Dr. King, Bull Connor, and Persuasive Narratives

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"No, you will not get a permit in Birmingham, Alabama to picket.
I will picket you over to the City Jail."
– Eugene "Bull" Connor[1]

This article describes an in-class exercise that illustrates the use of persuasive narrative techniques in a U.S. Supreme Court decision. The article first describes the background to the Supreme Court's decision in *Walker v. City of Birmingham*.[2] Next, the article examines persuasive narrative techniques through the lens of an in-class exercise in which students identify the Justices' narrative devices and consider how those devices preview the Justices' legal arguments.[3] Finally, the article describes why the Walker case and the exercise are valuable not only to teach persuasive narratives, but also to raise broader issues of lawyering and social justice.

I. Walker v. City of Birmingham

The *Walker* decision arose from the civil rights demonstrations in Birmingham, Alabama, during April and May of 1963.[4] Among those who

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1. Quoted in *Walker v. City of Birmingham*, 388 U.S. 308, 339 (1967).
2. 388 U.S. 308.
3. My inspiration for the exercise that I present below was Ken Swift's article, *Teaching Students to Utilize the Facts Section*, 16(1) The Second Draft: Bulletin of the Legal Writing Institute 11-12 (Dec. 2001) (available at http://www.lwionline.org/publications/seconddraft/dec01.pdf (accessed May 27, 2004)). In researching this article, I also discovered Julie M. Spanbauer's article, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 Leg. Writing 167 (1999). Both Swift and Spanbauer contrast Justice Stewart's opinions in two different cases arising out of Birmingham civil rights demonstrations in 1963, *Walker v. City of Birmingham*, 388 U.S. 308 (1967), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 149 (1969). I took a different tack, and instead chose to contrast the majority and dissenting opinions in *Walker*.
4. For an excellent description of the Birmingham demonstrations and their ramifications, see David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The*

organized the demonstrations were the Rev. Dr. Martin Luther King, Jr., the Rev. Frederick Lee Shuttlesworth, the leading civil rights activist in Birmingham, and Dr. Wyatt Tee Walker, the Executive Director of the Southern Christian Leadership Conference.[5] The arrests that led to the Walker case took place during demonstrations on Good Friday and Easter Sunday, 1963.[6]

A Birmingham ordinance prohibited demonstrations on city ways without a permit.[7] On April 2, civil rights activists tried to obtain a permit for their demonstrations, but Bull Connor himself denied the requests. Nevertheless, the demonstrations began on April 3, starting with sit-ins at local lunch counters. On Wednesday, April 10, after the prior weekend's demonstrations and arrests, city officials petitioned ex parte for an injunction against the marches. Alabama Circuit Judge William A. Jenkins, Jr., granted the injunction, which named over 130 civil rights activists, including King, Walker and Shuttlesworth. The city served notice of the injunction at approximately 1:00 a.m. on Thursday, April 11.[8]

The next day, Good Friday, fifty volunteers were selected to march from the Sixteenth Street Baptist Church to City Hall with King, Walker and Shuttlesworth.[9] They made it about four blocks before the police arrested everyone.[10] A similar demonstration took place on Easter Sunday.[11] Subsequently, the state circuit court held a contempt hearing concerning King, Walker and Shuttlesworth's violation of the injunction.[12] The ministers challenged the injunction's constitutionality, but the court refused to entertain such arguments because the defendants had not tried to challenge the injunction before the marches.[13] The court found the ministers in contempt and imposed the maximum sentence of five days in jail and a $50 fine.[14] The

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Events Leading to the Introduction of the Civil Rights Act of 1964, 29 U.S.F. L. Rev. 645, 646-70 (1995).

5. *Id.* at 646.

6. *Walker*, 388 U.S. at 310-11.

7. *Id.* at 309 n. 1. The ordinance read: "It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any . . . public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission. To secure such a permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such . . . public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such . . . public demonstration. The commission shall grant a written permit for such . . . public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Birmingham Parade Ordinance, § 1159 (quoted in *Walker*, 388 U.S. at 309 n. 1).

8. Oppenheimer, *supra* n. 4, at 659-61.

9. *Id.* at 662; *Shuttlesworth*, 394 U.S. at 148.

10. Oppenheimer, *supra* n. 4, at 662.

11. *Walker*, 388 U.S. at 311.

12. *Id.*

13. *Id.*

14. *Id.* at 312.

Alabama Supreme Court affirmed on the ground that the ministers waived any constitutional challenge to the injunction by failing to raise constitutional objections before violating the injunction.[15]

Writing for a five-Justice majority, Justice Stewart affirmed the convictions for essentially the reasons stated by the Alabama Supreme Court. Stewart recognized that the "breadth and vagueness of the injunction itself would . . . unquestionably be subject to substantial constitutional question. But the way to raise that question was to have the injunction modified or dissolved."[16] Stewart noted that the case did not involve defendants who tried to challenge a state court injunction and were "met with delay or frustration of their constitutional claims."[17] Nor did the case involve a situation where a state court had sprung a novel procedural bar upon an unsuspecting litigant.[18] Instead, the State of Alabama, like many other jurisdictions, had consistently applied the collateral bar rule, which required litigants to challenge injunctions on their merits before the fact, rather than disobey them and challenge them after the fact.[19]

The justification for the collateral bar rule, Stewart explained, was the need to maintain respect for court orders:

> [I]n 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' 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.[20]

Justice Brennan's dissent framed the case as a clash between the admittedly valid state interest in respect for court orders, and the First Amendment guarantees of free speech, the right to assembly, and the right to petition the Government for redress of grievances.[21] He noted that the Court had previously "modified traditional rules of standing and prematurity" to afford "breathing space" for these cherished First Amendment freedoms.[22] In particular, he emphasized "the right to speak first and challenge later"

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15. *Id.* at 313 (citing *Walker v. City of Birmingham*, 181 So. 2d 493 (1966)).
16. *Walker*, 388 U.S. at 317.
17. *Id.* at 318.
18. *Id.* at 319.
19. *See id.* at 319-20; Richard Labunski, *A First Amendment Exception to the "Collateral Bar" Rule: Protecting Freedom of Expression and the Legitimacy of Courts*, 22 Pepp. L. Rev. 405, 406 (1995).
20. *Walker,* 388 U.S. at 320-21.
21. *See id.* at 343-44 (Brennan, J., dissenting).
22. *Id.* at 344-45 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *NAACP v. Button*, 371 U.S. 415 (1963)).

when faced with a permit or licensing requirement giving the decision maker broad discretion, as did the Birmingham ordinance.[23] Brennan then criticized the majority for allowing "these constitutionally secured rights to challenge prior restraints invalid on their face [to be] lost if the State takes the precaution to have some judge append his signature to an ex parte order which recites the words of the invalid statute."[24] He accused the majority of creating "a devastatingly destructive weapon" that "arm[ed] the state courts with the power to punish as a 'contempt' what they otherwise could not punish at all."[25] Brennan preferred to treat convictions for violating injunctions abridging First Amendment freedoms in the same fashion as convictions for violating similarly unconstitutional licensing requirements. Accordingly, he would have allowed the ministers to raise their constitutional arguments as a defense to the contempt proceeding.[26]

II. Critiquing the Stewart and Brennan Narratives

The compelling story behind the *Walker* case, and the disparate narratives that Stewart and Brennan deploy, make *Walker* an excellent vehicle for introducing students to the use of narrative in advocacy. The in-class exercise begins with a brief preview of the narrative elements that the students will encounter. Students then receive a one-page handout. The front contains excerpts from Justice Stewart's description of the facts in his majority opinion. The back contains excerpts from Justice Brennan's description of the facts in his dissent. At this point, the students know only that Stewart wrote for the majority and Brennan for the dissent. They know nothing about the legal issues involved. The students spend between five and ten minutes reading the two narratives, and then form small groups. The small-group task is to come up with examples of how each Justice used the following narrative elements.

The first narrative element is character — the choice of protagonist and antagonist, and the depth or shallowness of each.[27] Lawyers make use of character by painting a three-dimensional and human picture of their client, and a one-dimensional and artificial picture of the opposing party. In their extensive examination of how lawyers use narratives, including the characters that we create to inhabit our narratives, Anthony Amsterdam and Jerome Bruner have recognized that narratives persuade when they personalize the

23. *Id.* at 345.
24. *Id.* at 346.
25. *Id.* at 349.
26. *Id.*
27. *See generally* Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 468 (2001) (discussing character and the role of the protagonist); Steven D. Stark, *Writing to Win: The Legal Writer* 81-82 (Doubleday 1999) (discussing how to portray and humanize one's client in the statement of facts).

story.[28] By way of illustration, Amsterdam and Bruner contrast the Supreme Court's opening paragraphs in two admiralty cases that presented common issues and were decided on the same day.[29] The Court finds for the defendant first case, and for the plaintiff in the second. The opening paragraph of the first opinion tells a story of "[t]he administratrix of the estate of Walter J. Halecki" bringing an action against the pilot boat owners.[30] The second opinion's opening paragraph explains how "Carl Skovgaard, an El Dorado maintenance foreman, was . . . summoned from his home to assist in the repair work."[31] So in each case the court gives the prevailing side a human face — in the first case the boat owners, and in the second a loyal employee. And in each case the losing side is impersonal: the administratrix in the first case and "the motor vessel Tungus" in the second.[32]

The next narrative element is imagery — the pictures and sounds that the author's words evoke.[33] The English language offers a rich vocabulary, empowering lawyers to select words that not only describe the facts fairly, but also connote themes or ideas that cast the client's case in a flattering light. Again returning to Amsterdam and Bruner's example, the story in the first case is told in purely "procedural terms: it is about the lawsuit, not about [the plaintiff's] demise. [The plaintiff's] demise is blurred by nominalization: he doesn't die; rather, his 'death' is caused by 'inhalation.' "[34] In the second case, the opening paragraph paints a picture of a faithful repairman "summoned from his home," who attempts to fix a "defective" pump and tries to step over a "deep tank" filled with "hot coconut oil," only to "f[a]ll to his death." [35] The first tale is technical; the second is tragic.

The last narrative element is emphasis — the author's choice of which facts to discuss in detail, which to describe in abstract terms, and which to

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28. Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 135, 177-79 (Harvard U. Press 2000). Amsterdam and Bruner also offer an extensive analysis of narrative and rhetoric in civil rights cases from the 1890s to the 1990s, by examining *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Brown v. Board of Education*, 347 U.S. 483 (1954), *Freeman v. Pitts*, 503 U.S. 467 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995). *See* Amsterdam & Bruner, *supra*, at 246-81. For a detailed examination of how the lawyers used narrative and rhetoric in *Brown v. Board of Education*, see Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in* Brown, 68 N.Y.U. L. Rev. 226 (1993); Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 Clin. L. Rev. 9 (1994).

29. Amsterdam & Bruner, *supra* n. 28, at 177-79 (citing *United Pilots Assn. v. Halecki*, 358 U.S. 613 (1959); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959)).

30. *United Pilots Assn.*, 358 U.S. at 614.

31. *The Tungus*, 358 U.S. at 589.

32. *See* Amsterdam & Bruner, *supra* n. 28, at 178.

33. *See generally* Stark, *supra* n. 27, at 86 (advising lawyers to use a consistent set of images); Laurel Currie Oates *et al.*, *The Legal Writing Handbook: Analysis, Research, and Writing* 344-46 (3d ed. Aspen L. & Bus. 2002) (discussing the use of word choice to create the appropriate image).

34. Amsterdam & Bruner, *supra* n. 28, at 178.

35. *Id.* (quoting *The Tungus*, 358 U.S. at 589).

omit entirely.[36] By including specific details, lawyers concretize particular facts, and thereby make those facts more memorable and more persuasive.[37] In Amsterdam and Bruner's example, there is almost no detail about the accident in the first case. We learn only that the "administratrix" sued the "pilot boat owners" for a death "allegedly caused by inhalation of carbon tetrachloride fumes."[38] In the second case, we see the repairman "summoned" from his home, and follow him step by step as he walks through an oil covered area of the deck, "attempt[s] to step from the hatch beams to the top of the partly uncovered deep port tank," and plunges to his death in a tank of hot oil.[39] So the first case presents essentially an abstract legal context, while the second details a gruesome accident.

Once the groups have completed their small-group task of identifying the Justices' use of these narrative devices, (which takes around ten minutes), we reconvene to discuss their findings.

A. Character

The most common observation concerning character is that Brennan presents the protagonists with human, sympathetic faces. His story begins, "Petitioners are eight Negro ministers."[40] In contrast, Stewart does not offer an obvious protagonist. This is understandable, given the unsympathetic nature of Birmingham city officials such as Bull Connor. Some students see Stewart's protagonist as the abstract "officials" to whom he refers. Others see the state court, or even the institution of the judiciary, as the protagonist. Such institutional protagonists are consistent with Stewart's emphasis on respect for court orders as essential to preserving freedom and the rule of law.

Many students quickly identify Bull Connor as Brennan's antagonist, or at least as representative of the city officials as antagonists. Brennan quotes Connor's rejection of the ministers' first request for a permit to picket: "I will picket you over to the city jail."[41] Others see the entire Birmingham city government as the antagonist, a position that finds support in the third sentence of Brennan's narrative: "These were the days when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought."[42] Stewart, on the other hand, was in no position to put a human face on his antagonists, because the ministers would be the story's most compelling characters. Although this leaves some students

36. *See generally* Stark, *supra* n. 27, at 83-87 (discussing the use of details to make particular facts memorable); Oates et al., *supra* n. 33, at 339-41 (same).

37. Amsterdam & Bruner, *supra* n. 28, at 177, 179; Stark, *supra* n. 27, at 87.

38. Amsterdam & Bruner, *supra* n. 28, at 178 (quoting *United Pilots Assn.,* 358 U.S. at 614).

39. *Id.* (quoting *The Tungus*, 358 U.S. at 589).

40. *Walker*, 388 U.S. at 338.

41. *Id.* at 339.

42. *Id.* at 338-39.

grasping for an antagonist in Stewart's story, many identify "the mob" as Stewart's abstract and unsympathetic selection.[43]

B. Imagery

The students' observations about imagery have been quite creative. They commonly identify Stewart's imagery as that of mob violence and civil unrest. Words that recur in his narrative include "mob," (occurring twice) "mass" (three times, as in mass parade or mass procession), and "crowd," (six times).[44] At one point he describes the crowd "clapping, and hollering, and (w)hooping."[45] He also characterizes the crowd as having "spilled out into the street" and "overflowed onto the sidewalks."[46] Finally, he describes one of the petitioners as organizing the crowd "in formation," a phrase with a potentially threatening and militaristic connotation.[47]

Brennan, in contrast, presents two sets of images — the peaceful protestors, and the racist city officials. The imagery of peace appears in Brennan's use of "peacefully," "peaceably" and "orderly," and in his descriptions of the protests as a "planned march" and "planned demonstration" of which the police were given "advance notice."[48] In contrast, the imagery of racism is obvious in phrases such as "official hostility to Negro efforts to gain civil rights," and is only slightly less explicit in Bull Connor's threat to "picket you over to the City Jail."[49]

C. Emphasis

The class discussion of emphasis has generally taken the most prodding on my part, but there is much to be gained from focusing students' attention on the differing details that each Justice emphasizes. Stewart is painting a picture of disorder and mob violence, so he includes specific numbers about how many people were in the streets at various times: "between 1,500 and 2,000 people"; "a crowd of 1,000 to 1,500 onlookers"; "Some 300 or 400 people."[50]

Brennan, in contrast, wants to emphasize how small the marches actually were, and to distinguish the protesters themselves from the mere observers. He specifies the relatively small number of marchers on both Good Friday and Easter Sunday, "[a]pproximately 50 persons" each day.[51] He also emphasizes that only a few members of even that small group were the

43. *See id.* at 308-11.
44. *Id.* at 310-11.
45. *Id.* at 308-11.
46. *Id.* at 310.
47. *Id.* at 311.
48. *Id.* at 339-41.
49. *Id.* at 339-40.
50. *Id.* at 310-11.
51. *Id.* at 341.

ministers now before the Court, by saying that one march was "led by three petitioners," and that "about 20 persons, including five petitioners, were arrested."[52] While Stewart draws the reader's attention to crowds numbering in the thousands, Brennan focuses the reader on a few dozen marchers and the handful of ministers involved.

The Justices' differing descriptions of a single incident typify their two narrative approaches. Stewart describes 300 to 400 people 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."[53] Brennan described the same event, but with entirely different emphasis and imagery: "[T]he only episode of violence, according to a police inspector, was rock throwing by three onlookers on Easter Sunday, after petitioners were arrested; the three rock throwers were immediately taken into custody by the police."[54] So Stewart relates a tale of chaos and violence, while Brennan details an isolated incident which the authorities quickly resolved, and in which the ministers were not involved.

D. Reverse engineering

In the next phase of the exercise, I have the students try to "reverse engineer" the two Justices' legal arguments, based solely on their two conflicting narratives. I had misgivings the first time that I tried this; I was concerned that it might turn into the frustrating game of "guess what I'm thinking" that law students sometimes ascribe to law professors. However, using the exercise successfully with five different classes at two law schools has assuaged my concerns.

My first questions are simple: Who do you think the litigants are? And in whose favor do you think each Justice wanted to decide the case? Students quite easily gather that Walker must be one of the "eight Negro Ministers" whom Brennan names as the petitioners, and speculate that Stewart favored the city while Brennan favored the ministers. When pressed on what features of the narratives give away the Justices' predispositions, most students suggest that Stewart portrays the demonstrators negatively, while Brennan portrays the ministers positively and portrays the city officials quite negatively.

From there, I press the students to speculate about the legal issue on appeal. Here, despite some initial uncertainty in dealing with an admittedly ill-defined task, someone eventually suggests that Stewart's emphasis on the injunction and the petitioners' intention to disobey it suggests that the holding must relate to the injunction. Other students focus on Brennan's claim that the injunction was "blatantly unconstitutional," and students generally agree that the appeal relates somehow to the injunction and its validity.

52. *Id.*
53. *Id.* at 311.
54. *Id.* at 341.

One tack that I have taken from this point is to focus the discussion on why Stewart would have found against the ministers. I ask whether Stewart agreed with Brennan that the injunction was unconstitutional. Students observe that Stewart says nothing about the injunction's constitutionality, but that he describes the injunction and the bill of complaint in great detail. Every time that I have taught this exercise, someone has eventually suggested that the issue must be whether the ministers were allowed to disobey the injunction without first challenging it in court. From there, with input from those who have made the connection to their study of res judicata or interlocutory appeals (and perhaps even the collateral bar rule itself) in their civil procedure class, students generally agree that, in Stewart's view, the ministers waived their constitutional claims by failing to challenge the injunction before disobeying it. When pressed to search Stewart's narrative for clues about the policy behind such a holding, students point to his imagery of disorder and mob violence that ensued after the ministers disobeyed the injunction.

When we turn to Brennan's argument, students have an easier time speculating about what holding he preferred, perhaps because they need only consider how Brennan's position would contradict Stewart's. Indeed, an excellent way to shift the discussion to Brennan is to ask why students think he disagrees with Stewart. Students rather quickly suggest that Brennan believes that you should be able to disobey a "blatantly unconstitutional" injunction without waiving your right to raise a later constitutional challenge. Playing devil's advocate, I ask whether people should be able to decide for themselves whether an order is constitutional. If they are, don't we invite the type of disorder with which Stewart tries to frighten the reader? I can recall roughly three different student responses on this point. First, some seemingly process-oriented students suggest that Brennan's approach would still impose consequences, but would target the consequences at the true wrongdoers. That is, if you're held in contempt and you lose your constitutional challenge, you're going to jail; if you're held in contempt but the court order turns out to have been unconstitutional, then you never deserved to be punished in the first place. Second, some students take a more context-specific focus, suggesting that Brennan may have found the disobedience appropriate because of the Birmingham city government's racial prejudice. Third, a few students suggest that Brennan placed special emphasis on the form that their disobedience took: they were conducting public protests.

Once the students have put such creative and diverse approaches on the table, I take it upon myself to wrap up the case analysis. I first explain the collateral bar rule upon which Stewart relied. I next explain the line of cases upon which Brennan relied, which allowed post-violation constitutional challenges to licensing statutes that infringed upon First Amendment rights, even though the defendants did not try to challenge the statutes before violating them. Finally, I discuss the role that racial prejudice and free speech concerns appear to have played in Brennan's opinion. To Brennan, it seemed

unthinkable to turn court orders into a "devastatingly destructive weapon" within easy reach of racist state governments, who with a single judge's signature could immunize unconstitutional statutes from constitutional scrutiny, at least until the targets of the injunction delayed their plans long enough to challenge the injunction.[55] Of course, Stewart might well have responded that the sanctity of court orders, especially federal court orders, was particularly important to the civil rights movement in the 1960s, with school desegregation orders becoming more common.[56]

Finally, after congratulating the class on their accomplishment, I then emphasize the nexus between each Justice's narrative and his legal argument. Stewart advocated a bright-line rule intended to preserve respect for the courts, so he told a story of disobedience and mob unrest. Brennan advocated a limited exception to protect First Amendment rights, so he told a story of an oppressive and racist government attempting to silence peaceful demonstrators. It was this connection between narrative and legal argument that allowed the class to reverse engineer the Justices' holdings, despite the students' unfamiliarity with the legal issues involved. Telling a compelling story is good, but telling a compelling story that plays directly into your legal argument is better. The essential lesson of this exercise, then, is that the confluence of narrative techniques and legal argument makes for a powerful statement of the case.

III. Lawyering, Context, and Social Justice

In addition to the lessons about narrative techniques and their connection to the legal argument, I also find this exercise useful because the story of the Birmingham demonstrations fosters the discussion of some broader perspectives on lawyering.

A. Lawyering tactics in context

First, the events in Birmingham place lawyering tactics in a vivid, real-world context which is sometimes lacking in the first year of law school. I address this point explicitly toward the end of the class by recounting several key legal tactics in the Birmingham campaign.

The Birmingham campaign was intended to provoke a public confrontation and expose segregation for all the world to see. A critical aspect of the campaign was the creation of a bail fund, so that demonstrators could return to action quickly after their expected arrests. Not long after the campaign began, however, the Alabama State Legislature raised the maximum bail for a misdemeanor from $300 to $2,500.[57] This legislative maneuver was a potentially devastating blow; the ministers had promised demonstrators that

55. *Id.* at 338.
56. Thanks to Teresa Godwin Phelps for suggesting this point.
57. Oppenheimer, *supra* n. 4, at 660.

they would spend only a few days in jail after their arrest, but now their bail fund would be exhausted within a few days.[58]

The city's eleventh-hour request for an injunction against the ministers themselves was another aggressive legal tactic. By having notice of the injunction served the day before the planned Good Friday march, the city made it practically impossible for the ministers to challenge the injunction before the demonstrations.[59] Perhaps they could file a motion to dissolve the injunction during the day on Thursday, but no one could expect the Alabama state judge who had issued the ex parte injunction to do the ministers the favor of granting their motion within twenty-four hours.

On Good Friday morning, Dr. King met with a group of advisers, many of whom counseled that they obey the injunction and put off the march. King knew that the bail fund had been exhausted the previous day, and wondered whether it would be responsible for him to go to jail, given that he was the movement's best fundraiser.[60] Yet he decided that the march must proceed. "I don't know what will happen," he said. "I don't know where the money will come from. But I have to make a faith act."[61]

The bail increase and the temporary injunction put the ministers in a very difficult position. Orchestrating and responding to such rapid-fire developments are critical parts of many lawyers' practices, but first-year law students rarely see examples of such legal maneuvering in context. Some have responded very positively after the class to the chance to hear about such tactics in action.

B. Lawyering and social justice

Using the Birmingham story as the backdrop for the exercise also injects a social justice perspective into the students' thinking about lawyering.[62] Some students are surprised to learn that Dr. King's arrest on Good Friday led to his writing of the Letter from Birmingham Jail, first in the margins of a newspaper and then on paper smuggled into jail by his lawyer.[63]

Still fewer students are aware of the ironic connection between the state legislature's bail increase and the brutal crowd control measures that helped shift the tide of national public opinion. With many of the ministers facing contempt convictions and the bail fund now empty, few adults could afford

58. *Id.* at 660-61.

59. *See id.*

60. *Id.* at 661.

61. *Id.* (quoting Martin Luther King, Jr., *Why We Can't Wait* 73 (New Am. Lib. 1964)).

62. On the topic of integrating social justice issues into lawyering skills courses, see e.g. Miki Felsenberg & Luellen Curry, *Incorporating Social Justice Issues into the LRW Classroom*, 11 Perspectives: Teaching Leg. Research & Writing 75 (2003); Pamela Edwards and Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 Leg. Writing 63 (2001); Brook K. Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 Perspectives: Teaching Leg. Research & Writing 51 (2001).

63. Oppenheimer, *supra* n. 4, at 662.

the financial hardship of a long stay in jail. How, then, could the ministers continue the Birmingham campaign? They called upon children by the thousands, hoping to fill the city's jails beyond capacity. On May 2, wave after wave of teenagers marched from the Sixteenth Street Church, singing "We Shall Overcome."[64] Police arrested as many as they could: nearly a thousand during the first day.[65] Another thousand were jailed the following day, but the jails were already overflowing.[66]

Bull Connor's brutal response was to use high-pressure water cannons, and eventually police dogs, as "crowd control" measures.[67] Powerful enough to strip the bark off of trees, the cannons ripped the clothes from children's backs and rolled some of them down the street.[68] Three demonstrators received dog bites severe enough to require hospitalization.[69] Pictures and stories of the brutality spread in the national media, and "[a] mood swing began which, in a few days' time, would fundamentally shift national opinion."[70] President Kennedy and his administration successfully pressured Birmingham community leaders to reach a settlement, and within a month Kennedy announced that he would send to Congress what eventually became the Civil Rights Act of 1964.[71]

Every time I teach this exercise, I find that most students are as engaged in the subject matter as I am. In the end, an important reason why I choose this exercise to teach persuasive narratives is the opportunity to integrate such a formative event into my course.

IV. Epilogue

One of the most interesting comments I have heard in response to this exercise was a student who said she was troubled that "the good guys lost" in *Walker*. I pointed out that in a subsequent case challenging Rev. Shuttlesworth's conviction under the Birmingham permit ordinance itself, the Court found the ordinance unconstitutional.[72] Ironically, Justice Stewart wrote the opinion for a unanimous Court, and his description of the facts was far more similar to Brennan's description in *Walker* than to his own description in *Walker*. Learning of the *Shuttlesworth* holding seemed to make the student even more dismayed at the result in *Walker*. One can imagine a lively discussion that might have ensued. If one truly believes that the *Walker* majority's adherence to the collateral bar rule was necessary to uphold respect for judicial orders, then who are the "good guys"? What makes the good guys

64. *Id.* at 666.
65. *Id.*
66. *Id.*
67. *Id.* at 667.
68. *Id.*
69. *Id.*
70. *Id.* at 668.
71. *Id.* at 667, 670-71.
72. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

good? And is it surprising that the good guys don't always win? We could not, however, explore these questions in a class that had already run late. Perhaps next year . . . .

V. Appendix: Handout for the Walker Exercise[73]

Conflicting Narratives in *Walker v. City of Birmingham*

1. *Walker v. City of Birmingham*, 388 U.S. 307, 310-11 (1967) (Stewart, J., for the Court):

On Wednesday, April 10, 1963, officials of Birmingham, Alabama, filed a bill of complaint in a state circuit court asking for injunctive relief against 139 individuals and two organizations. The bill and accompanying affidavits stated that during the preceding seven days:

> [Petitioners] (had) sponsored and/or participated in . . . 'sit-in' demonstrations, 'kneel-in' demonstrations, mass street parades, trespasses on private property after being warned to leave the premises by the owners of said property, congregating in mobs upon the public streets and other public places, unlawfully picketing private places of business in the City of Birmingham, Alabama . . . .

It was alleged that this conduct was '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.'

The bill stated that these infractions of the law were expected to continue and would 'lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the City of Birmingham,' and that the 'remedy by law (was) inadequate.' The circuit judge granted a temporary injunction as prayed in the bill, enjoining the petitioners from, among other things, participating in or encouraging mass street parades or mass processions without a permit as required by a Birmingham ordinance.

* * *

[The next day, four of the petitioners] held a press conference. There a statement was distributed, declaring their intention to disobey the injunction because it was 'raw tyranny under the guise of maintaining law and order.' At this press conference one of the petitioners stated: 'That they had respect for the Federal Courts, or Federal Injunctions, but in the past the State Courts

73. This is the text of the handout in the exercise described above. When formatted in 11-point Times New Roman type, the handout is a single page, with part 1 on the front and part 2 on the back.

had favored local law enforcement, and if the police couldn't handle it, the mob would.'

That night a meeting took place at which one of the petitioners announced that '(i)njunction or no injunction we are going to march tomorrow.' The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North. . . . A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, 'clapping, and hollering, and (w)hooping.' Some of the crowd followed the marchers and spilled out into the street. At least three of the petitioners participated in this march.

Meetings sponsored by some of the petitioners were held that night and the following night, where calls for volunteers to 'walk' and go to jail were made. On Easter Sunday, April 14, a crowd of between 1,500 and 2,000 people congregated in the midafternoon in the vicinity of Seventh Avenue and Eleventh Street North. . . . One of the petitioners was seen organizing members of the crowd in formation. A group of about 50, headed by three other petitioners, started down the sidewalk two abreast. At least one other petitioner was among the marchers. 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.

2. *Walker v. City of Birmingham*, 388 U.S. 307, 339-42 (1967) (Brennan, J., dissenting):

Petitioners are eight Negro Ministers. They were convicted of criminal contempt for violation of an ex parte injunction issued by the Circuit Court of Jefferson County, Alabama, by engaging in street parades without a municipal permit on Good Friday and Easter Sunday 1963. These were the days when Birmingham was a world symbol of implacable official hostility to Negro efforts to gain civil rights, however peacefully sought. The purpose of these demonstrations was peaceably to publicize and dramatize the civil rights grievances of the Negro people. The underlying permit ordinance made it unlawful 'to organize or hold . . . or to take part or participate in, any parade or procession or other public demonstration on the streets . . .' without a permit. A permit was issuable by the City Commission 'unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.'

Attempts by petitioners at the contempt hearing to show that they tried to obtain a permit but were rudely rebuffed by city officials were aborted when the trial court sustained objections to the testimony. It did appear, however, that on April 3, a member of the Alabama Christian Movement for Human Rights (ACMHR) was sent by one of the petitioners, the Reverend Mr. Shuttlesworth, to Birmingham city hall to inquire about permits for future demonstrations. The member stated at trial:

> 'I asked (Police) Commissioner Connor for the permit, and asked if he could issue the permit, or other persons who would refer me to, persons who would issue a permit. He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice.'

* * *

On April 6–7 and April 9–10, Negroes were arrested for parading without a permit. Late in the night of April 10, the city requested and immediately obtained an ex parte injunction without prior notice to petitioners. Notice of the issuance was given to five of the petitioners on April 11. The decree tracked the wording of the permit ordinance, except that it was still broader and more pervasive.

* * *

Several of the Negro ministers issued statements that they would refuse to comply with what they believed to be . . . a blatantly unconstitutional restraining order.

On April 12, Good Friday, a planned march took place, beginning at a church in the Negro section of the city and continuing to city hall. The police, who were notified in advance by one of the petitioners of the time and route of the march, blocked the streets to traffic in the area of the church and excluded white persons from the Negro area. Approximately 50 persons marched, led by three petitioners, Martin Luther King, Ralph Abernathy, and Shuttlesworth. A large crowd of Negro onlookers which had gathered outside the church remained separate from the procession. A few blocks from the church the police stopped the procession and arrested, and jailed, most of the marchers, including the three leaders.

On Easter Sunday another planned demonstration was conducted. The police again were given advance notice, and again blocked the streets to traffic and white persons in the vicinity of the church. Several hundred persons were assembled at the church. Approximately 50 persons who emerged from the church began walking peaceably. Several blocks from the church the procession was stopped, as on Good Friday, and about 20 persons, including five petitioners, were arrested. The participants in both parades were in every way orderly; the only episode of violence, according a police inspector, was rock throwing by three onlookers on Easter Sunday, after petitioners were arrested; the three rock throwers were immediately taken into custody by the police.