, is false to the point of insanity. It attributes a kind of divine omnipotence to legal institutions that nothing human possesses.

Yet the Court’s rhetoric in *Walker* could offer no escape from the closed circle of authority. We have seen that rhetorically the opinion’s aim was not ultimately to decide a disputed question: it was to reserve for authority the only possible voice through which disputed questions can even be posed. *Walker*’s narrative structure tars every unofficial voice as a “judge in its own case,” and thereby silences that voice’s claim to enunciate justice for itself.

I suggested earlier that legal narratives gain their authority by implicitly comprehending institutions in religious categories. The *Walker* Court, faced with the need to exclude the authoritativeness of unofficial voices, solved the problem by implicitly attributing to legal institutions a superhuman efficacy and disinterest that demands unconditional obedience and faith. Facing a choice between the anti-authoritarian consequences of liberal constitutionalism and the over-

(Book Review), 24 OSGOODE HALL L. REV. 421 (1986). Cover, *supra* note 1, offers a telling critique of Legal Centralism.

101. See generally R. KLUGER, *SIMPLE JUSTICE* (1976).

102. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 266-68 (1962).

103. This was Nixon’s response to the oral argument of *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), the decision ending “all deliberate speed” and ordering immediate school desegregation in Mississippi. J. BASS, *UNLIKELY HEROES* 314 (1981).

whelming desire to maintain reverence for authority, the *Walker* Court opted for the latter, staking out an extravagant claim on behalf of the legal system that only a supernatural power could fulfill and demanding allegiance that only a supernatural power deserves. Unable to tolerate the consequences of a merely secular liberalism, the Court chose to invest the legal system with an essentially religious authority.

In Sophocles' *Antigone* it is Creon who, like the *Walker* Court, is incapable of recognizing any claim to allegiance other than that exerted by the state: "[H]e who counts another greater friend than his own fatherland, I put him nowhere."¹⁰⁴ To which Creon's own son later responds: "You'd rule a desert beautifully alone."¹⁰⁵ Like Creon, the *Walker* Court was locked in the solipsism of an authority that recognizes only itself. Like Creon, the *Walker* Court, which failed even to mention the crucial social actors in Birmingham, put every social force other than the law itself "nowhere." Like Creon, the *Walker* Court would rule a desert beautifully alone.¹⁰⁶

When the guard first tells Creon that someone has disobeyed his command (*Antigone*, like King, disobeyed the command in the name of honoring a higher religious law), he flies into a rage; he suspects everyone of inciting community-destroying civil war. The chorus comments:

Many he wonders but nothing walks stranger than man. . . . When he honors the laws of the land and the gods' sworn right high indeed is his city; but stateless the man who dares to dwell with dishonor. Not by my fire, never to share my thoughts, who does these things.¹⁰⁷

It is the moment of supreme irony in the drama. We hear it through Creon's ears as a denunciation of *Antigone*; but as the action unfolds, we come gradually to realize that the chorus is referring to Creon himself, who has dishonored the gods' sworn right through his impious command, and who ends as a familyless exile from his own state, a prisoner of his own community-destroying autism.¹⁰⁸

104. Sophocles, *Antigone*, in 2 THE COMPLETE GREEK TRAGEDIES 159, 165 ll. 182-83 (E. Wyckoff trans. 1957).

105. *Id.* at 184 l. 739.

106. For a related thought about *Walker*, see R. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 103-13 (1988) (*Walker* commits error of "confounding the law and the judges").

107. Sophocles, *supra* note 104, at 170 l.335, 171 ll. 369-72.

108. Several readers of earlier drafts of this paper have asked me what rule I would propose in place of *Walker*'s. Though answering this question — or even raising it — is quite tangential to my purposes in this essay, I believe that an answer is implicit in my analysis; this being the case, it might as well be made explicit. As we have seen, existing doctrine already permits a party to contemn a constitutionally infirm court order if it is issued *ex parte* despite the possibility of notifying the opposing party, or if ample opportunity to challenge the order does not exist,

III. KING'S LETTER

King understood Creon's tragic error. Addressing the NAACP in Atlanta nine months before the Birmingham march, King reminded his law-oriented audience that "legislation and court orders can only declare rights. They can never thoroughly deliver them. Only when the people themselves begin to act are rights on paper given life blood."¹⁰⁹ So apt is this response to the final sentences of Stewart's *Walker* opinion that it is almost as though King had peered into the future to read it. Where the Court sought its panacea in "the civilizing hand of law" rather than "the petitioners' impatient commitment to their cause,"¹¹⁰ King found legal rights only where "the people themselves begin to act." In the same Atlanta speech King sounded some of the motifs that would later appear in his *Letter*, and indeed employed several of the similes and comparisons that we shall later examine; in part, the Atlanta speech amounts to a prototype of the *Letter*. It shows how deeply King was thinking about the basic tension between juridical institutions and community as the true source of legal authority.

King's *Letter* is a prophetic call to community; so much is obvious from the moment that he enunciates his basic thought: "We are

or if complying with the order would irremediably damage a party. Assume that none of these problems arise in the case of an injunction. Even then, except in one circumstance, demonstrators should be able to avoid punishment for contemning a court order by showing that the order was unconstitutional. The exception is this: when the act of disobedience itself consists of irreversibly and wrongfully damaging someone — for example, by revealing legitimately confidential information, or committing a violent crime — then parties may be punished for contemning the order whether or not it was constitutional. The exception is intended to grant courts authority to issue enforceable unconstitutional orders to deter intentional, wrongful damage to other people in emergency circumstances like those in *Shipp* (the lynching case discussed *supra* note 87). Now this exception seems to beg the same questions of judicial authority I have been accusing the Court of begging, since it allows courts to exceed their constitutional authority. But the reason for the exception has nothing to do with courts in particular; rather, I believe that *anyone* should be able to stop intentional, wrongful damage to other people by proportional means, even when those means are illegal. I am thinking here of something like the German law of "justifying emergency": "Whoever, in the face of an immediate and not otherwise preventable danger to life, limb . . . or other rights performs an act in order to hinder the danger . . . does not act illegally if, upon balancing the conflicting interests, particularly the rights concerned and the degree of danger which threatens them, the protected interest outweighs the impaired interest significantly . . ." *Strafgesetzbuch* [StGB] sec. 34. The issue is not a grant of extraordinary political authority to courts; rather, it is a recognition of extraordinary authority that vests in all of us in the face of an emergency. Note also that the exception in the rule I am proposing applies only when the act of disobedience itself wrongfully injures someone; it does not apply when the act itself is not wrongful or injurious, even in situations in which as it happens injuries result. In Project C, even if the nonviolent march provoked others to violence, the marchers could not be punished for contemning Judge Jenkins' order under the rule I favor. Nor does the rule permit "anarchy"; violators of court orders run the risk that at their contempt hearings the order will be upheld, in which case they will be punished.

109. Quoted in T. BRANCH, *supra* note 24, at 598.

110. *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).

caught in an inescapable network of mutuality, tied in a single garment of destiny."¹¹¹ And by its invocation of community — an entity or category so strikingly absent in the *Walker* opinion — King's is a voicing of the Birmingham events that is supplementary or dual to the *Walker* Court's. King repopulates the Creonic desert over which the Court has elected to preside. But King, like the Court, is unsure whether to issue his call in religious or secular terms. The *Letter* in fact has it both ways; therein lies its power but also its deficiency. I shall explain this by looking closely at King's political narratives, his identifications of the actions of himself and his fellow demonstrators with episodes of a larger, more universal history — or, more precisely, with several such histories, some of which are religious in character, some secular. First, to help orient the reader, I briefly summarize the *Letter*.

After an initial greeting to his "fellow clergymen,"¹¹² King addresses the various accusations that the eight clergymen had leveled in their newspaper advertisement. To the charge that he and his fellow organizers are outside agitators, King asserts the "interrelatedness of all communities and states," and likens himself to St. Paul answering the Macedonian call.¹¹³ To the charge that the demonstrations are "unwise and untimely," King responds by reviewing Birmingham's history of racism and of broken promises to the civil rights movement and outlines the careful steps taken by the campaign to prepare itself for nonviolence.¹¹⁴ To the charge that the demonstrators have substituted confrontation for negotiation, King responds that it is naive to believe that negotiation will ever take place unless the demonstrators have forced it by creating a "tension" in the community.¹¹⁵ To the charge that the demonstrators are forcing the issue before giving the Boutwell administration time to do what it can in race relations, King suggests that Boutwell, like Connor, is a segregationist, differing from the latter only in that Connor is more crude. In the most moving and urgent paragraph of the *Letter*, he meditates bitterly on the evils of segregation to illustrate one of his main themes: that "it is easy for those who have never felt the stinging darts of segregation to say, 'Wait,'"¹¹⁶ but wholly unreasonable to expect long-suffering blacks to remain patient in their suffering.

111. KING, *Letter*, *supra* note 13, at 79.

112. *Id.* at 77.

113. *Id.* at 78.

114. *Id.* at 79-81.

115. *Id.* at 81-82.

116. *Id.* at 82-83.

Next, King addresses a charge that is close to the issue in *Walker*. How can King ask whites to comply with *Brown v. Board of Education* if he is himself prepared to disobey a court order that he doesn't like? In response, King sketches an argument based on a series of distinctions from the natural law tradition: One is obligated to obey just law, but to disobey unjust law. Just law is law that uplifts human personality, whereas unjust law is law that degrades it. Segregation laws, by giving whites a false sense of superiority and blacks a false sense of inferiority, degrade human personality, whereas an integrationist decree such as *Brown* uplifts it and is consequently just. Alternatively, just law is law that applies evenhandedly to minorities and majorities — it is “sameness made legal” — whereas unjust law is law that does not — it is “difference made legal”; by this criterion as well, segregation laws and *Brown* differ fundamentally. Finally, a just law, such as an ordinance requiring marchers to obtain a parade permit, can be enforced selectively (as in Judge Jenkins's injunction), in which case it too is difference made legal and hence unjust. *Ergo*, *Brown*'s decree must be obeyed and segregation laws (including Judge Jenkins's injunction) must be disobeyed.¹¹⁷

After answering the white clergymen's accusations, King launches his own. He expresses dismay at white “moderates,” who are “more devoted to ‘order’ than to justice,” who agree with the movement's goals but characterize all of its methods as too extreme, and who believe fallaciously that the passage of time will in and of itself end segregation without demonstrators forcing matters.¹¹⁸ In response, he condemns “the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills”;¹¹⁹ he then reminds his readers that it is not his nonviolent movement but black nationalist groups such as the Muslims who stand at the extreme of the race issue.¹²⁰ King then reflects that on second thought he should willingly accept the “extremist” label, for it puts him in very good company. Since it will concern us later, I reproduce this vital paragraph here for convenience:

But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: “Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which spitefully use you, and perse-

117. *Id.* at 84-86.

118. *Id.* at 87-93.

119. *Id.* at 89.

120. *Id.* at 90-92.

cute you." Was not Amos an extremist for justice: "Let justice roll down like waters and righteousness like an ever-flowing stream." Was not Paul an extremist for the Christian gospel: "I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist: "Here I stand; I cannot do otherwise, so help me God." And John Bunyan: "I will stay in jail to the end of my days before I make a butchery of my conscience." And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self-evident, that all men are created equal"¹²¹

For future reference, let us refer to this as the "extremism passage." We shall return to it several times.

In the concluding pages of the *Letter*, King excoriates the white churches for their failure to embrace the cause of civil rights as a fundamental moral matter.¹²² In a prophetic mode, King castigates the churches for urging compliance with civil rights laws merely as a matter of prudence rather than welcoming blacks as brothers and sisters;¹²³ he thunders that the churches themselves will face a day of reckoning for their moral failings.¹²⁴ Finally, King criticizes the clergymen for congratulating the Birmingham police for "preventing violence"; King bitterly points out that this ignores the police dogs and the violence employed by the police out of sight of the cameras, not to mention that their public restraint was merely a tactic in the service of segregation.¹²⁵ In the end, however, King offers a conciliatory closing salutation: "I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil rights leader but as a fellow clergyman and a Christian brother."¹²⁶

This, however, is a bare summary. The true meaning of the *Letter* lies more in the detailed narratives King offers than in the larger structure of his argument. I shall be focusing on King's identifications of himself and his fellow demonstrators with a variegated but carefully chosen collection of other historical actors. In what I have labeled the "extremism passage,"¹²⁷ and elsewhere in the *Letter*, King identifies with biblical characters (Paul, Amos, Jesus, Shadrach, Meshach, and Abednego); with Christian dissidents (unnamed Christian martyrs, Luther, Bunyan); with theological thinkers (Augustine, Aquinas,

121. *Id.* at 92.

122. *Id.* at 93-98.

123. *Id.* at 94.

124. *Id.* at 96.

125. *Id.* at 98-99.

126. *Id.* at 100.

127. *Supra* note 121 and accompanying text.

Buber, Tillich); with American egalitarians (Jefferson, Lincoln); and with the patron saint of civil disobedience (Socrates). Together, these self-identifications generate a dense and, as we shall see, multiply ambiguous political narrative.

A. *King's Local Narrative*

My primary focus will be on King's political narratives, his efforts to make legal sense of a larger history of which the Birmingham campaign forms just one episode, rather than his local narrative of the Birmingham events. This is because King's local narrative — his description of the Birmingham campaign — tries not to be self-contained, but rather points explicitly outside itself toward the larger political narrative. The local narrative is, to borrow a term from the philosophy of science, "theory laden" to a remarkable extent. King organizes his account of the Birmingham campaign around a theory of direct action rather than a chronological sequence of events. "In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self-purification; and direct action. We have gone through all these steps in Birmingham."¹²⁸ Having propounded this schema, King proceeds in ordered sequence to describe Birmingham's racist predilections ("to determine whether injustices exist"), the events leading up to the demonstrations, including prior attempts at negotiation ("negotiation"), and the planning of the demonstrations, including workshops in nonviolence ("self-purification"). The local narrative he develops in this way is richer and more inclusive than that of the *Walker Court*; instead of a reductionist recounting of the event as an encounter between authority and individuals, King's narrative vocabulary also includes the civil rights organization and the Birmingham white community itself.

What is noteworthy about King's local narrative, however — apart from the striking set of categories he uses to organize it — is that he says virtually nothing about the demonstrations themselves, the fourth step of his schematism ("direct action"). Or rather, he says virtually nothing about the march, the crowds, the arrest, or the injunction.¹²⁹ Instead, he recounts the events by describing what he takes to be the political and spiritual import of direct action:

Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can

128. KING, *Letter, supra* note 13, at 79.

129. He does, however, describe these events in his 1964 memoir of the Birmingham campaign. M.L. KING, *New Day in Birmingham*, in *WHY WE CAN'T WAIT* 55-75 (1964).

no longer be ignored. . . . Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.

The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation.¹³⁰

King, I believe, purposely refuses to recount the events without subsuming them within an account of their purpose.¹³¹ In his narrative vocabulary, a march or a sit-in simply resists flat-footedly behavioral narration. A sit-in attempts to dramatize an issue, and thus to refer beyond itself. And so to describe it in behavioral terms without building that dramatic function into the description would be as misleading as a description of Othello choking Desdemona that omits the fact that the action is occurring in a play. To take another example — one that is highly pertinent to King's spiritualized understanding of a direct action campaign — a religious revelation may well resist flat-footedly behavioral narration. ("St. So-and-So knelt in prayer. Two hours later she stood up. That's all, folks!") The physical events that transpired on April 12, 1963 are, in King's narrative apparatus, shadow-events or bare husks whose recitation — here we must think of Stewart's local narrative in *Walker* — misleads and misses the truth of what occurred: a local narrative of crisis and creative tension.¹³²

King's Socratic allusion in the passage I have just quoted is surely intended as a conscious underscoring of this point. The allusion to "ris[ing] from the bondage of myths and half-truths" is a reference to the famous allegory of the Cave in book 6 of Plato's *Republic*, which likens us to spectators of a shadow drama projected on a wall. According to Socrates, we mistake the shadows for reality, completely

130. KING, *Letter*, *supra* note 13, at 81-82.

131. This, of course, is a strategy that runs the risk of self-deception or even whitewash, of substituting an idealized picture of what one hoped to do for an accurate rendition of what one in fact did. In my view, however, the Birmingham campaign actually lived up to the description that King offers in the *Letter*, so no self-deception or whitewash actually occurs.

132. This is not to deny that sometimes it is appropriate to insist on the behavioral narration. The terrorist group insists that it merely dramatized the plight of its people (by setting off a car-bomb in a crowded street); we rightly insist that what it did was set off a car-bomb in a crowded street. The administration claims that it is signaling support for democratic institutions in Central America; we rightly insist that it is aiding and abetting right-wing murders and tortures. When the dramatic act is *malum in se*, when it consists of support for violence or violation of human rights, that fact swamps the expressive character of the act and becomes the only appropriate description. In the case of the Birmingham campaign, however, this is not the circumstance, and it would be as misleading to describe the demonstration as an unauthorized parade as it would to describe it as a pleasant stroll down the street.

overlooking the solid objects whose images we are contemplating.¹³³

Once we have grasped the appropriateness of this allusion, we understood why King substitutes a conceptual narrative of the Birmingham campaign for a journalistic account of the events: the journalistic account mistakes shadows for reality. For what occurred on April 12, 1963 was not a march followed by an arrest, but a maieutic drama "bring[ing] to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with."¹³⁴ The bulk of King's *Letter*, including its philosophical arguments as well as its political narratives, is an attempt to make good this description.

The *Walker* opinion and King's *Letter* are in an odd way mirror images of each other. *Walker* devotes most of its attention to its local narrative, its recitation of the events of April 10-12, 1963. This is unsurprising: since the Court has presumed the position of authority, it need not concentrate its efforts on political narrative, since its authority very literally speaks for itself. By contrast, King devotes most of his attention to the political narrative that will confer legitimacy on the Birmingham campaign; his local narrative of the events is abbreviated, for that narrative will make sense only when King's political narrative has persuaded us that the marches and sit-ins are indeed mere husks of a more profound story. Let us turn then to King's political narratives.

B. *King's Biblical Allusions*

The literary prototype of King's *Letter* is immediately apparent: the letter is modeled after the epistles of Paul.¹³⁵ King confirms this when he writes, "[J]ust as the Apostle Paul left his little village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco-Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid."¹³⁶ The reference is to the Book of Acts. "And a vision appeared to Paul in the night: a man of Macedonia was standing beseeching him and saying, Come over to Macedo-

133. PLATO, *REPUBLIC* *514a-18b. For a useful discussion of the myth of the Cave, see Fogelin, *Three Platonic Analogies*, 80 *PHIL. REV.* 371 (1971).

134. KING, *Letter*, *supra* note 13, at 88.

135. Consider, for example, King's closing salutation: "I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil-rights leader but as a fellow clergyman and a Christian brother." KING, *Letter*, *supra* note 13, at 100. The contemporary references apart, the language resonates with Paul's various salutations (perhaps especially with *Ephesians*, when Paul like King was a prisoner).

136. KING, *Letter*, *supra* note 13, at 78.

nia, and help us."¹³⁷ As we shall see, it is highly significant that King likens himself to Paul of the Book of Acts, for this Book is the portion of the Bible closest in its utopian and communitarian ecstasy to King's own basic thought, "We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."¹³⁸

None of King's biblical guises — Paul, Amos, Jesus, or even Shadrach, Meshach, and Abednego — are accidental. But Paul's is the most evident, since his guise shapes the literary form of the *Letter*. Why does King assume the guise of Paul? The answer should be clear when we recollect his audience: eight white clergymen. For King, the fact that they were white and the fact that they were clergy combined irresistibly to suggest a parallel with Paul's evangelism, his efforts to weld the people of many nations into a City of God. Paul's epistles are directed to small, insular Christian communities amid larger unbelieving nations. The *Letter* is nothing short of a reminder to brethren in Christ that, black or white, they are, indeed, brethren in Christ, therefore bound together by a bond that knows no distinction of skin color.¹³⁹

The *Letter* is more particular than that, however, as we realize when we turn to the Biblical passages to which King refers. These are: the Book of Acts, the Book of Amos, Paul's Epistle to the Galatians, the Sermon on the Mount, and the Book of Daniel. I take these up in turn.¹⁴⁰

In structure, recall, King's *Letter* proceeds from a justification of the Project C demonstrations and of nonviolent civil disobedience more generally to an Old Testament denunciation of contemporary iniquity, particularly the iniquity of pusillanimous white "moderates" and the Southern churches. King moves along a course from communitarian creed to prophetic menace: "But the judgment of God is upon the church as never before."¹⁴¹ All this is on the surface; but it is

137. *Acts* 16:9. (I use the Revised Standard Version of the Bible except where noted.)

138. KING, *Letter*, *supra* note 13, at 79.

139. King's rhetoric, however, did not sway Episcopal Bishop C.C. Jones Carpenter, the instigator of the clerical attack on King that provoked the *Letter*.

Bishop Carpenter sat down in his study with a copy of King's mammoth reply. He read the letter through to the end, then turned to his bishop coadjutor, George Murray, with a sigh of resignation. "This is what you get when you try to do something," he said. "You get it from both sides. George, you just have to live with that." Carpenter felt abused and misunderstood for his efforts to act as a progressive force in race relations. The clash of emotion turned him, like his great-grandfather, into a more strident Confederate.

T. BRANCH, *supra* note 24, at 745.

140. In an order chosen for ease of exposition, though it is not King's own order.

141. KING, *Letter*, *supra* note 13, at 96.

also in the depths, contained in the biblical allusions that King deploys, knowing that the clergy who read it would embed it in the biblical narratives it invokes.

Thus, the prophetic stance of King's *Letter* is exhibited clearly in the contrast between the early Christians described in the most explicitly communitarian — even communistic — passages of Acts, the Book to which King points us in his evocation of Paul's call from the Macedonians, and the corrupted Israelites whose religious offerings God angrily rejects in the denunciations of Amos to which King later alludes. Thus the Book of Acts: "And all who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need."¹⁴² "Now the company of those who believed were of one heart and soul, and no one said that any of the things which he possessed was his own, but they had everything in common."¹⁴³ "There was not a needy person among them, for as many as were possessors of lands or houses sold them, and brought the proceeds of what was sold and laid it at the apostles' feet; and distribution was made to each as any had need."¹⁴⁴ It is noteworthy, and scarcely coincidental, that Marx remembered these passages when, in his most utopian writing, he attributed to the future communist society the principle "from each according to his ability, to each according to his needs!"¹⁴⁵ For these passages from Acts have inspired utopian communists for over a thousand years.¹⁴⁶ Moreover, they inspired the Social Gospel theologian Walter Rauschenbusch to draw parallels between the Bible and Marxism, in a book that impressed King deeply in his seminary days.¹⁴⁷

This is the City of God as it should be. Compare this with King's reference to the Book of Amos, one of the Bible's most vituperative denunciations of the actual community's unrighteousness. The line he quotes from Amos is this: "Let justice roll down like waters and righteousness like an ever-flowing stream."¹⁴⁸ Amos' line appears in the context of a ghastly denunciation of a corrupted Israel:

Therefore because you trample upon the poor and take from him exactions of wheat, you have built houses of hewn stone, but you shall not dwell in them; you have planted pleasant vineyards, but you shall not drink their wine. For I know how many are your transgressions, and

142. *Acts* 2:44-45.

143. *Acts* 4:32.

144. *Acts* 4:34-35.

145. K. MARX, *CRITIQUE OF THE GOTH A PROGRAMME* 10 (C. Dutt ed. 1938).

146. See N. COHN, *THE PURSUIT OF THE MILLENNIUM* 194, 197 (rev. ed. 1970).

147. See T. BRANCH, *supra* note 24, at 73.

148. KING, *Letter*, *supra* note 13, at 92.

how great are your sins—you who afflict the righteous, who take a bribe, and turn aside the needy in the gate.¹⁴⁹

The applicability of these charges to the segregated South need scarcely be remarked (“turning aside the needy in the gate” may well stand as a literal description of Bull Connor’s action in arresting King and his fellow demonstrators as they marched to downtown Birmingham). And because of these sins, religious observances will avail the unrighteous not at all:

I hate, I despise your feasts, and I take no delight in your solemn assemblies. Even though you offer me your burnt offerings and cereal offerings, I will not accept them, and the peace offerings of your fatted beasts I will not look upon. Take away from me the noise of your songs; to the melody of your harps I will not listen. *But let justice roll down like waters, and righteousness like an ever-flowing stream.*¹⁵⁰

The line King quotes thus appears in a passage that would convey a stern, even terrifying reminder to the clergymen to whom King’s letter is addressed.

As I noted earlier, King likens himself (for the second time in the *Letter*) to Paul immediately following his reference to Amos in the extremism passage. This reference too directs us to a biblical passage fraught with significance, for it bears with startling directness on King’s confrontation with the courts. The line King quotes, “I bear in my body the marks of the Lord Jesus,”¹⁵¹ appears at the end of the Epistle to the Galatians, the most fervid of all New Testament declarations that love and community stand above the law. Paul could not be more blunt: “Christ redeemed us from the curse of the law”¹⁵² And again: “Now before faith came, we were confined under the law, kept under restraint until faith should be revealed. So that the law was our custodian until Christ came, that we might be justified by faith. But now that faith has come, we are no longer under a custodian”¹⁵³ Paul evokes the mystical, hence translegal, character of egalitarian community in language that resonates with King’s aspirations for the redeemed American polity: “There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you

149. *Amos* 5:11-12.

150. *Amos* 5:21-24 (emphasis added). The line was evidently dear to King, for he repeated it in the “I have a dream” speech in the March on Washington a few months later; moreover, King had used it in the first political speech of his career, the address to the mass meeting called after the arrest of Rosa Parks for refusing to move to the back of the bus in Montgomery that propelled him to leadership of the Montgomery bus boycott. T. BRANCH, *supra* note 24, at 141.

151. KING, *Letter*, *supra* note 13, at 92 (quoting *Galatians* 6:17).

152. *Galatians* 3:13.

153. *Galatians* 3:23-25.

are all one in Christ Jesus.”¹⁵⁴ (Compare this with the finale of the “I have a dream” speech: “all of God’s children —black men and white men, Jews and Gentiles, Protestants and Catholics — will be able to join hands”¹⁵⁵) “For the whole law is fulfilled in one word, ‘You shall love your neighbor as yourself.’”¹⁵⁶ Community and brotherhood in faith trump fidelity to established law. Indeed, the Book of Acts, which we have seen forms one of King’s referential reservoirs, itself contains an explicit statement of the same antinomian principle: “We must obey God rather than men.”¹⁵⁷

This carries us quite naturally to King’s reference to Jesus. The “Love your enemies” verse that King quotes in the extremism passage appears, of course, in the Sermon on the Mount.¹⁵⁸ Significantly, it is the continuation of this verse: “You have heard that it was said, ‘You shall love your neighbor and hate your enemy.’ But I say to you, *Love your enemies and pray for those who persecute you.*”¹⁵⁹ Christ’s allusion here is to *Leviticus* 19:18, “You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the Lord.” He interprets the Levitical injunction to love your neighbor as a negative pregnant: an implicit restriction of the injunction to those who are like oneself; the Sermon on the Mount radicalizes the message of love by extending it to those unlike oneself. Small wonder that King would invoke this

154. *Galatians* 3:28.

155. Quoted in D. GARROW, *supra* note 20, at 284.

156. *Galatians* 5:14. See *Leviticus* 19:18, which places “You shall love your neighbor as yourself” as but one of the Mosaic commandments — though Hillel would later enunciate the Golden Rule as the entire teaching of the Torah.

Robert Cover has offered a complex argument that Paul, in *Galatians* 4:22-31, invokes a hidden subversive theme, closely tied to the problem of legal legitimacy that we have been examining, that animated the entire Old Testament. Cover, *supra* note 1, at 19-25. One of the most important Mosaic laws concerned the right of the firstborn son to a double portion of the father’s inheritance. *Deuteronomy* 21:15-17. As Cover points out, this law is violated in the stories of Cain and Abel, of Ishmael and Isaac, of Jacob and Esau, of Joseph and his brothers, of Solomon’s rise to the Davidic throne, of Moses’ dominance over Aaron, of the Prophet Samuel’s birth and assumption of the place of Eli, and of David’s succession to the throne of Saul — each of which involves a catapulting of a younger son over the elders. Cover argues that the meaning of this tension between the law of succession and these key biblical narratives is “first, that the rule of succession can be overturned; second, that it takes a conviction of divine destiny to overturn it; and third, that divine destiny is likely to manifest itself precisely in overturning this specific rule.” Cover, *supra* note 1, at 22. It is to one of these stories, that of Hagar and Ishmael, that Paul points in the passage in *Galatians*, which Cover characterizes as a “revolutionary allegorical extension of the typology.” *Id.* at 24. It is not my argument that King himself drew these connections; but it *is* my argument that King meant consciously to invoke a biblical text that glorifies the violation of legal precepts in the name of divine destiny.

157. *Acts* 5:29. Cover refers to this principle as “a religious rule of recognition,” functionally equivalent and therefore directly contradictory to the supremacy clause of article VI, section 2 of the Constitution. Cover, *supra* note 1, at 30.

158. *Matthew* 5:44.

159. *Matthew* 5:43-44 (emphasis added).

biblical passage, since extending the injunction of love from one's own people to all people is precisely the universalist and cosmopolitan theme of King's *Letter*.¹⁶⁰

A more important point is this. We recall that in the Epistle to the Galatians, to which King alludes shortly after his reference to Jesus, Paul takes this passage from the Sermon on the Mount to reject the Mosaic law. ("Christ redeemed us from the curse of the law For the whole law is fulfilled in one word, 'You shall love your neighbor as yourself.'"¹⁶¹) Yet this is not how Christ himself characterized the Sermon's import. On the contrary, Christ cautions, "Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfil them. For truly, I say to you, till heaven and earth pass away, not an iota, not a dot, will pass from the law until all is accomplished."¹⁶²

Now it is possible to reconcile Paul's and Christ's characterizations of what Christ has done to the law when he proclaims "Love your neighbor as yourself." Christ has proclaimed, "I am not come to abolish [the law] but to fulfill," and Paul satisfies the letter of this warning when he writes, "For the whole law is fulfilled in one word, You shall love your neighbor as yourself." Yet that is surely not what Christ preached in the Sermon, where "You shall love your neighbor as yourself" appears as but one of a dozen or more revaluations of the Mosaic law, occupying no privileged position. Paul's is an idiosyncratic reinterpretation of Christ's own word, transforming the Sermon on the Mount into an antinomian religion of love.

There is, however, another way to reconcile the attitudes toward law expressed in these two biblical passages (if not their religious substance). Paul understands the Sermon on the Mount to be Christ's radicalization, or purposive revaluation, of the Mosaic law — a radicalization that amounts to its rejection. Christ demands the fulfillment of the law's underlying purpose, which indeed annihilates it as (mis)interpreted by the "scribes and Pharisees."¹⁶³ On this reading, Paul's antinomian dicta merely make explicit what was indeed implicit in the Sermon: that in the fulfillment of the law's spirit lies the destruction of its received juristic interpretation. And King, by juxta-

160. It is worth pointing out that the traditional Jewish understanding of *Leviticus* 19:18 is not "Love your neighbor and hate your enemy," but rather is fully as universalist and cosmopolitan as Christ's own message. See J. HERTZ, *THE PENTATEUCH AND HAFTORAHS* 501 nn. 563-64 (2d ed. 1981); see also A. COHEN, *EVERYMAN'S TALMUD* 212-16 (1949). This is one of the theological points that divides Jews from Christians.

161. *Galatians* 3:13, 5:14.

162. *Matthew* 5:17-18.

163. *Matthew* 5:20.

posing the Sermon with Paul's epistle to the Galatians, invites his readers to interpret the sermon in just this way: as an authoritative unofficial reading of the law that in effect overthrows the official reading. As we shall see, King's own analysis of legality in the *Letter* takes just such a tack.

Notwithstanding this interpretive finesse, there is no denying that Paul's "Christ has redeemed us from the curse of the law" and the Sermon on the Mount's "Do not think that I have come to abolish the Law" are quite different in tenor and import — the latter assuming the mantle of legality, the former proclaiming what Kierkegaard would have deemed a "teleological suspension of the legal."¹⁶⁴ It will be part of my argument that King's *Letter* itself vacillates between these two stances, with important consequences.

The fact that King evidently saw no inconsistency between the Sermon on the Mount and the epistle to the Galatians is important, for Paul's equation of the law's end with the law's fulfillment readily transposes into a justification of King's civil rights activity: if there is any obvious legal theme to the *Letter* it is that the end of the segregationist legal order is the fulfillment, the purposive revaluation, of the constitutional promise of equal protection. (I return to this point below.) King's is an authoritative unofficial reading of the Constitution that overthrows Southern officials' readings.

The final Biblical reference I shall discuss in the *Letter* appears when he likens the demonstrators' civil disobedience to "the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake."¹⁶⁵ The reference, to *Daniel* 3:8-30, is straightforward and transparent, but it is worth noting one peculiarity in the story. After Shadrach, Meshach, and Abednego were thrown into the fiery furnace for disobeying Nebuchadnezzar's command in order to remain faithful to their God, the Book of Daniel relates:

And these three men, Shadrach, Meshach, and Abednego, fell down bound into the midst of the burning fiery furnace. Then Nebuchadnezzar the king was astonished, and rose up in haste, and spake, and said unto his counselors, Did we not cast three men bound into the midst of the fire? They answered and said unto the king, True, O king. He answered and said, Lo, I see four men loose, walking in the midst of the

164. Kierkegaard actually spoke of the teleological suspension of the ethical, not the legal. S. KIERKEGAARD, *FEAR AND TREMBLING* 64-77 (Lowrie trans. 1954). He used the term to describe Abraham's murderous attempt to sacrifice Isaac, which could be justified teleologically by reference to the miraculous commandment of God, though viewed from the sphere of the ethical it could never be regarded as anything but a transgression.

165. KING, *Letter*, *supra* note 13, at 86-87.

fire, and they have no hurt; and the form of the fourth is like the Son of God.¹⁶⁶

This passage is often taken by Christians to prefigure the New Testament, and thus the Christian *Aufhebung* (to use Hegel's term meaning at once cancellation and preservation) of the Old Testament and the Mosaic law. As in the other allusions we have examined, King evokes a biblical context that suggests the finitude and inadequacy of law before the experience of an egalitarian, loving community.

Let me summarize my reading of King's biblical allusions. The key points are these.

(1) King underscores his own communitarianism by invoking the God-intoxicated, overtly communistic, egalitarian Christian community of the Book of Acts.

(2) King places the cosmopolitan and universalist message of the civil rights movement side-by-side with cosmopolitan and universalist passages of the Bible such as "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus"¹⁶⁷ and the Sermon on the Mount.

(3) King echoes his denunciation of the existing church by alluding to Amos' denunciations of Israel for empty, impious observances of a law that has become merely formal.

(4) Crucially, King singles out passages in which the formal legality of Israel is either fulfilled — *aufgehoben*, to utilize Hegel's word once again — by the Christian law of love or, in the important alternative, annihilated by it.¹⁶⁸ That is, King points ambiguously in the incompatible directions of a higher law of love or a divine antinomianism. And thus the earlier themes of communitarianism, cosmopolitanism, and denunciation waffle dangerously between natural law legalism — a theme that is capable of purely secular development — and mystical anarchism, a doctrine of love grounded in the revelation of divinity. Insofar as King identifies himself more closely with Paul than with Jesus, he seems to tilt a bit more toward the latter alternative.

(5) This is in no way to deny that King speaks often and rever-

166. *Daniel* 3:23-25 (King James Version). The Hebrew *bar Elohim* is coupled with a verb-form implying the indefinite article: "a Son of God" — which weakens the New Testament prefiguration that the King James Bible question-beggingly builds into its translation. (Thanks to Steve Winter for the translation.)

167. *Galatians* 3:28.

168. In this respect, the New Testament allusions are fully consistent with Amos' denunciation of Israel's empty formalities and the King James Bible's version of *Daniel* 3:25 as a prefiguration of the New Testament. In all of them, Christians are likely to identify the *Aufhebung* of formal legality by love with the *Aufhebung* of the Old Testament by the New.

ently of the law: the natural law and legalist strain in the *Letter* is totally authentic. Yet legalism, too, becomes a communitarian and universalist tool in King's hands. For it is clear that King advocates what Levinson calls the "protestant" mode of legal interpretation, in which the individual, or at any rate the nonhierarchical community, retains ultimate interpretive authority. As we have seen, the *Walker* Court has built its entire argument around the necessity of the catholic approach, in which the Court/Church — the *curia* — is the sole repository of interpretive authority. Levinson's eloquent argument for the coincidence of religious and constitutional hermeneutics is nowhere more telling than in the contrast between *Walker* and King's *Letter*. The contrast is simply Catholicism and Protestantism revisited. Indeed, in King's *Letter* "protestant" interpretation of the Constitution quite simply coincides with Protestantism itself, King's own religious commitment. This makes two of King's other self-identifications in the extremism passage fall immediately into place: "Was not Martin Luther an extremist: 'Here I stand; I cannot do otherwise, so help me God.' And John Bunyan: 'I will stay in jail to the end of my days before I make a butchery of my conscience.'"¹⁶⁹ Luther's "stand," of course, inaugurated the Protestant reformation, and Bunyan was jailed for his Puritan preaching.¹⁷⁰

(6) Finally, it is clear that King's chain of religious self-identifications, his transposition of the Birmingham events into a biblical key, offers a political narrative that refigures and reconstitutes the legal meaning of those events. In the sense explicated in my opening discussion, King's "biblicizing" of the Birmingham campaign in the *Letter* is legal argumentation in the full and unqualified sense.

C. *King's Natural Law Theory*

The ambivalence I have described between King's natural law legalism and what I have called his mystical anarchism pervades the

169. KING, *Letter*, *supra* note 13, at 92. Note that this is the continuation of the extremism passage we have been examining.

170. However, Luther's own stance toward secular authority is considerably more quiescent than King's. See LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in LUTHER: SELECTED POLITICAL WRITINGS 51 (J.M. Porter ed. 1974). Moreover, I find it disturbing that King should liken himself to a tormented, dismal, and half-mad fanatic such as Bunyan. I write this footnote on February 16, 1989, as the newspapers report that an Iranian cleric has offered a one million dollar reward to any faithful Moslem who assassinates Salman Rushdie for his "blasphemous" novel *Satanic Verses*. Bunyan had more in common with this vicious cleric than with either King or Luther (though Luther himself burned the works of Pope Leo). For a delightfully opinionated but illuminating discussion, see Macaulay's article on Bunyan. 4 ENCYCLOPAEDIA BRITANNICA 389 (14th ed. 1937). For a more sympathetic account, see C. HILL, *A SOLDIER AND A POOR MAN: JOHN BUNYAN AND HIS CHURCH 1628-1688* (1989).

argumentative or conceptual portion of the *Letter* just as it does the chain of biblical self-identifications. King's argument arises, recall, as an attempt to explain why he is willing to disobey a court order while continuing to urge white obedience to the Supreme Court's desegregation orders: "[T]here are two types of law: just and unjust. . . . One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all.'"¹⁷¹ King then offers what I take to be two separate accounts of the distinction between just and unjust laws. The first is a theological and mystical account:

A just law is a manmade code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.¹⁷²

The second is a secular and essentially liberal argument based on considerations of fairness:

An unjust law is a code that a numerical or power[ful] majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. . . . Can any law enacted under such circumstances be considered democratically structured?

Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is

171. KING, *Letter*, *supra* note 13, at 84.

172. *Id.* at 85.

used to maintain segregation and to deny citizens the First Amendment privilege of peaceful assembly and protest.¹⁷³

I take it that the difference between these two descriptions of natural law theory is readily apparent even on the surface. The first implicitly presumes that "eternal law and natural law" are fulfilled by the end of separation between human beings, the effacement of boundary and even of the very possibility of boundary signified by Buber's "basic word I-thou." For Buber, indeed, it understates matters even to say that "I-thou" entails a fusion of I and thou, for the very thought of two distinct entities that fuse belongs itself to the sphere of I-it. Here King's thought is close to Paul's insistence in Galatians that divine law achieves its fulfillment in the single injunction to love, and that "you are all one in Christ Jesus." This is communitarianism as mystical union.

By contrast, the second characterization of natural law as "sameness made legal" emphasizes values of process, participation, and democratic equality. In my view it is best understood as a version of the fair play argument of Hart and Rawls, according to which we are obligated to obey the law only insofar as the law is a cooperative enterprise requiring and receiving widespread compliance to achieve its beneficial aims.¹⁷⁴ Insofar as the law is unfair ("difference made legal"), it cannot be understood as such a generally beneficial cooperative scheme, and thus it loses its obligatory character.

To lay my cards on the table, I believe that this argument is exactly right.¹⁷⁵ But make no mistake: it is an argument wholly secular in character. It rests on a premise of human political equality that presumes no theological revelation of human unity in Christ (or out of Christ, for that matter). This premise arises from a nonbiblical political narrative of the American Constitution; indeed, we shall see that King himself provides such a narrative in the extremism passage when he likens himself to Jefferson and Lincoln.

The fair play argument, moreover, is grounded in the characteristically liberal political relationship of *mutual respect*, not in the mystical and loving communitarianism implicit in King's invocation of Buber and Tillich.¹⁷⁶ Obviously, the two arguments parallel each other in important respects: both ground legal obligation in equality, both at-

173. *Id.* at 85-86.

174. Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 9-10 (S. Hook ed. 1964); Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955).

175. See D. LUBAN, *supra* note 90, at 32-49 (wherein I elaborate a solidarity-based theory of legal obligation understood as fair play, derived from King's *Letter*).

176. On the distinction between respect and love, see Luban, *The Quality of Justice*, 66 *DENVER L. REV.* 381, 413-16 (1989).

tack the monstrous premise of white superiority underlying racial segregation, and both vindicate disobedience to segregation-preserving laws as well as obedience to the Court's *Brown* decision. But the difference between love and respect as defining relationships for the egalitarian community decisively distinguishes the two arguments. The purpose of any community-defining relationship is to establish social trust, but love and respect do so in quite different ways.¹⁷⁷ For the primary concern of love is to abolish the distance between people, while that of respect is to maintain it.

Love, moreover, is an essentially antinomian relationship: as Roberto Unger argues, love rejects the very tincture of formality, and a political order founded on love rejects *ex ante* limitations on the content of loving action.¹⁷⁸ Therein lies the promise, but also the danger, of founding a political order on love or mystical union. The promise is of political relationships of unimaginable richness. The danger is that, historically, love-based utopias — no matter how benign their origins — have so often been appropriated by totalitarian prophet-leaders capable of terrifying acts of violence, since there are no limitations on the content of ostensibly loving action. Consider the historical precursors of King's own Baptist Church, the Muenster Anabaptists of the sixteenth century:

On the morning of 27 February [1534] armed bands, urged on by Matthys in prophetic frenzy, rushed through the streets calling: "Get out, you godless ones, and never come back, you enemies of the Father!" In bitter cold, in the midst of a wild snowstorm, multitudes of the "godless" were driven from the town by Anabaptists who rained blows upon them and laughed at their afflictions. These people included old people and invalids, small children and pregnant women and women who had just given birth. . . . By the morning of 3 March there were no "misbelievers" left in Muenster; the town was inhabited solely by the Children of God. *These people, who addressed one another as "Brother" and "Sister,"* believed that they would be able to live without sin, in a community bound together by love alone.¹⁷⁹

Now it is obvious that Martin Luther King, one of the greatest apostles of nonviolence in history, had nothing in common with the Anabaptists or any of the other violent millennial movements. And, to repeat my basic point, King's antinomian communitarianism forms

177. On trust as a defining relationship in moral and political theory, see N. LUHMANN, *Trust: A Mechanism for the Reduction of Social Complexity*, in TRUST AND POWER 1 (1979); Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986); Baier, *What Do Women Want in a Moral Theory?*, 19 NOUS 53 (1985); Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1688-89 (1986).

178. R. UNGER, *LAW IN MODERN SOCIETY* 206-09 (1976).

179. N. COHN, *supra* note 146, at 262-63 (emphasis added). Many millennial movements founded themselves on the communistic passages of the Book of Acts; this included the Anabaptists. *Id.* at 259.

only one strand of the *Letter*; it is combined with a natural law legalism that fully honors the liberal amenities. My invocation of the Anabaptists is intended merely to illustrate the instability and danger of founding political relationships on love rather than respect, and thus to underscore the distinction between love-based and respect-based political orders (and thus the tension between King's religious and secular arguments).¹⁸⁰

In short, the two versions of King's natural law argument in the *Letter* correspond to the ambiguity between viewing the Christian narrative as a perfection of the law and as the mystical *Aufhebung* of it implicit in King's earlier juxtaposition of the Sermon on the Mount with Galatians.

D. *King's American Allusions*

This ambiguity emerges as well in the difference between King's biblical and secular political narratives. Just as King's biblical allusions in the extremism passage point — ambiguously, to be sure — in the direction of antinomian mysticism, his secular allusions point toward liberal natural law egalitarianism. The secular argument, recall, derives egalitarianism from the notion of fairness incipient in natural law. This entails a particular political narrative of American constitutionalism, one that tells the story of constitutional progress as the drive toward emancipation and equality.

Thus we find, immediately after King likens himself to Jesus, Amos, Paul, Luther, and Bunyan in the extremism passage, the invocation of Lincoln and Jefferson: "Was not Martin Luther an extremist And John Bunyan And Abraham Lincoln: 'This nation cannot survive half slave and half free.' And Thomas Jefferson: 'We hold these truths to be self-evident, that all men are created equal. . . .'"¹⁸¹

Jefferson and Lincoln are well-coupled. After all, it was Lincoln who, in the Gettysburg Address, claimed that the true meaning of America lay in Jefferson's Declaration of Independence rather than in the Constitution: he characterized America as "a new nation . . . dedicated to the proposition that all men are created equal." Dulled by

180. It is in part for this reason that I take a very dim view of the "critique of rights" advocated by some contemporary writers (Unger, Tushnet, Gabel); the vocabulary of rights expresses the discourse of mutual respect, and to abandon the centrality of mutual respect is to move in an unacceptable direction: either toward disrespect (domination and subservience) or toward a communitarianism of love about which we may rightly be skeptical. See Luban, *supra* note 177, at 1679-81; Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (also expressing skepticism about the "critique of rights").

181. KING, *Letter*, *supra* note 13, at 92.

long familiarity, we are inclined to read this sentence without giving it a second thought (or even a first thought), without realizing that it is a powerfully heretical — because deconstitutionalized — interpretation of the meaning of American history.¹⁸² King's political narrative draws a straight line from Jefferson and Lincoln through the civil war Amendments that finally constitutionalized this interpretation to the civil rights movement, and indicates that egalitarianism is the imminent truth of America.

He also, if I read him aright, alludes in the most powerful passage of the *Letter* to another link in this political narrative, the Court's opinion in *Brown v. Board of Education*. King bitterly meditates on his experience as a black parent,

when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people. . . .¹⁸³

Surely King is here alluding to Kenneth Clark's experiments on self-perceptions of inferiority among black children, which formed the sociological linchpin of the *Brown* opinion. Rhetorically, the allusion is strikingly well-suited to the white clergymen to whom the *Letter* was addressed; just as his biblical allusions attempted to preach Christian community to the clergymen, the allusion to *Brown* attempts to remind white Americans of their unkept promise of equality. As part of a political narrative, *Brown* is another point on the line from Jefferson through Lincoln and the fourteenth amendment to the civil rights movement — a narrative line that aims to recall the promise of egalitarian constitutionalism incipient in *Brown* as a continuation of Lincoln's and Jefferson's political vision.

To summarize my reading so far, I have been tracing two versions of communitarianism in King's *Letter*: a religious and antinomian communitarianism based on love, and a liberal natural law egalitarianism aiming at communities based on respect. King's biblical narratives, particularly his self-identification with Paul, point ambiguously toward the former, whereas his American political narrative clearly points in the latter direction.

182. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* xiv-xxiv (1978); S. LEVINSON, *supra* note 14, at 140.

183. KING, *Letter*, *supra* note 13, at 81.

E. *King's Socratic Allusion*

King's *Letter* incorporates one final self-identification. At two points King likens his own actions in Birmingham and those of his fellow demonstrators to Socrates, who "felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal."¹⁸⁴ King goes on to analogize the Birmingham demonstrators to "nonviolent gadflies," Socrates' self-description in the *Apology*.¹⁸⁵ Later he alludes again to the condemnation of Socrates: "Isn't [condemning the Birmingham demonstrators for provoking violence] like condemning Socrates because his unswerving commitment to truth and his philosophical inquiries precipitated the act by the misguided populace in which they made him drink hemlock?"¹⁸⁶ Though I shall later have occasion to doubt the appropriateness of the Socratic analogy, there is indeed an uncanny parallel between the moral and legal problem posed by King's arrest and a perplexing dilemma posed in Plato's *Apology* and *Crito*.

The dilemma is easily seen. In the *Apology* Socrates boasts that he has always been unwilling to comply with unjust official orders, including court orders. Thus, when the Thirty Tyrants had ordered him to arrest Leon the Salaminian unjustly, so as "to implicate as many in their crimes as they could," Socrates merely went home; he tells his jurors that he would have died for his disobedience had the government not fallen soon after.¹⁸⁷ And earlier in his defense Socrates provokes his jurors by telling them that if they were to order him, on pain of death, to abandon his philosophical activities, he would reply: "Men of Athens, I respect and love you, but I shall obey the god rather than you, and while I live and am able to continue, I shall never give up philosophy."¹⁸⁸

The *Apology* is thus the protean text of conscientious disobedience, and King's appropriation of the figure of Socrates seems completely clear. In the *Crito*, however, the convicted Socrates refuses to flee his impending execution, offering a series of arguments that he is obligated to obey the laws, including his own unjust death sentence. These arguments, based on consent or the "social contract," on gratitude, on the citizen's tutelage under government, and on the dire con-

184. KING, *Letter*, *supra* note 13, at 81; *see also id.* at 87. As we have seen, the imagery of removing fetters binding us to myths and half-truths comes from Plato's *Republic*.

185. *See* PLATO, *APOLOGY* *30e.

186. KING, *Letter*, *supra* note 13, at 88-89.

187. PLATO, *supra* note 185, at *32c-e.

188. *Id.* at *39d.

sequences were everyone to disobey, have shaped all subsequent philosophical discussions of the subject.¹⁸⁹ The facial contradiction with the *Apology* could scarcely be more striking, and it has puzzled generations of commentators. If it is wrong to disobey even unjust laws and court orders, why did Socrates disobey the Thirty Tyrants? How could he boast that he would continue to practice philosophy in the face of a court order to desist? On the other hand, if it is right to disobey an unjust edict, why should Socrates have complied with his death sentence?

Recently, Richard Kraut has offered a remarkable interpretation of the *Crito* aiming to show that, far from an encomium to absolute obedience and submission, it is actually a powerful argument on behalf of civil disobedience that is fully consistent with the *Apology*.¹⁹⁰ Kraut focuses on Socrates' careful phrasing of his arguments for obedience in the *Crito*. Rather than concluding categorically that one must obey the laws, Socrates three times phrases the injunction in the alternative: one must *either* persuade the state as to the nature of justice *or else* obey.¹⁹¹ Now this may suggest that Socrates is offering the unhelpful thought that the citizen may try to get a law changed or repealed, but if he fails he must obey. Since in practice one will seldom be able to get a law repealed, this suggestion amounts to precisely the encomium to absolute obedience.

Kraut responds that the forum Socrates had in mind for persuasion is not the legislature but the court.¹⁹² And persuasion is not an attempt to get the law changed *before* obeying it, but an attempt to argue against a criminal conviction *after* disobeying it. That is, Socrates' position amounts to permitting one to disobey an unjust law provided one is subsequently willing to offer a defense in court, and accept the punishment if the jury rejects that defense.

Kraut's reading of the *Crito* makes a lot of the text fall into place, and ingeniously resolves the facial contradiction between the *Apology* and the *Crito*.¹⁹³ However, there is one situation that Kraut's reading

189. They are, however, unsound, and their unsoundness has been remarked often in the history of philosophy. See Luban, *supra* note 90, at 36-37.

190. R. KRAUT, *SOCRATES AND THE STATE* 54-90 (1984). *But see id.* at 75-76 (concerning the difference between Socratic conscientious disobedience and civil disobedience for expressive and political purposes).

191. PLATO, *CRITO*, *supra* note 185, at *51c-52d.

192. See R. KRAUT, *supra* note 190, at 55-56.

193. A very different, perhaps even more persuasive, resolution of the contradiction has been offered by Ernest Weinrib. Weinrib suggests that Socrates never believed his arguments for obedience to the law in the first place. This is strikingly signalled by the fact that Socrates does not offer the arguments in his own voice, but rather puts them in the "mouth" of the personified laws. It is signalled equally strikingly when, at the conclusion of the dialogue, Socrates likens the

fails to resolve. What if a court, unpersuaded by the disobedient citizen, does not punish him for disobedience but merely reiterates the order to obey? That, after all, is the hypothetical situation Socrates himself raises in which at the conclusion of his trial the jury orders him to abandon philosophy. He tells the jurors that he will disobey; but since he has failed to persuade, must he not obey?

The problem is this. Kraut seems to assume that disobedience will precede persuasion: you are hailed into court because you have disobeyed. Then you attempt to persuade, and if you fail you take your punishment. But when the court responds not with punishment but with another order, persuasion has failed *before* the choice between obedience and disobedience to the new order must be made. Now, surely, Socrates' persuade-or-obey conclusion leaves you no option but obedience; for it is plainly no answer to suggest disobeying the new court order, being hailed into court again, attempting once again to persuade, failing, receiving another court order, disobeying, and so on ad infinitum. That is simply a ruse for making an end run around the "obey" horn of the dilemma. No: if Socrates fails at persuasion and is subsequently ordered to abandon philosophy, Kraut's version of the persuade-or-obey doctrine requires obedience. Yet Socrates has told us he will disobey. And so the contradiction has not, after all, been resolved.

The basic dilemma between conscience and obligation reappears, that is, when a citizen is faced with an unjust court order (rather than an unjust punishment). It is this problem, in almost precisely this form, that the Birmingham events raise. One political narrative, then — the narrative of conscientious disobedience, from Socrates on — stands ready to offer placement to the argument between the *Walker Court and King*.

I do not mean to suggest that when he alluded to Socrates in the *Letter King* had anything in mind as specific as the textual inconsistency between the *Apology* and the *Crito*, to say nothing of classicists' arguments about it. Significantly, however, King invoked both dialogues in his Atlanta NAACP address, which (I noted earlier) amounts to a preliminary version of portions of the *Letter*: "Come if you will to Plato's *Dialogues*. Open the *Cr[it]o* or the *Apology*. See Socrates practicing civil disobedience."¹⁹⁴ In the *Letter*, King clearly

arguments to Corybantic flute-playing, a technique for curing madness by inducing a musical frenzy in its sufferer. This is surely a strange characterization of serious arguments. Weinrib, *Obedience to the Law in Plato's Crito*, 27 AM. J. JURIS. 85 (1982). While Weinrib's may well be the right reading of the *Crito*, I do not consider it here, since after all even if the textual problem is resolved in this way, the dilemma of obedience and disobedience is not.

194. Quoted in T. BRANCH, *supra* note 24, at 599.

did have the *Apology* itself in mind and the dilemma between conscience and obedience is the explicit subject matter of the *Letter's* argumentative portion. And we have seen King's own resolution of the dilemma. He offers an argument for the moral obligation to obey the law that is distinct from the standard arguments of the *Crito*; all of those arguments attempt to explain the obligation to obey the law as an obligation to the state, whereas the fair-play argument offered by King explains it as an obligation to one's fellow citizens. It is a communitarian, rather than a statist, argument for obedience to just laws. And it yields the conclusion that this obligation exists only when the law in question reflects "sameness made legal" rather than "difference made legal" — only, that is, when the law is fair. Thus, King maintains the tradition of the *Apology* by abandoning the statism implicit in the *Crito*.

Where does the Socratic narrative of civil disobedience fit into the tension between mystical anarchism and natural law legalism I have been stressing? At first Socrates seems to belong in the second camp: natural law is closely tied to the rationalist ethical vision that appears in numerous Socratic dialogues, particularly the *Euthyphro* (and, ambiguously, the *Phaedo*, where the rationalism assumes distinctly mystical overtones). Moreover, Plato has long been identified as a principal source for the natural law tradition.

Nevertheless, it is noteworthy that neither in the *Apology* nor elsewhere does Socrates claim to be responding to a "higher law." Rather, he repeatedly says that he is responding to a divine call. Socrates tells us that the god at Delphi originally launched his philosophical career,¹⁹⁵ and he reveals to the Athenians that he is guided in all his endeavors by a divine voice, his famous *daimon*, that warns him whenever he is about to do anything wrong.¹⁹⁶ Socrates' *daimon* is instantly recognizable as what later ages would call "the voice of conscience"; and it is important to realize that Socrates identifies conscience, and therefore conscientious disobedience, with fidelity to a supernatural being. Viewed as the prototypical conscientious disobedient, as King clearly views him, Socrates is much more the religious saint than the natural law adherent. And so King's Socratic self-identification falls more plausibly on the side of his mystical anarchism than on the side of his natural law legalism.

195. PLATO, *supra* note 185, at *20c-21e.

196. *Id.* at 115, 139, 141.

IV. THE TENSION BETWEEN RELIGION AND POLITICS

So far my examination has stayed reasonably close to the actual language and range of allusion within *Walker* and King's *Letter*. In this section, I wish to venture further afield and explore the consequences this examination carries for social change as well as legal argument. I shall be borrowing again from Benjamin's *Theses*, but also from a remarkably interesting essay on civil disobedience written by Hannah Arendt during the height of the Black Power, student, and anti-war movements, an essay that trenchantly addresses some of the issues I have raised.¹⁹⁷

A. *Arendt on the Self-Misunderstanding of Civil Disobedience*

It should be clear from our foregoing examination that King's *Letter* contains a narrative complexity and richness wholly absent from the *Walker* opinion.¹⁹⁸ It also, I fear, contains a fundamental self-misunderstanding with serious consequences. King's Socratic allusion may serve us as a point of entry to the discussion of this self-misunderstanding.

In her extraordinary essay on civil disobedience, Hannah Arendt points out the falseness of identifying politically motivated civil disobedience with the figure of Socrates (and of Thoreau as well).¹⁹⁹ As we have seen, Socrates opposes his conscience, which we might think of as an organ attuned to the supernatural, to the demands of the state. Conscientious civil disobedients are essentially solitary figures in communion with divinity; they are essentially unpolitical. Thus, the tension between King's mystical anarchism and his natural law legalism points to a tension between conscience and politics in his thought that effaces the political character of the movement by comprehending it through supernatural political narratives. Arendt writes:

Here, as elsewhere, conscience is unpolitical. It is not primarily interested in the world where the wrong is committed or in the consequences that the wrong will have for the future course of the world. It does not say, with Jefferson, "I tremble *for my country* when I reflect that God is just; that His justice cannot sleep forever," because it trembles for the individual self and its integrity.²⁰⁰

The point, once made, is obvious: there is an important sense in which Socrates, like Paul and Amos and Shadrach and Luther and Bunyan,

197. H. ARENDT, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 51-102 (1972).

198. Not to mention that the argument concerning obedience to the law is better.

199. Arendt, *supra* note 197, at 58-68.

200. *Id.* at 60-61 (footnote omitted) (quoting T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, Query XVIII (1781-85)).

does not belong in the same political narrative as the Southern Christian Leadership Conference. The defining relationship of Socrates' public stance, like the figures in the biblical narratives, was a relationship with a divine voice.²⁰¹ This relationship, to be sure, manifested itself in a politically significant action, but in the case of Socrates that was happenstance. This is in no way to deny the obvious, namely that religiously inspired people can be canny politicians and publicists. Paul and Luther were. But, unless we take Paul and Luther to be lying at the core of their being, their political acumen accrued to them (to speak scholastically) *per accidens*; it was their God-consciousness that defined their public stance *per essens*. And so the theological narratives contained in King's *Letter* may actually suppress or displace an explicitly political self-understanding of political action by substituting relationships with the divinity for political relationships.²⁰²

Now of course churches have always been among the most successful organs of political action, and a black political movement without black churches is virtually unthinkable; the church has always been the most powerful and significant of black American institutions.²⁰³ Moreover, among our permanent political images of the civil rights movement are those of demonstrators bowed in prayer as the police assault them, or groups of enthusiasts singing in churches. We cannot imagine the movement without the hymn "We Shall Overcome," and that is another way of saying that we cannot imagine the movement garbed in secular clothing.

But it is equally important to realize that, whereas in King's religious narrative nonviolent civil disobedience was a matter of divine principle, others in the movement viewed it primarily as a tactic, to be

201. This is not to deny that King, too, was guided by a divine voice. Consider his recollections in M.L. KING, *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 134-35 (1958):

It seemed as though I could hear the quiet assurance of an inner voice saying: "Martin Luther, stand up for righteousness. Stand up for justice. Stand up for truth. And lo I will be with you, even until the end of the world." . . . I heard the voice of Jesus saying still to fight on. He promised never to leave me, never to leave me alone. No never alone. No never alone. He promised never to leave me, never to leave me alone.

I mean to be saying only that King's revelation does not constitute the public meaning of his actions nor those of the civil rights movement more generally.

202. The Situationist theorist Guy Debord writes perceptively: "Modern revolutionary expectations are not irrational continuations of the religious passion of millenarianism, as Norman Cohn thought he had demonstrated in *The Pursuit of the Millennium*. On the contrary, millenarianism, revolutionary class struggle speaking the language of religion for the last time, is already a modern revolutionary tendency which as yet lacks *the consciousness that it is historical*. The millenarians had to lose because they could not recognize the revolution as their own operation." The Society of the Spectacle sec. 138 (unauthorized ed. 1970). It is ironic that Debord, writing only five years after the Birmingham campaign, evidently believed that revolution spoke the language of religion for the last time in the sixteenth century.

203. See A. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 4-12 (1984). See generally T. BRANCH, *supra* note 24.

used when it could be effective but abandoned when it was not; and, eventually, the civil rights movement as a whole abandoned it. Discouragingly, perhaps, many of the successes we ascribe to the civil rights movement emerged from other tactics and other circumstances, not the least of which were urban rioting and the rise of Black Power. After the Birmingham settlement, recall, Klan bombings provoked black riots, and these as much as Project C were an integral part of the chain of events leading Kennedy to introduce civil rights legislation.

My point is not to suggest that violence is “better” or “more effective” than nonviolence (whatever that might mean); rather, it is to suggest that the religious strands of King’s narrative make historical sense of only a fragment of the actual black movement, and to that extent they fail as a political narrative.

Arendt points to another difficulty with attempting to embed a political movement in a narrative framework based on individual relationships with the supernatural:

No doubt even this kind of conscientious objection can become politically significant when a number of consciences happen to coincide, and the conscientious objectors decide to enter the market place and make their voices heard in public. But then we are no longer dealing with individuals, or with a phenomenon whose criteria can be derived from Socrates or Thoreau. . . . In the market place, the fate of conscience is not much different from the fate of the philosopher’s truth: it becomes an opinion, indistinguishable from other opinions.²⁰⁴

Religious truth “in the market place” — less metaphorically, in a secular democracy containing several powerful religious denominations — becomes in the long run politically indistinguishable from dogmatic factionalism. It cannot inspire those who do not share the faith, and may instead provoke or antagonize them. At the limit, religious factionalism threatens to deteriorate into the kind of convulsive doctrinal strife that drenched Europe in blood for centuries (and has drenched the Middle East in blood for most of the present decade) — precisely the kind of doctrinal strife that led Hobbes to urge the absolute supremacy of legal authority that survives in the *Walker* opinion.

Indeed, perhaps the only political narrative that might yield a sympathetic reading of *Walker* is one that begins with the violent messianic movements of the Middle Ages, proceeds to religious conflicts such as the Thirty Years’ War and the English revolution,²⁰⁵ and con-

204. ARENDT, *supra* note 197, at 67-68.

205. On the role of religious factionalism in the English Revolution, see generally C. HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (1972); T. HOBBS, *LEVIATHAN* (C. Macpherson ed. 1968) (1st ed. 1651); 5 D. HUME, *THE HISTORY OF ENGLAND* (1778); M. WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* (1965).

cludes by reading the American Constitution primarily as a device to avoid such God-intoxicated bloodletting by insisting on the absolute supremacy of secularizing officials.²⁰⁶ In this way, the Christian particularism of King's *Letter* ultimately reflects a deep weakness in the biblical narratives as a mode of organizing a universalist political movement. Religion eventually divides a community, where egalitarian liberalism aims to unite it.²⁰⁷

Lest these suggestions create a misunderstanding, let me emphasize that I have chosen to analyze King's *Letter* not because of its narrative weaknesses, but because of its overwhelming strength. More importantly, I have been concerned throughout this essay to stress that the *nonbiblical* strand of the *Letter* promotes a remarkably attractive — let me go so far as to say “true” — political and legal theory. It is my view that King has pointed the way to a truly liberal communitarianism (a political possibility that philosophers have often neglected or denied²⁰⁸); that his fair-play version of natural law resolves the Platonic problem of political obligation; and that his narrative of American political history from Jefferson to Lincoln to *Brown* to Project C displays the fourteenth amendment to our Constitution in what may well be the best light it can truthfully sustain.²⁰⁹ These are vir-

206. See, e.g., L. LEVY, *supra* note 7; T.J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

207. This point should need no underscoring in a year when we have witnessed such amazing signs and portents as the attempt to censor *The Last Temptation of Christ* (Universal, 1988) and the Rushdie affair — including the burning of Rushdie's book in England, which went undenounced by Labour politicians because the book-burners are their constituents. Rushdie, *The Book Burning*, N.Y. REV. BOOKS, Mar. 2, 1989, at 26. A confirmation of the danger of religious particularism occurred in March 1989 when followers of impeached Arizona governor Evan Mecham — famous for refusing to allow Martin Luther King's birthday to become a state holiday — rammed through the state Republican Party a declaration “that the U.S. ‘is a Christian nation’ ” and that the U.S. Constitution created “a republic based upon the absolute laws of the Bible, not a democracy” — a view, ironically, not far from the religious strand of King's *Letter*. Reid, *Republicans Rue Mecham's Return: Arizonan's Maneuvers Embarrassing National Party Leaders*, Wash. Post, Mar. 14, 1989, at A12. Amazingly, the “Evanistas” were aided in ramming through this declaration by a correspondence between Justice Sandra Day O'Connor and a GOP activist from — appropriately enough — Superstition Mountain in Arizona. The activist's letter read in part: “Some of us are proposing a resolution which acknowledges that the Supreme Court ruled in 1872 that this is a Christian Nation. It would be beneficial and interesting to have a letter from you perhaps giving the details of that decision . . .” Kamen, *O'Connor Regrets Letter Was Used for Politics: Activist Sought ‘Christian Nation’ Citations*, Wash. Post, Mar. 16, 1989, at A3. Justice O'Connor replied: “You wrote me recently to inquire about any holdings of this Court to the effect that this is a Christian Nation. There are statements to such effect in the following opinions: [citations follow to three cases, in two of which no such statement is to be found].” Kamen, *2 Experts Fault O'Connor for Letter: Justice Said to Misquote Court Rulings on Christianity of U.S.*, Wash. Post, Mar. 15, 1989, at A3.

208. See, e.g., A. MACINTYRE, *AFTER VIRTUE* (1981); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); R. UNGER, *supra* note 178; R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

209. I believe, moreover, that King's liberal communitarianism harmonizes with the three premises of American constitutionalism I identified in my discussion of *Walker*, namely the rule

tues for which we may well be moved to abandon the antinomianism of the epistle to the Galatians and the political narrative of supernaturally-inspired conscientious disobedience from Socrates through Bunyan.

B. "The Myth Concerning Time"

Having argued that political action cannot be understood through assimilation to religious narratives, I shall now court paradox by insisting that an adequate conception of political action must recognize its essentially theological character. Theological, but not religious: what can this mean? What I wish to suggest is that certain structures of religious experience and religious thought correspond with similar structures in political experience and thought. Perhaps it is more accurate to say that certain fundamental structures of experience and thought are capable of being articulated in either religious or political language, and the ready (mis)translation of politics into religious terms arises from this deep underlying similarity. And thus even when politics is translated back out of biblical and religious narratives — as I have suggested we must do with King's *Letter* — theological categories may offer the best description we have of the underlying structures of experience. We have seen, for example, that the authority of laws may be experienced in either "protestant" or "catholic" modes — a theological distinction used to encode a political structure. And I shall now suggest, returning to themes I sounded at the outset of this essay, that historical time — the time in which political action and political narrative unfold — may best be understood in theological terms. Here I shall rely again on Benjamin's *Theses*, but also on the *Letter*.

In his local narrative of the Birmingham events, recall that King describes the purpose of nonviolent direct action as follows. "Nonviolent direct action seeks to create such a crisis and foster such tension that a community that has refused to negotiate is forced to confront the issue."²¹⁰ On King's characterization, nonviolent direct action seeks a qualitative transformation of the community. This observation recalls Benjamin's remarks about revolutionary social change that I elaborated at the beginning of this essay. Historical time cannot be regarded as a homogeneous progression. Rather, it consists of periods of routine punctuated or in a sense even stopped by moments of crisis or creative tension in which the continuum of history explodes. These

of law, popular sovereignty, and the publicity of law — precisely the premises that the Court found it necessary to finesse.

210. KING, *Letter*, *supra* note 13, at 81.

latter are moments that Benjamin describes as “a present which is not a transition, but in which time stands still and has come to a stop,”²¹¹ or, again, as “a Messianic cessation of happening [*i.e.*, routine happening].”²¹²

This, of course, is the language of a high, and highly mystical, metaphysics. Benjamin is analogizing political action to the coming of the Messiah in Jewish theology, and it is this use of a theological category to explain politics on which I wish to focus. The messianic moment is not a part of the continuum; rather, it marks a rupture in the linear progression of history, bringing the previous era to a stop while at the same time redeeming it and preserving its meaning in a nongradualist *Aufhebung*.

Benjamin offered this theory in order to criticize the ideology of the German Social Democratic Party, which held that society would inevitably evolve toward socialism; to illustrate the vapidness of this view, he sardonically quotes Wilhelm Dietzgen's book *The Religion of Social Democracy*: “Every day our cause becomes clearer and people get smarter.”²¹³ Because of their dogmatic and insipid optimism, the Social Democrats failed to mount an effective opposition to the emergency of Nazism, since they discounted the Nazis as a mere waystation on Germany's route to a rosy future. Benjamin wrote in despair, “Nothing has corrupted the German working class so much as the notion that it was moving with the current.”²¹⁴ “Social Democratic theory, and even more its practice, have been formed by a conception of progress which did not adhere to reality but made dogmatic claims.”²¹⁵

Benjamin locates the fallacy of the Social Democrats' position in something very abstract, namely their conception of time itself. J.G.A. Pocock once wrote that “the understanding of time, and of human life as experienced in time, disseminated in a society, is an important part of that society's understanding of itself — of its structure and what legitimates it, of the modes of action which are possible to it and in it.”²¹⁶ Benjamin's theory, including its critique of the ideology of inevitable progress, operates on this level of understanding. It is the insidiously corrupting concept of (inevitable) progress that provokes

211. W. BENJAMIN, *supra* note 2, at 264.

212. *Id.* at 265.

213. *Id.* at 262.

214. *Id.* at 260.

215. *Id.* at 262.

216. J. POCOCK, *Time, Institutions and Action; An Essay on Traditions and Their Understanding*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 233 (1973).

Benjamin's metaphysical intervention: "The concept of the historical progress of mankind cannot be sundered from the concept of its progression through a homogeneous, empty time. A critique of the concept of such a progression must be the basis of any criticism of the concept of progress itself."²¹⁷ Hence the theory that progress lies in a Messianic ending of the past rather than in gradual change, and that political action is essential to create the Messianic break that redeems the past.

Benjamin's debate with German Social Democracy is thus not a mere historical curio, for the view Benjamin ascribes to the Social Democrats is in fact the most pervasive myth of our time: it is the theory of inevitable historical progress, which King terms "the myth of time." King's view, in fact, corresponds with Benjamin's with uncanny exactitude. King writes in the *Letter*:

I had also hoped that the white moderate would reject the myth concerning time in relation to the struggle for freedom. I have just received a letter this morning from a white brother in Texas. He writes: "All Christians know that the colored people will receive equal rights eventually, but it is possible that you are in too great a religious hurry. . . ." Such an attitude stems from a tragic misconception of time, from the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. . . . Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God, and without this hard work time itself becomes an ally of the forces of social stagnation.²¹⁸

This discussion of time, so strangely congruent with Benjamin's, harmonizes completely with King's view that nonviolent direct action is meant to provoke moments of crisis and creative tension. These are precisely what Benjamin identifies as messianic moments.

This explains a characteristic risk of nonviolent civil disobedience: the risk of being domesticated into a kind of permanent and hapless "loyal oppositionism." Protest institutionalized is protest routinized, protest co-opted, protest that loses whatever messianic power it may possess. Such protest is no longer capable of shocking and arousing the community. And thus it will yield only "a negative peace which is the absence of tension" rather than "a positive peace which is the presence of justice."²¹⁹

And indeed, since the 1970s, civil disobedience has become a purely symbolic and almost senseless exercise in protest-politics-as-usual. Demonstration leaders and police typically meet beforehand to

217. W. BENJAMIN, *supra* note 2, at 263.

218. KING, *Letter*, *supra* note 13, at 89.

219. *Id.* at 87.

work out the rules of the game so that there are no surprises, no violence, no injuries and — of course — no moments of crisis and creative tension forcing anyone to confront anything. A drastic illustration of the deflation of nonviolent direct action occurred in the 1987 civil disobedience of gay activists at the United States Supreme Court building, protesting the Court's decision in *Bowers v. Hardwick*.²²⁰ A section of the building was cordoned off and reserved for civil disobedience; demonstrators lined up to enter the cordoned-off section to undergo arrest; police stood by to make sure that nobody skipped in line or tried to get arrested anywhere else. Gay activist Richard Mohr writes:

The arrests themselves were a Foucauldian ballet of police power diffused and modulated and of citizens disciplined and molded. In the face of advance negotiations with the police, affinity groups, plastic handcuffs, police controlled turnstiles to the arrest site, quizzes before actual arrest, and school busses doubling as paddy wagons and holding tanks, individual dignity did not stand a chance Bull Connor, where are you when we need you?²²¹

Where indeed? The disturbing conclusion of these melancholic reflections is that dissent can hope to succeed only when it is unofficial and therefore most typically extra- or contra-legal. An officially recognized, undisruptive Messiah who abides by the law loses the power to redeem. And thus the excluded voice can be included in authority's narrative only at the price of domesticating its redemptive force. In this sense, the clash between King and the *Walker* Court was inevitable: social protest that pays "proper respect for judicial process," that fails to outrage, offers only a shell or husk of redemption — a shadow on the wall of the Cave.

V. CONCLUSION: ON OUR WEAK MESSIANIC POWER

My discussion of King's *Letter* has attempted to separate out two strains of his thinking, one essentially religious and one essentially secular. I have urged the priority of the secular side, both as a more credible form of communitarian political association and as a more authentic basis for political action.

At the same time, however, I have suggested that political authority and political action are best understood in terms that are thoroughly theological. Benjamin's *Theses*, upon which I have relied so

220. 478 U.S. 186 (1986).

221. Mohr, Text(ile): Reading the NAMES Project's AIDS Quilt 16-17 (unpublished typescript, 1988). I should note that Mohr understands the purpose of civil disobedience to be the expression of individuality, rather than the projection of small-group politics as I have been arguing.

extensively in this essay, speaks recurrently about the messianic nature of political upheaval. To speak of the Messiah is to speak of a miraculous intervention into human affairs inaugurating an epoch that has broken decisively with what has hitherto constituted our history. Benjamin thus implies that political action amounts to just such a miraculous intervention.

Benjamin evokes a specifically Jewish tradition of messianism.²²² On this view the Messiah occupies a uniquely past-oriented and backward-looking position: the Messiah's purpose is not only, indeed not even primarily, to create a better future, but rather to redeem the past and make meaningful the sufferings of the Jewish people. Benjamin speaks in the final thesis about a rabbinic tradition that prohibits Jews from investigating the future,²²³ and earlier he had emphasized that the spirit of sacrifice is "nourished by the image of enslaved ancestors rather than that of liberated grandchildren."²²⁴ Political action is messianic not only because it blasts the present moment out of the continuum of history, but because its aim is first and foremost to redeem the past.

This is not meant figuratively; rather, Benjamin — like King — suggests that political action transforms the structure of history, interrupting the calendrical sequence ("homogeneous, empty time") and stitching together past and present, so that the present redeems the past by reenacting it — literally, by *becoming* it.

What can this mean? The notion of discrete moments in the calendrical sequence fusing is, of course, a highly mystical one, and, we may fear, it is for that very reason a nonsensical one. Indeed, the claim that discrete — numerically distinct — moments are numerically identical is simply a self-contradiction. What Benjamin had in mind, I believe, was not the numerical identity of past and present, but rather bringing the past back to life through celebration and commemoration, particularly where these include not just retelling the past but reenacting it.

222. Benjamin wrote the *Theses* as a response to his friend Gershom Scholem's masterpiece, G. SCHOLEM, *MAJOR TRENDS IN JEWISH MYSTICISM* (1941). On the personal meaning of the *Theses*, and especially the famous "angel of history" thesis (Thesis 9), see SCHOLEM, *Walter Benjamin and His Angel*, in *ON JEWS AND JUDAISM IN CRISIS* 198-236 (W. Dannhauser ed. 1976). The *Theses* were provoked by Scholem's discussions of the seventeenth-century Sabbatian movement, a millenarian popular movement that convulsed all of Judaism and that bears great similarity to chiliastic movements in Christendom, including the Anabaptists. See G. SCHOLEM, *SABBATAI SEVI: THE MYSTICAL MESSIAH* 93-102 (1973). Yet Jewish mysticism could also be connected with liberalism, as was the case with Spinoza, who befriended English radicals as well as Dutch republicans, and defended liberalism against messianism after his excommunication by rabbis who would in a few years openly embrace Sabbatai Sevi. See L. FEUER, *SPINOZA AND THE RISE OF LIBERALISM* 29-30, 47-57 (1958).

223. W. BENJAMIN, *supra* note 2, at 266.

224. *Id.* at 262.

“The initial day of a calendar serves as a historical time-lapse camera. And, basically, it is the same day that keeps recurring in the guise of holidays, which are days of remembrance. Thus the calendars do not measure time as clocks do. . . .”²²⁵ Here Benjamin may have had in mind not only the theological notion of holidays — holy days — as interruptions of clock-time devoted to remembrance, but also the thought that Nietzsche once described as the “high point of the meditation”: “That *everything recurs* is the closest *approximation of a world of becoming to a world of being*.”²²⁶ A series of reenactments is the closest mortal approximation to immortality; we resurrect and redeem enslaved ancestors by refighting their battles for freedom.

Here it is useful to draw an analogy to improvisatory musical pieces, such as jazz compositions, which are realized differently in each performance. No archetype exists, and we understand precisely what it means to say that the piece is brought to life, and indeed lives, only in its realizations, even though the realizations differ widely from one another. In the same category as jazz compositions we may place many folk-arts: dances that have never been notated but are simply handed down from dancer to dancer, epic poems in preliterate societies, folk songs, and — most to the point — folk tales and stories. Such stories exist only in the retelling, and their retelling, like all acts of collective memory, revives the past by commemorating it. The very etymology of the word “commemorate” — literally, commemorate, “to remember together” — suggests the combining of two epochs in one memory, and the collective character of that memory.

Benjamin’s idea amounts to the assertion that political action should be seen as a device of collective memory in precisely this sense.²²⁷ In Benjamin’s words: “There is a secret agreement between past generations and the present one. Our coming was expected on earth. Like every generation that preceded us, we have been endowed with a *weak* Messianic power, a power to which the past has a claim.”²²⁸ It is a “weak” Messianic power, of course, because no gen-

225. *Id.* at 261.

226. F. NIETZSCHE, *THE WILL TO POWER* 330 sec. 617 (W. Kornhauser ed., R. Hollingdale & W. Kaufmann trans. 1967).

227. I have discussed the relationship between narrative, poetry, political action, and collective memory in Luban, *Explaining Dark Times: Hannah Arendt’s Theory of Theory*, 50 *Soc. RES.* 215 (1983). It is hardly surprising that Arendt’s views, which I discuss in that essay, are close to Benjamin’s: Arendt closely studied Benjamin’s *Theses*, and in fact was responsible for their survival. Benjamin entrusted the manuscript of the *Theses* to Arendt, who smuggled it out of occupied France and brought it to New York; Benjamin himself committed suicide when he was turned back at the Spanish border as he attempted to flee the Nazis. See E. YOUNG-BRUEHL, *HANNAH ARENDT: FOR LOVE OF THE WORLD* 160-63 (1982).

228. W. BENJAMIN, *supra* note 2, at 256.

eration is truly the Messiah promised by religion; we will not end history, and believing that we can is a millenarian delusion.²²⁹ Our power to act is messianic nonetheless because our victorious struggle for the privilege of recounting the past makes sense of past suffering. The successful outcome of the Birmingham campaign makes sense of the deaths incurred by the campaign, and, to a certain (“weak”) extent, the sufferings endured by 400 years of black experience in America.

I am laboring this point because I believe it is central not only for a theory of political action but also for a theory of legal argument. It is, indeed, the view of legal argument that I sketched at the outset of this essay: legal argument succeeds when it demonstrates that a local narrative has reenacted an episode of a political narrative, and thus that the two have become stitched together, paired in affinity. Legal argument understood as persuasion, hence as political action, works in a medium of historical time that is backward-looking and redemptive in structure.

This account contrasts starkly with another influential view of legal argument: on this view, which Ronald Dworkin has called “pragmatism,” legal argument is entirely forward-looking, seeking only to create a better future and remaining generally oblivious to the past.²³⁰ On this view — its similarity to the Social Democratic view that Benjamin excoriates should be clear — a legal argument consists largely of an attempt to predict and assess the likely future consequences of a judicial decision; it seeks to show that a certain outcome would yield the best consequences overall.

My quarrel is not with the notion that we should aim to achieve the best consequences overall, but rather with the notion that the best consequences are to be sought by peering into the future — in Frankfurter’s words, attempting “[t]o pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time.”²³¹ Partly, this is because I have little faith in our predictive powers; more fundamentally, however, I am arguing that the consequences we seek are in large measure to be sought in the past — as Benjamin says, “our image of happiness is indissolubly bound up with the image of redemp-

229. See Luban, *supra* note 177, at 1684-85, 1694.

230. R. DWORKIN, *LAW'S EMPIRE* 95, 151-75 (1986) (Pragmatism is the view “that judges do and should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake.”). Utilitarian theories of adjudication are obvious examples of pragmatism. For an example of a rule-utilitarian theory, see R. WASSERSTROM, *THE JUDICIAL DECISION* (1961).

231. F. FRANKFURTER, *The Judicial Process and the Supreme Court*, in *OF LAW AND MEN* 39 (P. Elman ed. 1956).

tion.”²³² We achieve happiness in the thought that we have resurrected the memory of our dead ancestors, rescued their history from the defamations of their enemies, and therefore given ourselves a past that makes us comprehensible.²³³ That is the true function of legal narrative.

Perhaps the most self-conscious example of an exclusively forward-looking view of the sort I am criticizing is found not in legal pragmatism, but in Marx. At the beginning of his greatest historical work, *The Eighteenth Brumaire of Louis Bonaparte*, Marx writes, “Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as tragedy, the second as farce.”²³⁴ Marx understands full well that revolutionary action is typically backward-looking, seeking to explain itself by assimilation to a political narrative of the past; but unlike Benjamin (and me), he finds the attempt to be farcical, grotesque superstition:

The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionizing themselves and things, in creating something entirely new, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service and borrow from them names, battle slogans and costumes in order to present the new scene of world history in this time-honoured disguise and this borrowed language. Thus Luther donned the mask of the Apostle Paul, the Revolution of 1789 to 1814 draped itself alternately as the Roman Republic and the Roman Empire, and the Revolution of 1848 knew nothing better to do than to parody, in turn, 1789, and the revolutionary tradition of 1793 to 1795.

. . . Similarly, at another stage of development, . . . Cromwell and the English people had borrowed speech, passions and illusions from the Old Testament for their bourgeois revolution. When the real aim had been achieved, when the bourgeois transformation of English society had been accomplished, Locke supplanted Habakkuk.²³⁵

After heaping his considerable scorn on backward-looking, ghost-rid-

232. W. Benjamin, *supra* note 2, at 256.

233. In this sense, the sharp distinction I have drawn between forward-looking and backward-looking understandings of action and argument blurs: the redemption of the past *is* one of the consequences we hope for in the future, and, as Cover, *supra* note 1, insists, narratives of the past will include our ancestors' prophecies of their and our futures. Thus, the backward-looking gaze will see the future reflected in the mirror of ancestral prophecies, just as the forward-looking gaze will find future happiness indissolubly bound up with the redemption of past wrongs and sufferings. The difference in emphasis and valuation the two understandings place on the past nevertheless remains decisive. (My thanks to Paul Kahn for stressing to me the extent to which past and future are caught up with each other.)

234. K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 13 (C. Dutt ed. 1957) (3d German ed. 1883).

235. *Id.* at 13-14 (footnote omitted).

den and superstitious revolutionaries, Marx arrives at this passionate exhortation:

The social revolution of the nineteenth century cannot draw its poetry from the past, but only from the future. It cannot begin with itself before it has stripped off all superstition in regard to the past. Earlier revolutions required world-historical recollections in order to drug themselves concerning their own content. In order to arrive at its own content, the revolution of the nineteenth century must let the dead bury their dead.²³⁶

It has been my argument that these brave and passionate words amount to a profound misunderstanding of our possibilities of action. Marx aims to eliminate superstition and theology, to disenchant us; similarly, legal pragmatists aim at a disenchanted view of legal argument. In my view, it cannot be done; let me turn for the last time to Walter Benjamin, who offered the following parable in criticism of the scientific and disenchanted vision offered by orthodox Marxism:

The story is told of an automaton constructed in such a way that it could play a winning game of chess, answering each move of an opponent with a countermove. A puppet in Turkish attire and with a hookah in its mouth sat before a chessboard placed on a large table. A system of mirrors created the illusion that this table was transparent from all sides. Actually, a little hunchback who was an expert chess player sat inside and guided the puppet's hand by means of strings. One can image a philosophical counterpart to this device. The puppet called "historical materialism" is to win all the time. It can easily be a match for anyone if it enlists the services of theology, which today, as we know, is wizened and has to keep out of sight.²³⁷

This parable returns us to King, but also to *Walker*. In Benjamin's ingenious jest we may find not only a critique of Marx, who was forced to smuggle in his theology in the form of a necessitarian theory of historical change, but a moral applicable to the *Walker* Court as well. Instead of calling Benjamin's puppet "historical materialism," call it "the civilizing hand of law," which must win all the time if the judicial suppression of social protest is to be justified. I have argued that the Court buttresses its preposterous deification of law's efficacy by a theological reliance on authority, and this may serve as the hunchback crouching beneath the table. The mirrors that disguise the hunchback are the unmentioned premises of constitutionalism and popular sovereignty, which the Court seems to evoke when it speaks of "constitutional freedom," but which in reality serve only to deflect our attention from the authoritarian hand that drives the opinion.

Martin Luther King, on the other hand, found no need to hide

236. *Id.* at 16.

237. W. BENJAMIN, *supra* note 2, at 255.

theology under the table. In King's case the critical portion of my argument has been different: it is that the real theology required by King is not a biblical or even Socratic doctrine of conscience, but rather an understanding of the essentially redemptive character of political action itself. And just as the real political narrative underwriting the Supreme Court's authority ought to be the suppressed "protestant" narrative of constitutionalism under popular sovereignty, the real political narrative that embeds and fulfills the Birmingham campaign ought to be the narrative of constitutional egalitarianism and natural law legalism in Jefferson, Lincoln, and *Brown*. The two halves of my argument converge: *our* history — the history of black and white Americans, of protesters and the Supreme Court, that would allow us to speak of any history as a common possession — is a narrative of communitarian liberalism that redeems our past oppressions and iniquities. It is the narrative of social protest and moments of "creative tension" that remind us of unkept promises and of the moral emergency in which we live.