MCDONNELL DOUGLAS CORP. V. GREEN
REVISITED: WHY NON-VIOLENT CIVIL DISOBEDIENCE SHOULD BE PROTECTED FROM RETALIATION BY TITLE VII

by David Benjamin Oppenheimer*

I. INTRODUCTION

In the important new work on Title VII retaliation law that anchors this Symposium, Professor Terry Smith argues in favor of expanding the present definition of conduct protected from employer retaliation so as to include subtle oppositional conduct. He convincingly argues that the failure to provide an expansive definition of retaliation hobbles the Civil Rights Act of 1964, preventing it from effectively protecting the many non-white employees who, when subjected to conduct they legitimately perceive as discriminatory, engage in self-help to right the wrong. He traces the problem to an overly restrictive view of legitimate oppositional conduct, and to case law that has created defenses never contemplated by the drafters of the Civil Rights Act.

I will argue herein that one root of the problem identified by Professor Smith is judicial intolerance of disorder, and particularly disorder by black Americans, an intolerance that resulted in an unjustified Supreme Court ruling.

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2. Id. at 530; see Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).
3. Smith, supra note 1, at 530.
4. Id. at 552–72.
that withholds Title VII protection from non-violent civil rights demonstrators.\textsuperscript{5} I will further argue that the Court’s decision has no support in the text of the statute, the legislative history, or the social views on dissent held by the supporters of the Civil Rights Act at the time of its passage.\textsuperscript{6} It is ironic that the portion of the Court’s decision criticized herein was entirely unnecessary to the opinion, yet this dicta has suppressed an important area of socially legitimate (albeit unlawful) dissent.\textsuperscript{7}

By examining this early Title VII case, and a second important case in which the Court demonstrated its intolerance of non-violent civil disobedience, I conclude that the Court’s myopic view of civil disobedience has undermined the enforcement of civil rights.\textsuperscript{8} Further, both cases support numerous assertions made by the other contributors to this Symposium. In particular, the two cases exemplify: Professor Michael Zimmer’s argument that the lack of judicial empathy for the victims of racial discrimination has contributed to our failure to achieve the goals of the civil rights movement;\textsuperscript{9} Professor Barbara Flagg’s argument that our courts view discrimination claims with a transparently white, unknowingly racialized perspective;\textsuperscript{10} Professor Michael Selmi’s argument that social dominance theory can explain our courts’ bias in favor of employers in employment discrimination cases;\textsuperscript{11} and Professor Darren Hutchinson’s argument that the Supreme Court’s employment discrimination and equal protection decisions represent “factless” jurisprudence.\textsuperscript{12}

II. THE GREEN CASE

Percy H. Green, a lifelong resident of St. Louis, Missouri, is a civil rights activist.\textsuperscript{13} In the 1960s, he was the founder and chair of one civil rights

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\textsuperscript{5} See \textit{infra} Part II for a detailed discussion of the Supreme Court’s ruling in \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973), in which the Court refused to grant the defendant Title VII protection.

\textsuperscript{6} See \textit{infra} Parts II–III.

\textsuperscript{7} See \textit{infra} Part II.

\textsuperscript{8} See \textit{infra} Part IV.


\textsuperscript{13} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).
group, ACTION, and an active member of another, the Congress on Racial Equality (CORE). He was drawn to the movement in 1963, at a time when black family income in St. Louis was barely half of white family income, when more than forty percent of black families were poor, and when blacks comprised thirteen percent of the region’s population but two-thirds of the unemployed. During seven months in 1963 and 1964, he picketed daily in a series of celebrated equal employment demonstrations, while working the night shift at the McDonnell Douglas Corporation (McDonnell Douglas).

Green was trained as a radio mechanic. For eight years he worked as a mechanic, and then as a laboratory technician, at a McDonnell Douglas assembly plant. McDonnell Douglas was then a major employer in St. Louis, with 30,000 employees working in three shifts at Green’s plant alone. However, blacks composed only five percent of McDonnell Douglas’s St. Louis workforce, and Green was the only black technician among over one hundred whites.

In 1964, Green turned his activism toward his employer, with a primary focus on McDonnell Douglas’s hiring practices. He soon captured the attention of company management, as well as their enmity, through such actions as the (lawful) picketing of the home of James F. McDonnell, chair of the McDonnell Douglas board of directors. In August 1964, soon after he had led demonstrations at McDonnell Douglas, Green was laid off from his technician position. Fourteen white employees with less seniority, and who were thus more eligible for layoffs, were retained. Green believed his layoff was
retaliatory and racially discriminatory. Although the Civil Rights Act of 1964 had been adopted and signed into law the previous month, its effective date, unfortunately for Green, was still nearly a year away. If Green correctly understood the company's reasons for his termination, he had no legal recourse under federal law.

On July 2, 1965, Title VII of the Civil Rights Act came into full effect. Title VII prohibited race discrimination by employers, as well as retaliation for opposition to those forms of discrimination prohibited by the Act. Green marked the occasion by helping to lead an ACTION civil rights demonstration, in which demonstrators demanded that McDonnell Douglas end its policies of racial discrimination. The demonstration included peaceful picketing and a "lock-in," whereby a chain and padlock were attached to the front door of a McDonnell Douglas building to prevent its occupants from leaving. Green was present at the lock-in and engaged in lawful picketing, but his role in the chaining of the doors was unclear.

In October 1964, soon after his layoff, Green and other members of CORE stalled their cars on the main roads leading to McDonnell Douglas's plant in order to block access to it at the time of the morning shift change. The stall-in occurred without violence. It took place a considerable distance from the plant and lasted about ten minutes. Egress was not totally blocked; cars were able to pass. Green was arrested at the stall-in and pled guilty to a traffic offense, for which he paid a fifty dollar fine.

On July 26, 1965, McDonnell Douglas advertised openings for a mechanic position for which Green was qualified. He applied the following

29. Id.
34. Id. at 794.
35. Green, 463 F.2d at 348; NAACP Brief, supra note 15, at 28.
36. Green, 463 F.2d at 348; NAACP Brief, supra note 15, at 27.
37. NAACP Brief, supra note 15, at 27.
38. Green, 463 F.2d at 348.
day but was rejected.\textsuperscript{40} He then filed an administrative action against McDonnell Douglas with the newly formed Equal Employment Opportunity Commission (EEOC).\textsuperscript{41} He alleged that McDonnell Douglas's refusal to hire him constituted both race discrimination in violation of Section 703(a)(1) of Title VII\textsuperscript{42} and retaliation for his prior opposition to McDonnell Douglas's race discrimination in violation of Section 704(a).\textsuperscript{43} The company admitted they had refused to rehire him because of his protests against company policy, including the picketing of McDonnell's house, the lock-in, and the stall-in.\textsuperscript{44}

The EEOC found probable cause with respect to Green's Section 704 retaliation claim, but not with respect to his Section 703 discrimination claim.\textsuperscript{45} Conciliation failed, and the EEOC issued a right-to-sue letter.\textsuperscript{46} Green then filed a civil action in the United States District Court for the Northern District of Missouri, alleging discrimination in violation of Section 703 and retaliation in violation of Section 704.\textsuperscript{47} The district court dismissed the discrimination claim, holding that a finding of probable cause by the EEOC was a jurisdictional prerequisite to a civil action under Title VII.\textsuperscript{48} Following a bench trial, the district court held that McDonnell Douglas was justified in rejecting Green's employment application because of Green's "misconduct"—the lock-in and stall-in—and entered judgment for the company.\textsuperscript{49}

\textsuperscript{40}. Id. at 796.
\textsuperscript{41}. Id.
   It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
\textsuperscript{43}. Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2000) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter."); McDonnell Douglas Corp., 411 U.S. at 796.
\textsuperscript{44}. NAACP Brief, supra note 15, at 18 (citing letter from McDonnell Douglas Corp., to Percy Green).
\textsuperscript{45}. McDonnell Douglas Corp., 411 U.S. at 792.
\textsuperscript{46}. Id. at 797–98.
\textsuperscript{47}. Id. at 792.
Green appealed to the United States Court of Appeals for the Eighth Circuit. The court of appeals focused on the question of whether Green’s participation in the stall-in justified McDonnell Douglas’s decision. The court reversed the district court’s holding that Green’s discrimination action was barred by the EEOC’s failure to find probable cause. Turning to the merits of the discrimination claim, the court ordered a remand, explaining:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant’s past participation in unlawful conduct directed at his prospective employer might indicate the applicant’s lack of a responsible attitude toward performing work for that employer.

With respect to the retaliation claim, the court characterized the arguments in this way: “According to Green, since the ‘stall-in’ was a non-violent protest designed to call attention to McDonnell’s allegedly discriminatory practices, this activity commands the protection of § 2000e-3(a). McDonnell, on the other hand, asserts that the unlawfulness of this protest removes it from the protection of that section.” Here, the court sided with McDonnell Douglas by affirming the district court’s holding that Green’s participation in the stall-in was not protected from employer retaliation.

Had Green decided to appeal the Eighth Circuit’s affirmance of the judgment on his retaliation claim, the question of whether non-violent civil disobedience is protected from retaliation could possibly have reached the Supreme Court—but he didn’t. Instead, it was McDonnell Douglas that sought review, and the sole issue was whether the Eighth Circuit had erred in permitting Green to pursue his discrimination claim.

Green’s litigation decision is easily understood. The Eighth Circuit had sided with him on his discrimination claim; why muddy the waters by asking the Supreme Court to review the retaliation claim? In addition, he had persuasive evidence to support the Eighth Circuit’s Section 703 discrimination

50. *Green*, 463 F.2d at 338.
51. The court found that there was insufficient evidence regarding Green’s role in the lock-in. *Id.* at 341.
52. *Id.* at 342.
53. *Id.* at 344.
54. *Id.* at 341.
56. *Id.* at 800.
theory. On November 8, 1965, just a few months after the company refused to rehire Green, a white employee was arrested in a similar demonstration in favor of a labor strike; in that instance, however, the company reached an agreement with the union to allow the white man to retain his job.\textsuperscript{57}

The Supreme Court granted certiorari, accepting only the second Title VII case in its history.\textsuperscript{58} Its decision, probably the best known Title VII case it has heard, permitted Green to go forward with his discrimination claim.\textsuperscript{59} To determine whether Green’s race had motivated the company’s decision, the Court reasoned, Green should be allowed to compare his treatment with similarly situated white applicants.\textsuperscript{60} For example, Green could argue that the company’s willingness to rehire white former employees who had engaged in comparative misconduct demonstrated that its reason for rejecting Green’s application was pretextual.\textsuperscript{61}

Since the retaliation claim was not before the Court, and the validity of the discrimination claim rested on the comparative treatment of employees engaging in unlawful acts and not the legality of the stall-in, there was no need for the Court to discuss the question of whether the stall-in was a protected activity. The parties did not focus on the question in their briefs,\textsuperscript{62} and its resolution would add nothing to an analysis of the issue under review. Any reference to the subject would have been classic dicta.

Nonetheless, Justice Powell, on behalf of an unanimous Court,\textsuperscript{63} went out of his way to condemn Green’s civil disobedience. He described Green’s conduct as “a seriously disruptive act against the very one from whom he now seeks employment.”\textsuperscript{64} Nothing in Title VII, the opinion explained, “compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.”\textsuperscript{65} Thus, “Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.”\textsuperscript{66}

\begin{footnotesize}
\begin{enumerate}
\item McDonnell Douglas Corp., 411 U.S. at 804.
\item Id. at 798.
\item Id. at 793.
\item Id. at 804.
\item See id. at 797 n.6.
\item Id. at 803.
\item Id. at 806.
\item Id. at 803.
\item Id. at 804.
\end{enumerate}
\end{footnotesize}
Justice Powell mounted another unnecessary attack at oppositional conduct by comparing Title VII to the National Labor Relations Act (NLRA), which does not protect employees from discipline for illegal acts directed at their employers. Since the issue was not properly before the Court, it was left unsaid that the NLRA protects employees from retaliation for participation in labor organizing but is silent on protection for opposition to unlawful labor practices. By contrast, although Title VII was partially modeled on the NLRA, it protects both participation and opposition. The Green case illustrates well the need for the additional protection provided by Title VII. When the white employee was fired in November for a union-related stall-in, the union went to his aid and negotiated for his reinstatement. Civil rights activists, in contrast, lacked the bargaining power of a union and therefore needed greater protection from retaliation.

In these sweeps of dicta, Justice Powell eliminated potential retaliation claims by applicants and employees who had protested their employers' discriminatory policies through non-violent civil disobedience, and sowed the seeds for the disruption exception to Section 704 that Professor Smith describes. Yet there was no consideration of whether Title VII generally, and Section 704 in particular, was passed with a measure of congressional tolerance for non-violent disorder and dissent.

Imagine the same decision, reaching the same result on the actual question that was before the Court, but written with tolerance for non-violent civil disobedience and empathy for the victims of racial discrimination. It might read as follows:

Petitioner McDonnell Douglas Corporation seeks review of a decision by the Court of Appeals for the Eight Circuit holding that Respondent Percy H. Green has established a prima facie case of

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68. Compare National Labor Relations Act §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1) (2000) (establishing in § 158(a)(1) that “[i]t shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 [guaranteeing rights of employees to organize, engage in collective bargaining, etc.] of this title”), with Title VII Section 704(a) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter.”).


71. Smith, supra note 1, at 560–68.
Racial discrimination under Section 703(a)(1) of the Civil Rights Act of 1964. For the reasons that follow, we affirm and remand to the trial court.

Respondent, a Negro, was first hired by Petitioner as a radio mechanic in 1956. Aside from a twenty-one month gap for military service, he continued in its employ until laid off in 1964. His layoff followed his participation in numerous non-violent demonstrations directed at Petitioner's employment practices, in which demonstrations he publicly alleged that Petitioner discriminated against black employees and applicants. The demonstrations included peaceful picketing of the home of the chair of Petitioner's board of directors. Respondent claimed that his layoff was the result of his race and his civil rights advocacy, relying on the allegation that fourteen white workers who should have been laid off before him were retained. However, because the layoff preceded the effective date of the Civil Rights Act, it is not before us in the instant case.

In protest of his layoff, Respondent participated in additional demonstrations against Petitioner's employment policies. The demonstrations included acts of non-violent civil disobedience, a technique used frequently in the civil rights movement, and one that contributed to Congress's decision to adopt the Civil Rights Act. Respondent helped to organize a "stall-in" outside Petitioner's manufacturing plant, at which he was arrested for a minor traffic violation. He pled guilty and paid a small fine. He participated in a demonstration on July 2, 1965—intended to commemorate the Act on the date on which it came into effect—which included the symbolic chaining of the doors to a building in which Petitioner had offices. At least one white employee engaged in similar conduct in support of a labor dispute the same year. Petitioner initially disciplined the white employee but, upon intervention by the union, restored him to his functions.

Later in July 1965, Petitioner advertised for mechanics, Respondent's trade, and Respondent immediately applied for employment. He was rejected the following day, with the explanation that his demonstrations directed at the company disqualified him from employment. This suit followed.

In the district court, Respondent made two claims under Title VII of the Civil Rights Act. He alleged that he was refused employment because of his race, in violation of Section 703(a)(1), and that he was refused employment in retaliation for opposing practices prohibited by the Act, in violation of Section 704(a). The district court entered judgment for Petitioner, and Respondent appealed. The court of
appeals affirmed the ruling that Petitioner did not violate Section 704(a), but reversed the judgment on Section 703(a)(1), remanding for a trial on whether Respondent was discriminated against because of his race. Petitioner sought review in this Court, and we granted certiorari. Respondent did not seek review of the judgment on his retaliation claim. Thus, the question of whether an employer may discipline or refuse to hire an applicant or employee for engaging in non-violent civil disobedience in opposition to the employer’s employment policies is not before this Court, and we offer no opinion on the question.

We are presented with the question of whether Respondent has established a prima facie case of hiring discrimination under Title VII. We think he has. Where a member of a class protected by the statute applies for an open job for which he is qualified, and the employer rejects him while continuing to seek applicants, we think a trier of fact may and, in the absence of further evidence, must, infer that there was a causal connection between his protected status and the adverse employment decision.

Petitioner asserts that it has dispelled any inference of discrimination by offering into evidence a non-discriminatory reason for its decision. We agree that when an employer offers as competent evidence a legitimate non-discriminatory reason, it has dispelled the mandatory presumption of discrimination. The trier of fact may conclude that, on balance, the employer’s evidence of non-discrimination is more persuasive than the applicant’s evidence of discrimination.

But the inquiry cannot end there. Where the presumption of discrimination has been dispelled, the applicant must be afforded an opportunity to show that the legitimate non-discriminatory reason offered by the employer is pretextual, and that the real reason is discrimination.

Here, Petitioner offers as a non-discriminatory reason for its decision the fact that Respondent participated in illegal acts directed at the employer, arguing that such acts may never be protected activity under Title VII. We agree that such acts may, at times, be a legitimate non-discriminatory reason for an employer’s decision. But we cannot lose sight of the fact that the very right to bring an action such as this exists because of a social movement that used illegal but non-violent acts to bring to public attention the evils of discrimination. Thus, we think the critical question is not whether Respondent’s acts were illegal, but whether they would have motivated the same response by Petitioner if Respondent were white.
That takes us to the question of pretext. If Respondent can offer persuasive evidence that Petitioner has hired white applicants who had engaged in similar illegal conduct, or has failed to discipline white workers who engaged in such conduct, the trier of fact may conclude that the real reason for Petitioner's decision was not the illegality of Respondent's protests. And if the Respondent shows that Petitioner's purported legitimate non-discriminatory reason was a pretext, then, on the basis of his prima facie case and his refutation of Petitioner's non-discriminatory reason, the trier of fact must enter judgment for Respondent.

Finally, we note that the question of whether Petitioner violated section 704(a), the portion of Title VII protecting applicants and employees from retaliation for opposing employment discrimination, is not before us. Whether an employer may ever discipline an employee for engaging in non-violent civil disobedience without violating the anti-retaliation portion of the Act is a different issue, and must be postponed to a later day.


As Professor Smith notes, there is virtually no legislative commentary regarding the opposition language in Section 704.72 The little that exists supports a broad reading. The language first appeared in the proposed Fair Employment Practice Act (FEPA), introduced to the 79th Congress on February 20, 1945.73 The author of the FEPA was Mary T. Norton.74 In a report she drafted for the House Labor Committee, she explains that Section 704 is intended "to protect those persons who suffer discrimination not because of race or creed, but because they seek to assist their fellow employees who belong to a minority group. Thus, it forbids discrimination against employees who oppose discrimination or who assist in any proceeding under the bill."75

There is also evidence from the time of the Act's adoption that suggests greater tolerance toward non-violent dissent than that demonstrated by the Court. An examination of speeches and editorials supporting the Civil Rights Act, with an understanding of their temporal context, suggests that, had

72. Smith, supra note 1, at 554.
73. Fair Employment Practice Act, H.R. 2322, 79th Cong. § 5(c) (1945).
74. H.R. 2322.
Congress been asked to draw a line between protected and unprotected dissent, it would have chosen the point of violence, not illegality. 76

For example, in President Kennedy’s speech of June 19, 1963, in which he announced his intent to introduce the Civil Rights Act, he began by warning that a “rising tide of discontent . . . threatens public safety” and argued that without civil rights legislation “the leadership on both sides [will] pass from the hands of reasonable and responsible men to the purveyors of hate and violence.” 77 The New York Times lead editorial on that day, entitled Self-Defeating Violence, called on civil rights activists to persist in their efforts, but without resort to violence. 78 The same theme was echoed in the lead editorial of June 28, entitled The Negro Articulation. 79

In July 1963, pointing out that, in a recent protest, demonstrators in Maryland had “almost lost sight of what the demonstration is about” because the event was marred by violence, the President asked the demonstrators to “avoid violence” in the forthcoming March on Washington. 80 At a July 4th rally sponsored by the National Association for the Advancement of Colored People (NAACP), Senator Paul Douglas, a leading civil rights supporter, warned the protestors “to be extremely careful in the coming months not to allow themselves to be provoked by their opponents into committing physical violence.” 81 The following week, the Air Force announced that off-duty service members could participate in civil rights demonstrations as long as they were out of uniform and there was no danger of violence. 82

A similar dividing line could be seen among civil rights leaders. A New York Times article on June 29, 1963 describes a CORE convention at which James Farber, CORE’s national director, warned the delegates that some civil rights activists were carrying weapons to meetings and demonstrations, making it necessary for CORE to “enforce nonviolent tactics in racial

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76. See infra notes 77–90 and accompanying text.

77. Text of the President’s Message to Congress Calling for Civil Rights Legislation, N.Y. Times, June 20, 1963, at 16.


demonstrations" to address a racial situation that he called "a powder keg." By spring 1964, with the Civil Rights Act stalled in the Senate under the Southern filibuster, Malcolm X was telling crowds in Harlem: "[I]n order to start casting ballots, you have to have some bullets." By contrast, Dr. Martin Luther King, Jr. was urging "disciplined" non-violent demonstrations and predicting that violence "would play into the hands of 'many opponents in the South who would be happy if we turned to violence.'" In *The New York Times*, Anthony Lewis wrote of the "new tension in the racial struggle—the simultaneous heightening of militancy among Negroes and of racial fears among Northern whites." In his *New York Times* column of April 15, James Reston warned:

An odd mood of foreboding is developing in the civil rights debate in the Senate. The leaders on both sides—segregationists as well as integrationists—share a common fear—this is that they will not be able to control events during the long summer debate and that some ghastly accident will inflame the races and once more command this doom-filled story.

On which side of the violence/non-violence line would Congress have placed Percy Green's stall-in? The answer is uncertain. Some of the calls for non-violence combined non-violence and moderation, condemning, for example, the proposal to hold a stall-in at the entrance on opening day of the 1964 World's Fair in Queens, New York. Others described stall-ins as a form of non-violence. But clearly, the great concern of leaders and commentators of

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85. Gene Currivan, *Dr. King Urges Nonviolence in Rights Protests*, N.Y. Times, Mar. 15, 1964, at 46 (quoting Dr. Martin Luther King, Jr.).
the time related to potential violence in civil rights demonstrations, rather than non-violent disruption or dissent.\(^{90}\)

**IV. DR. KING’S EXPERIENCE IN BIRMINGHAM AS ILLUSTRATIVE OF THE SUPREME COURT’S INTOLERANCE OF NON-VIOLENT CIVIL DISOBEDIENCE**

One can better understand Percy Green’s case as illustrative of the Supreme Court’s intolerance of dissent when it is compared with the Court’s treatment of Dr. King’s conviction for contempt in Birmingham, Alabama in 1963.\(^{91}\) As described below, the Birmingham demonstrations were a turning point in the civil rights movement and led to President Kennedy’s decision to introduce the Civil Rights Act.\(^ {92}\) But while the nation accepted the legitimacy of the use of non-violent civil disobedience in Birmingham, the Court did not.\(^ {93}\) When Dr. King’s decision to march in violation of an injunction was reviewed by the Supreme Court in 1967, the Court affirmed Dr. King’s conviction for contempt, which required that Dr. King return to Birmingham to serve his sentence.\(^ {94}\)

When Dr. King had arrived in Birmingham on April 2, 1963, the civil rights movement was in disarray, and the likelihood of President Kennedy supporting a Civil Rights Act was remote.\(^ {95}\) King’s leadership of the movement, secured by his success in the 1956 Montgomery bus boycott, was being challenged from two sides.\(^ {96}\) Traditional civil rights groups like the NAACP viewed him as too radical and confrontational,\(^ {97}\) while new, more militant groups like CORE and the Student Non-Violent Coordinating Committee.

\(^{90}\) Currivan, *supra* note 85, at 46.


\(^{92}\) See *infra* notes 129–153 and accompanying text.


\(^{94}\) *Id.*

\(^{95}\) Oppenheimer, *Martin Luther King*, *supra* note 91, at 825 (citing reflections of Norbert Schlei, former Assistant Attorney General, on the political circumstances and legislative developments prior and subsequent to the Birmingham events).


(SNCC) viewed him as too cautious. His most recent direct action campaign, in Albany, Georgia in 1962, had fizzled out, leaving his future leadership in doubt. As King’s biographer Taylor Branch notes:

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

Meanwhile, the President was a political captive of the Southern Democrats; even his tame rhetoric in support of civil rights was threatening to unravel the New Deal coalition of Northern labor and Southern segregationists.

Dr. King had been invited to Birmingham by local civil rights and church leaders, principally Reverend Fred Shuttlesworth. Reverend Shuttlesworth led the Alabama Christian Movement for Human Rights (ACMHR) and served on the board of Dr. King’s organization, the Southern Christian Leadership Conference (SCLC). ACMHR was founded in 1956, after the State of Alabama had succeeded in banning the NAACP statewide.

Birmingham was widely known as “Bombingham” for its bombings and other violence, including the notorious 1961 Mother’s Day beatings of freedom riders and the chain-whipping of Reverend Shuttlesworth when he tried to enroll his children at a white school following the Brown v. Board of Education decision. From 1957 to 1962, there were sixteen to twenty reported bombings directed at black churches and civil rights leaders, including two at Reverend Shuttlesworth’s church, one of which destroyed his home.

100. Branch, supra note 96, at 709.
101. Id. at 699–700, 827–28, 885.
102. See Oppenheimer, Martin Luther King, supra note 91, at 801 (describing the invitation by Reverend Shuttlesworth).
103. Id.
104. Id. at 801.
105. Id. at 799.
106. Id. at 798–99.
107. Id. at 801–02.
108. Id. at 799, 802.
At Reverend Shuttlesworth's invitation, Dr. King assigned Reverend Wyatt Walker, Executive Director of SCLC, and Reverend Andrew Young, Walker's chief aide, the task of planning a series of non-violent direct action demonstrations with the aim of persuading the white business leaders of Birmingham to abandon their support for segregation. Local government was seen as intransigent, with Birmingham's segregation laws the strictest in the nation. But if boycotts, sit-ins, and mass arrests in the business district could slow down trade during the busy Easter season, perhaps local business leaders would join with the black leadership out of economic self-interest.

The previous summer, Reverend Shuttlesworth had implemented a similar plan with some success. A boycott by black patrons had reduced business substantially, and, in response, many businesses agreed to remove their "white only" signs from dressing rooms and drinking fountains. But when Public Safety Commissioner Eugene "Bull" Connor threatened to enforce the segregation laws by arresting and prosecuting the white business owners, the signs went back up.

The demonstrations began on Wednesday, April 3, 1963 with picketing and sit-ins at downtown department stores. There were marches, sit-ins, and arrests each day for the next week, but aware that the numbers of participants fell below expectations, Dr. King feared that the campaign was failing. Then, on Holy Thursday, April 11, he was faced with a decision that would change the direction of history; in the process, it also provided a lesson in the Supreme Court's intolerance of dissent.

The prior night, April 10, the Birmingham City Attorney submitted an *ex parte* application for an injunction barring Dr. King and over one hundred other activists from all public demonstrations. A temporary injunction was immediately issued and served on Dr. King on Thursday morning. Until then,
those arrested had merely been charged with violating the segregation laws or with parading without a permit.\textsuperscript{120} But now they would be charged with contempt of court for violating a court order.\textsuperscript{121}

In a decision that Andrew Young later pointed to as the “beginning of [Dr. King’s] true leadership,”\textsuperscript{122} Dr. King decided to demonstrate despite the order.\textsuperscript{123} The following afternoon, Good Friday, he led a march of fifty-two demonstrators from the Sixteenth Street Baptist Church (where four girls would be murdered in a bombing\textsuperscript{124} a few months later) toward City Hall.\textsuperscript{125} Within a few blocks of the church, they were stopped and arrested for marching in violation of the injunction.\textsuperscript{126} Dr. King was handcuffed, dragged to a paddy wagon, and delivered to the Birmingham jail, where he would spend Easter weekend in solitary confinement in an unlighted cell.\textsuperscript{127} He used his time there to write what is now widely regarded as the most important essay of the civil rights movement, and one of the most influential statements of principle ever published—the \textit{Letter from Birmingham Jail}.\textsuperscript{128}

Dr. King’s arrest had two consequences with vastly different trajectories. One was the revitalization of the Birmingham campaign, leading to President Kennedy’s decision to introduce the Civil Rights Act of 1964.\textsuperscript{129} The other was Dr. King’s conviction for contempt and the Supreme Court’s affirmanse of this conviction, which revealed its deep hostility toward civil disobedience.\textsuperscript{130}

The campaign, revitalized by Dr. King’s courage on Good Friday, was recast as a children’s campaign.\textsuperscript{131} Thousands of Birmingham’s black teenagers (and a few pre-teens), facing expulsion from school as well as jail sentences,
volunteered to be trained in non-violence and skip school to demonstrate.\footnote{132}{Id.} On May 2, 1963, well over one thousand young people marched, with nearly one thousand arrested.\footnote{133}{Id. at 819.} In a single day the jails were full, and thousands more students were ready to march and go to jail.\footnote{134}{Id.}

“Bull” Connor responded in the Southern segregationist tradition, meeting non-violence with violence.\footnote{135}{Id. at 819–20.} With no room in the jails, he attacked the young marchers with police dogs and high intensity fire hoses.\footnote{136}{Id.} In Birmingham, the attacks were popular with local whites; they gathered to cheer as the police turned the water cannons on the demonstrators.\footnote{137}{Id. at 821.} But outside the South, the media depictions of the attacks on the children had a dramatic effect on white public opinion.\footnote{138}{Id. at 820–21.} A few days earlier, \textit{Time Magazine} and \textit{The New York Times} were criticizing Dr. King as an unwelcome outsider in Birmingham; now they were editorializing against the police violence.\footnote{139}{Editorial, \textit{Poorly Timed Protest}, Time, Apr. 19, 1963, at 30–31; Editorial, \textit{Racial Peace in Birmingham}?, N.Y. Times, Apr. 17, 1963, at 40.}

Under pressure from the President and the Department of Justice, the white business leaders agreed to negotiate with the civil rights leaders.\footnote{140}{Oppenheimer, \textit{Martin Luther King}, supra note 91, at 823.} On May 10, a settlement was reached.\footnote{141}{Id.} The fitting rooms in the stores would be desegregated immediately.\footnote{142}{Id.} Public rest rooms and drinking fountains would follow within thirty days, with lunch counters in another thirty days.\footnote{143}{Id.} Department stores would start hiring black sales clerks.\footnote{144}{Id.} A bi-racial committee would be formed to discuss the desegregation of parks and schools and the hiring of black city employees.\footnote{145}{Id.} Money would be raised to release the 2,000 demonstrators who remained in jail.\footnote{146}{Id. at 823–24.}
On May 21, President Kennedy asked the Department of Justice to begin drafting a civil rights law. On June 11, the President announced to the nation his intention to ask Congress to adopt such a law, citing the events in Birmingham to demonstrate that the time had come for such legislation. On June 19, he fulfilled his pledge, introducing the bill that would, after his death, become the Civil Rights Act of 1964. There is no conclusive evidence that the President was aware this historic act coincided with the ninety-eighth anniversary of Juneteenth, the holiday that commemorates June 19, 1865, the day that the slaves of Texas learned that two years earlier President Lincoln had issued the Emancipation Proclamation, granting them their freedom. But President Kennedy saw and described the Act as a second Emancipation Proclamation. Clearly, he, and the Congress that passed the Act in the wake of his death, were willing to overlook the illegality of the Birmingham demonstrations in rewarding the demonstrators with their goal. They were willing to tolerate non-violent dissent, even illegal and disorderly dissent, as a legitimate tool for influencing public policy.

Following the introduction of the Civil Rights Act, the March on Washington, President Kennedy’s assassination, Dr. King’s Nobel Prize, the passage of the Act, and the subsequent passage of the Voting Rights Act of 1965 (where Dr. King again played a major role through civil disobedience), Dr. King’s Birmingham contempt conviction continued to make its way through the appellate courts. In 1967, it reached the Supreme Court, where the conviction was affirmed.

In language that illustrates Professor Zimmer’s insights on a perpetrator perspective, Justice Stewart, writing for the majority, described the

147. Id. at 825.
148. See Transcript of the President’s Address, N.Y. Times, June 12, 1963, at 20.
151. See Transcript of the President’s Address, supra note 148.
152. Oppenheimer, Martin Luther King, supra note 91, at 810–11.
153. Id.
156. Id. at 321.
events of Birmingham entirely through the eyes of the white city officials.\textsuperscript{157} Fearing violence, the officials had sought and received an injunction.\textsuperscript{158} The defendants violated the injunction, and the ensuing violence proved the need for the injunction.\textsuperscript{159} Nowhere does the opinion reveal that the violence came from the white crowds who opposed the marches and the city officials themselves.\textsuperscript{160} The voices of the demonstrators are so effectively silenced that the uninformed reader would think that Dr. King, identified by name only in the dissent, led an unruly mob set on violence and destruction.\textsuperscript{161}

In words that echo the Court's disrespectful depiction of Percy Green's civil disobedience, Justice Stewart concludes his opinion: "[O]ne may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."\textsuperscript{162}

"Impatient"? One hundred years after the Emancipation Proclamation—in a city in which support for equality was met with lynchings and bombings while the government alternately participated and looked the other way and in which the law mandated nearly absolute apartheid—peaceful demonstrators countered violence with non-violence, and our Supreme Court characterized them as "impatient"? What would patience look like to such a court?

"The civilizing hand of law"? In what way was the law in Birmingham "civilizing"? How was it anything but a tool of oppression for black Americans living in Birmingham? It was the source and enforcer of apartheid, inequality, and violence. It did nothing to protect them from harm.

In Birmingham, what "meaning" did "the civilizing hand of law" give to the phrase "constitutional freedom"? The laws that granted federal authority over Birmingham's system of segregation and oppression were adopted because the defendants in this very case had been willing to disobey the laws of Birmingham.\textsuperscript{163} It was their disobedience to the laws of Birmingham, not the laws themselves, that "gave meaning to constitutional freedom."\textsuperscript{164}

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\item \textsuperscript{157} Id. at 315–21; Zimmer, supra note 9, at 585, 591–92.
\item \textsuperscript{158} Walker, 388 U.S. at 309–10.
\item \textsuperscript{159} Id. at 310–11.
\item \textsuperscript{160} Id. at 309–12.
\item \textsuperscript{161} Id. at 341.
\item \textsuperscript{162} Id. at 321.
\item \textsuperscript{163} See id. at 307.
\item \textsuperscript{164} Id. at 321.
\end{itemize}
Despite the impact of the Birmingham events on Congress and American law and society, the Court’s inability to tolerate civil disobedience even in Birmingham dramatically illustrates the level of its aversion to any form of disorder. Just as the Court complains of Dr. King’s “impatience,” it demonstrates little patience for Percy Green’s deliberate, disruptive, and illegal acts aimed at McDonnell Douglas. Whether the act at issue is marching in violation of the Birmingham injunction, or stalling a car to call attention to McDonnell Douglas’s employment policies, the act’s formal illegality leaves the Court blind to its social legitimacy.

But in the Green case, the Court interpreted an act of Congress. Does Congress share the Court’s institutional aversion to civil disobedience? More generally, should the Court set aside its own opposition to dissent in order to consider the possibility that Congress would have a more forgiving attitude toward civil disobedience?

If Congress viewed civil disobedience as the Court did, it would not have passed the Civil Rights Act of 1964. Rather, had it shared the Court’s view, it would have found the non-violent disruptions of Birmingham and those that followed in other cities to be intolerable. But legislators are a different breed than judges. Within limits, members of Congress relish disorder. They are pragmatists, result-oriented professors of compromise. By contrast, at the Court, order is paramount; disorder is friendless.

V. POSTSCRIPT

For those of us who teach, study, and practice law, our concern with Percy Green ended with the Supreme Court’s decision and its articulation of the elements needed to establish a prima facie case of discrimination. In St. Louis, however, Green has pursued his civil rights activism. In 1993, the city of St. Louis hired him to review applicants for city contracts under an affirmative action program; he was responsible for smoking out “fronts”—white male controlled companies with women and/or minorities falsely represented as owners. After smoking out and banning approximately a dozen firms per

165. See supra Part II.
166. See supra notes 123–28.
167. See supra Part II.
year, he was fired in fall 2001.\textsuperscript{170} He claims that he was regarded as too vigorous and that he had angered the Mayor by disqualifying a firm run by the Mayor's allies.\textsuperscript{171}

If Green's allegations are true, can he state a claim for retaliation under Section 704? Under one reading of \textit{Holden v. Owens-Illinois, Inc.},\textsuperscript{172} as set forth by Professor Smith,\textsuperscript{173} he cannot. Although from his own perspective and perhaps that of a neutral observer, Green was fired for conscientiously enforcing the employment rights of women and minorities, the City may argue that, since Title VII merely permits, but does not require, affirmative action, an individual's overzealous enforcement of an affirmative action decree does not qualify as opposition to practices made unlawful by Title VII. Ironically, the support for this position derives from the Court's narrow approach, developed in dicta, in Green's first case.

Professor Smith's insights on retaliation law, and Professor Zimmer's on empathy, allow us to better comprehend the gap between an empathetic and nuanced understanding of the ways in which discrimination victims respond to subtle (and not-so-subtle) discriminatory treatment in the real world, and what our courts require of them when they seek to enforce the guarantees of Title VII. Like Professor Zimmer, I hope that publications like this Symposium will help to educate the bench and bar to the barriers our legal system has created, and to encourage reexamination of the law of discrimination and retaliation.

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\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Holden v. Owens-Illinois, Inc.}, 793 F.2d 745 (6th Cir. 1986).
\item \textsuperscript{173} Smith, \textit{supra} note 1, at 556.
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