When "Wait" Means "Never": American Tolerance of Racial Injustice

I write today to advocate intolerance: intolerance of racial injustice.

For too long now, Americans have remained strikingly inert regarding matters of race. In his "Letter from Birmingham City Jail," Rev. Martin Luther King, Jr. noted that in the struggle for racial justice too often society's response has been "Wait." And this "Wait" has almost always meant "Never."[1] American society, while asserting a strong intolerance of injustice generally, has specifically displayed a remarkable tolerance of racial injustice.

It is said that "what has been will be again, what has been done will be done again; there is nothing new under the sun."[2] So it has been with racial injustice in America for too long. Racial injustice has been; injustices have been done again; racial injustice is nothing new. It is a cancer for which Americans have refused to seek a cure.

From its inception, the Constitution fostered racial injustice. The Framers through a series of compromises embraced the institution of slavery, saying "Wait for freedom" to generations of Americans who would live as slaves. For the next 100 years, the American government continued to say "Wait for emancipation." And even after the Thirteenth Amendment abolished slavery, the American courts insisted that Black Americans "Wait for equality."[3]

I write today to say that we must no longer tolerate racial injustice. We must give meaning to the promises of the Constitution. To that end, let us look at the historical roots of America's lamentable patience with racial injustice; let us examine Martin Luther King, Jr.'s response to this "Wait." And then, let us take direct action and replace the dull drone of "Wait" with a sharp, insistent "Now."

I. "WAIT": RACE AND THE CONSTITUTION

Racial injustice was nothing new when the Framers sat down to draft and debate the United States Constitution. Slave traders first brought slaves to the colonies around 1620.[4] By 1660 colonial planters had begun to rely upon slave labor,[5] and by the 1680s colonies had passed the first slave codes.[6] So when, in 1787, the Framers negotiated the Constitution, slavery had existed in the colonies for more than one hundred years.

Colonial racial injustices were not limited to the institution of slavery. Free Blacks fared little better than those in bondage.[7] Inequality was pervasive and in most instances "clearly defined by law and custom that became all

1. Martin Luther King, Jr., Letter from Birmingham City Jail (1963), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289 (James M. Washington ed., 1986).

2. *Ecclesiastes* 1:9 (New International Version).

3. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883).

4. Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 102 (1989).

5. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 25 (1980).

6. Diamond, *supra* note 4, at 102.

7. *See* JOHN H. FRANKLIN, RACIAL EQUALITY IN AMERICA 7 (1976).

but universal."[8] American colonists were at best ambivalent toward the status and condition of Blacks, both free and slave.[9] It is indeed ironic that at the very moment in history when colonists fought for their own freedom, they concurrently ignored the freedom of Black Americans.

The colonists were not unaware of this contradiction. Abigail Adams, for instance, in a letter to her husband wrote, "It always appeared a most iniquitous scheme to me to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have."[10] Patrick Henry, too, noted the contradiction, baffled that slavery could exist "in a country, above all others, fond of liberty."[11]

Abigail Adams—Patrick Henry—but perhaps above all others, Thomas Jefferson embodied the contradiction of colonial American slavery. Jefferson wrote at length in opposition to slavery and, in fact, included in his first draft of the Declaration of Independence a "vehement philippic" against slavery.[12] Yet Jefferson owned slaves, and Jefferson freely traded in slaves to pay off his debts.[13] Not unlike his contemporaries, Jefferson, while affirming the rights and equality of "man" in the Declaration of Independence, ignored the rights of Blacks.

When the Framers drafted the Constitution, this colonial contradiction became what Derrick Bell has called "the Constitutional Contradiction."[14] The Constitution, while promoting principles of liberty, freedom and justice, did little to end the institution of slavery. Several commentators have offered explanations of the Framers' inaction on issues of race. Derrick Bell has suggested that the Framers were driven more by love of property than love of freedom and equality.[15] In fact, Bell quotes one of the Framers as asserting, "Government . . . was instituted principally for the protection of property and [property] . . . was the great object of government . . . ."[16] Another scholar has argued that the slavery compromises in the Constitution resulted from the

8. *Id.* Franklin describes the differing legal treatment of Whites and free Blacks. Colonies often punished Whites and Blacks differently for the same crimes; colonies excluded free Blacks from the militia; and many colonies made it a crime for a free Black to lift his or her hand against a White even in self-defense. *Id.*

9. *See* BELL, *supra* note 5, at 20 (discussing the attitudes of the Framers regarding slavery). *See generally* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968) (discussing colonial and early American attitudes of Whites toward Blacks).

10. FRANKLIN, *supra* note 7, at 10.

11. *Id.* at 11.

12. John Adams labelled Jefferson's anti-slavery passage in the Declaration a "vehement philippic." The Continental Congress quickly deleted the passage from the document. *Id. But see* FRANKLIN, *supra* note 7, at 12-20 (questioning the depth of Jefferson's notions of equality and his anti-slavery views).

13. *See* FRANKLIN, *supra* note 7, at 15.

14. DERRICK A. BELL, JR., AND WE ARE NOT SAVED 26-50 (1987). Derrick Bell details the "concerns that likely led even those Framers opposed to slavery to sanction its recognition in a Constitution whose Preamble pledges to 'secure the Blessings of Liberty to ourselves and our posterity,' " through the use of his narrative "chronicles." *Id.* at 7. In this particular Chronicle, Geneva Crenshaw, a twentieth century Black woman, travels back to the Constitutional Convention to test whether the Framers would have made a different decision had they known the dire consequences of the Constitutional Contradiction. *See id.* at 26.

15. BELL, *supra* note 5, at 23. Bell quotes several Framers who stress the primacy of property rights.

16. BELL, *supra* note 14, at 30 (quoting 1 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at xvi (Max Farrand ed., 1911)).

competing political and economic interests of Whites.[17] To the Framers, the issue of slavery was an economic and political, rather than a moral, matter.[18] The Framers gave priority to the protection of property interests and in so doing sacrificed the liberty and equality of those not freed from slavery.

Just as the motivations of the Framers are clear, so is their inaction. Given the opportunity to do justice, they did nothing. Like so many before and after them, the Framers were inactive participants in America's perpetual tolerance of racial injustice.[19] At the very least, they lacked commitment strong enough to oppose the remarkable, societal inertia on matters of racial justice.

At the close of the Constitutional Convention nothing had changed. Instead of working toward the abolition of slavery, the Convention had settled on three slavery compromises.[20] In apportioning taxes and representation among the states, the Convention decided to count each slave as three-fifths a person.[21] In limiting the importation of slaves, the Convention compromised on delaying the prohibition on slave importation until 1808.[22] And the Convention expressly protected the institution of slavery by requiring the return of fugitive slaves to their owners.[23]

No, nothing had changed. Slavery existed before the Constitution; it existed after. The American slave trade persisted before the Constitution; it persisted after. Slaves were deemed property before the Constitution; they were deemed property and only three-fifths a person after.

The constitutional compromises accommodated the economic and political interests of Whites and tacitly tolerated an institution which was the very embodiment of racial injustice. The "three-fifths compromise" balanced political power among the states, strengthened Southern states and thereby entrenched the interests of slaveholders.[24] And slaves remained slaves. The continuation of the slave trade accommodated Northern shipping interests and Southern agricultural interests.[25] And slaves remained slaves. The Fugitive Slave Clause, which the Convention barely discussed, honored the property interests of slaveholders.[26] And slaves remained slaves.

Many argue that the constitutional compromises were inevitable.[27] In-

17. *See* Diamond, *supra* note 4.

18. BELL, *supra* note 5, at 22.

19. *See* Diamond, *supra* note 4 (discussing the Framers' decisions).

20. *See* Diamond, *supra* note 4, at 94 ("[T]he Constitution . . . deals squarely with the issue of slavery in only three places."). *But see* BELL, *supra* note 14, at 34-35 (listing eight constitutional accommodations to slavery noted by historian William Wiecek).

21. *See* U.S. CONST. art. I, § 2, cl. 3. Note that the Framers cautiously avoided use of the word slave, instead using the more tame and innocuous "other Persons."

22. *See* U.S. CONST. art. I, § 9, cl. 1.

23. *See* U.S. CONST. art. IV, § 2, cl. 3.

24. *See* Diamond, *supra* note 4, at 101-13 ("The Constitution by design delivered political control of the federal government to the South."); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987) ("The economics of the regions coalesced."). Justice Marshall's address also appeared as Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

25. *See* Diamond, *supra* note 4, at 120. *See also* Bell, *supra* note 14, at 31 (a South dependent on slaves also provided a convenient market for Northern business).

26. *See id.* at 121.

27. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 336 (1842); BELL, *supra* note 14, at 43 (Bell's protagonist asserts "no one could have prevented the Framers from drafting a constitution

deed, that may be true. However, it is also true that the Constitution itself tolerated racial injustice. In Justice Thurgood Marshall's words, the Constitution was "defective from the start."[28] It would take a bloody Civil War, three constitutional amendments, and a century of social upheaval to even begin to right the original constitutional wrongs.[29] To those who cried for freedom, the Constitution at great cost said, "Wait."[30] Because the Framers tolerated racial injustice, Black Americans would live for decades longer in bondage. With their "Wait," the Framers postponed justice and "passed on to the next generation . . . the unenviable task of extending human equality to non-Whites."[31]

II. "NOW": MARTIN LUTHER KING, JR.'S RESPONSE TO "WAIT"

Racial injustice was nothing new when Martin Luther King, Jr. emerged as leader of the twentieth century civil rights movement. By the time King accepted the call to become pastor of the Dexter Avenue Baptist Church in Montgomery,[32] he had experienced segregation.[33] He had experienced racial hatred. He had also experienced the resounding refrain: "Wait" for racial justice.

King would answer this demand of "Wait" a few years later in his "Letter from Birmingham City Jail."[34] In January 1963, White ministers in Birmingham, Alabama, published an open letter in response to King's efforts to end segregation.[35] They urged him to wait, to curb his nonviolent direct action campaign which they viewed as "unwise and untimely."[36]

King wrote back. King wrote that the call to wait was familiar and that in every instance " 'Wait' has almost always meant 'Never.' "[37] At that mo-

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including provisions protecting property in slaves."); JORDAN, *supra* note 9, at 323 (noting that proposals to abolish slavery would have "sent half the delegates packing").

Commentators judge this inevitability differently. One has said, "The Framers chose to sell the soul of the Nation . . . in exchange for the life of the Nation as a unified whole." Diamond, *supra* note 4, at 130. Another, when asked whether a Black person should sign the Constitution replied, "[T]here is sufficient evidence of the possibility for social justice that adherence to the constitutional contract is both morally creditable and politically prudent." Randall Kennedy, *Afro-American Faith in the Civil Religion: Or, Yes, I Would Sign the Constitution*, 29 WM. & MARY L. REV. 163, 166 (1987).

28. Marshall, *supra* note 24, at 1338. Raymond Diamond would later interpret Marshall's theme to mean "the Constitution as written was profoundly racist." Diamond, *supra* note 4, at 94.

29. *See* Marshall, *supra* note 24, at 1338, 1340-41; *see also* BELL, *supra* note 14, at 28-29 (discussing the consequences of the constitutional contradiction). Justice Marshall credits any progress that has occurred, not to the Framers, but to those who strove to better the American notions of liberty, justice, and equality. *See* Marshall, *supra* note 24, at 1341.

30. John Hope Franklin calls this the "Dream Deferred." *See* FRANKLIN, *supra* note 7, at 3-36.

31. FRANKLIN, *supra* note 7, at 48.

32. King accepted this position in 1954. In little over a year, he would lead the Montgomery bus boycott to end segregation on Montgomery's city buses. MARTIN L. KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY (1958), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 482.

33. KING, *supra* note 32, at 420-21.

34. King, *supra* note 1, at 289.

35. *Id.* Attorney General Robert Kennedy and the WASHINGTON POST also attacked the timing of King's nonviolent direct action campaign. *See* Martin L. King, Jr., WHY WE CAN'T WAIT (1963), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 538.

36. King, *supra* note 1, at 289.

37. *Id.* at 292. *See also* Douglas Strumm, *Crisis in the American Republic: The Legal and Political Significance of Martin Luther King's Letter from a Birmingham City Jail*, 2 J.L. & REL. 309, 314

ment in history, Black Americans had waited more than 340 years for racial justice.[38] Abraham Lincoln had issued the Emancipation Proclamation one hundred years earlier. Yet in those one hundred years, Black Americans had been lynched; they had been brutalized; they had been excluded from rights and privileges White Americans enjoyed.[39] As the world moved at rocket speed, progress toward racial justice crept at "horse and buggy pace."[40]

King flatly rejected the suggestion that any people should "Wait" further for justice, pointing out the flaws in demanding that someone "Wait" for justice. First, "Wait" by its nature stalls the progress of racial justice. It is what King called a "tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration."[41] There is nothing in time that in and of itself will bring about social good. "[T]ime is neutral."[42] People must use time wisely to effect social change. Progress by its very nature entails movement; "Wait" entails stagnation. "Wait" is an obstacle to progress which "makes humanity seethe."[43]

Second, "Wait" costs. To those who must wait, the cost is injustice. They bear the abuse, the poverty and the segregation.[44] Society as a whole also bears certain costs. In *Where Do We Go From Here?*, King noted that society bears the costs of inadequate education as well as the costs of rampant poverty.[45]

Third, "Wait" ratifies the injustice. King made little distinction between the one who seeks injustice and the one who passively allows it to persist.[46] Relying on religious tenants, he asserted that "to accept injustice or segregation passively is to say to the oppressor that his [or her] actions are morally right."[47]

According to King, "Wait" is immoral.[48] He posits in each individual a moral obligation of noncooperation with evil and of cooperation with good.[49] Simply put, "it is an immoral act to compel a man [or woman] to accept injustice until another man [or woman's] heart is set straight."[50] In the face of injustice, the response of "Wait" is unacceptable.

In particular, King throughout his many writings implored White moderates to abandon their chorus of "Wait." He was deeply disappointed with the

(1984) (arguing that King's letter demonstrates the "agonizing" contradiction between American democratic ideals and "the unremitting perseverance of racism in American society").

38. King, *supra* note 1, at 292.

39. *Id.* at 292-93.

40. *Id.* at 292.

41. *Id.*

42. *Id.* at 296.

43. Martin L. King, Jr., *In a Word: Now*, N.Y. TIMES MAG., Sept. 29, 1963, at 91, *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 167.

44. *See* King, *supra* note 1, at 292; *see also* Derrick A. Bell, Jr., *Does Discrimination Make Economic Sense?*, 15 HUM. RTS. Q. 38 (argues that Whites in power sacrifice Black rights and at the same time use race to distract poor Whites who lack power).

45. MARTIN L. KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967), *excerpted in* A TESTAMENT OF HOPE, *supra* note 1, at 555.

46. KING, *supra* note 32.

47. *Id.*

48. *See id.* at 488 (discussing "the immorality of slowing up in the move toward justice and capitulating to the guardians of an unjust status quo").

49. Martin L. King, Jr., *Love, Law and Civil Disobedience*, NEW SOUTH, at 3 (Dec. 1961), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 43, 48.

50. KING, *supra* note 32, at 473.

attitude of the White moderate, what he called a "shallow understanding from people of good will."[51] According to King, the White moderate failed to recognize inequality and injustice. Twelve years after *Brown v. Board of Education,*[52] segregation remained.[53] Civil rights legislation was honored more in the breach than in the observance.[54] And Black Americans had yet to gain a meaningful vote.[55] White moderates similarly ignored economic injustice and its "malignant kinship" with bigotry.[56] Equality to the White moderate became a "loose expression for improvement."[57]

The White moderate accordingly failed to demand justice and "assiduously avoided" equality. The White moderate had conflicting priorities. In the place of equality, the White moderate valued the status quo[58] and was, in King's estimation, "more devoted to 'order' than to justice."[59] King's frustration stemmed from the fact that the White moderate while agreeing to racial justice in principle, seemed reluctant to bring about racial justice in fact.[60] Instead, the White moderate seemed content to rely on an elusive, "steady growth toward middle-class utopia embodying racial harmony."[61]

By such reliance, the White moderate failed to accept the very real costs which must accompany progress toward racial justice. Americans were "uneasy with injustice but unwilling yet to pay a significant price to eradicate it."[62]

The White moderate said, "Wait." King refused, insisting that justice would not come without action and progress. He candidly acknowledged "the hard truth that neither Negro nor White has yet done enough to expect the dawn of a new day."[63] King's command was straightforward: "speak the truth, obey the law, and suffer if necessary for what . . . is right."[64] In other words: recognize inequality and injustice; demand justice; and accept the cost necessary to bring it about.

To Martin Luther King, Jr., justice through nonviolent direct action became a moral imperative. Justice was not something that Americans waited for, but rather something they moved towards.

The basis for King's nonviolent direct action was Christian love and its methodology Gandhian nonviolence.[65] For King, "[p]ower at its best [was] love implementing the demands of justice."[66] Proceeding from the assumption that groups were immoral and therefore tolerated injustice,[67] King urged

51. King, *supra* note 1, at 295.
52. 347 U.S. 483 (1954).
53. KING, *supra* note 45.
54. *Id.*
55. *Id.*
56. KING, *supra* note 35, at 524.
57. KING, *supra* note 45, at 560.
58. *See id.* at 558.
59. King, *supra* note 1, at 295.
60. *See id.*
61. KING, *supra* note 45, at 557.
62. *Id.* at 562.
63. *Id.* at 567.
64. KING, *supra* note 32, at 475.
65. *See id.* at 447 (King wrote: "Christ furnished the spirit and motivation, while Gandhi furnished the method.").
66. KING, *supra* note 45, at 578.
67. King frequently cited the theologian Reinhold Niebuhr in assessing the basic problem of

confronting these groups with Christian love through nonviolent direct action. In fact, King traced the very origins of his refusal to cooperate with injustice to the tradition of Christian love and forgiveness.[68] It was this Christian love to which King credited the success of the Montgomery bus boycott.[69] He distinguished the active *agape* love of which he spoke from mere *philia* (friendship) and *eros* (romantic love).[70] King's motivating love was action; it was "an understanding, redemptive, creative, good will for all men [and women]."[71] It was a "neighbor-regarding love for others,"[72] concerned more with the interests of the other than the interests of the self.

King wrote that this love, operating through nonviolence is one of the most powerful weapons in the struggle for freedom and justice.[73] His approach is straightforward. Nonviolent direct action involves four steps: "(1) collection of facts to determine whether injustices are alive, (2) negotiation, (3) self-purification, and (4) direct action."[74] During the Civil Rights Era, this technique, driven by Christian love, transformed injustices into justice.[75] Nonviolent direct action has much to commend it.

First, nonviolent direct action is positive. It insists that moral power propels our system of justice. Nonviolent direct action operates against oppression, not against the oppressor. It seeks to defeat the system, not individuals.[76] Its goal is to repair the cleavage of inequality and injustice which severs our society and thereby complete the process of American democratization.

Second, nonviolent direct action is direct. Acknowledging that something must happen to bring about justice, nonviolent direct action works directly to change the hearts of men and women. A government is not likely to

racial injustice. *See, e.g.*, KING, *supra* note 45, at 602 (noting that Niebuhr as early as 1932 had suggested boycotts to end discrimination). According to Niebuhr, there is a difference between the morality of individuals and the morality of groups: groups are almost always more immoral than individuals. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY xi (1932). Groups would be more apt to tolerate injustice, because groups in power rarely give up that power voluntarily. King, *supra* note 1, at 292. King gleaned from Niebuhr's work the necessity of confronting the "glaring reality of collective evil." Martin L. King, Jr., *Pilgrimage to Nonviolence*, CHRISTIAN CENTURY, at 77 (Apr. 27, 1960), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 36.

68. *See* KING, *supra* note 35, at 525.

69. *See* KING, *supra* note 32, at 447. (In the first days of protest, "the phrase most often heard was "Christian love.")

70. *See* King, *supra* note 49, at 46-47; *see also* Martin L. King, Jr., *Nonviolence and Racial Justice*, CHRISTIAN CENTURY, at 74 (Feb. 6, 1957), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 8.

71. King, *supra* note 49, at 47.

72. Martin L. King, Jr., *An Experiment in Love*, JUBILEE (Sept. 1958), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 19.

73. *Id.* at 16. There is little doubt that his source for nonviolent direct action was the example of Mohandas K. Gandhi. *See* KING, *supra* note 35, at 547 (citing Gandhi's example of filling up the jails); King, *supra* note 67, at 38; King, *supra* note 49, at 45 (citing Gandhi's use of nonviolence to free his people from foreign domination). Although one commentator has noted that King brought Gandhi's message of nonviolence to America, *see* Andrew W. Haines, *Why Law Schools Should Celebrate the Contribution of Dr. Martin Luther King, Jr.*, 10 NAT'L BLACK L.J. 224, 230 (1987), both King's and Gandhi's approach borrow from the writings of Thoreau. *See* HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE; *see also* Haines, *supra*, at 229 (comparing King's and Thoreau's emphasis on conscience-based morality and individual responsibility).

74. King, *supra* note 1, at 290.

75. *See, e.g.*, KING, *supra* note 32 (chronicling the use of nonviolent direct action to end segregation on Montgomery city buses).

76. *See* King, *supra* note 72, at 18.

correct a problem until confronted.[77] Nonviolent direct action peacefully confronts those in power.

Third, nonviolent direct action is active. It produces a "creative tension" which is "necessary for growth."[78] It proceeds from the assumption that freedom is something not given, but won;[79] something not found, but created.[80] In short, nonviolent direct action, rooted in Christian love, resists injustice. Nonviolent direct action responds to the command, "Wait," with the firm reply: "No, now."

III. Applying "Now" to Constitutional Analysis

When Martin Luther King, Jr. described his program of nonviolent direct action, he offered it as a method whereby persons who are oppressed might challenge those in power to effect positive social change.[81] The wisdom of nonviolent direct action is just as relevant to the way in which individuals of all races and all positions should approach these issues. It is relevant to the way in which legislatures should approach laws concerning these issues. And it is relevant to the way in which our courts, applying established constitutional principles, should analyze and act upon issues of racial justice. Nonviolent direct action is a lens through which we can focus honestly on racial injustice.

As an example, let us briefly turn our attention to one instance where the Supreme Court said "Wait" in response to a demand for racial justice, *Palmer v. Thompson*,[82] and then let us examine how the result would have differed if the Court had said "Now." In 1962, a federal district court held that Jackson, Mississippi's segregation of its public parks, golf courses, and swimming pools violated the Equal Protection Clause.[83] The city, while it segregated some other public facilities, responded by closing its five public pools.[84] The district court upheld the city's actions as "justified to preserve peace and order," and the court of appeals and the Supreme Court affirmed.[85]

In an opinion authored by Justice Black, the Court insisted that the city's actions in no way violated the Constitution's guarantees of equal protection. The Court admitted that this was "unquestionably" state action[86] and recognized that the action might have been "motivated by a desire to avoid integration of the races."[87] However, the Court went on to deny relief under both the Fourteenth and Thirteenth Amendments. The Court acknowledged that the intent of the Fourteenth Amendment was to protect Blacks from discriminatory action by the state, and yet refused to see the pool closing as discrimina-

77. *See* Martin Luther King, Jr., *A Showdown for Nonviolence*, LOOK, at 23 (Apr. 1968), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 65.

78. King, *supra* note 1, at 291.

79. *See* KING, *supra* note 45, at 567.

80. *See id.* at 572.

81. *See* King, *supra* note 1.

82. 403 U.S. 217 (1971).

83. *Id.* at 217.

84. The city of Jackson had operated five pools: four were for the use of Whites and one for the use of Blacks. *Id.* at 218.

85. *Palmer*, 403 U.S. at 217.

86. *Id.* at 219.

87. *Id.* at 223.

tory.[88] The Court also acknowledged that the purpose of the Thirteenth Amendment was to eliminate badges of slavery, and yet refused to use "the skimpy collection of words" in the Thirteenth Amendment to right this wrong.[89]

If the Court had looked at these same facts through the direct action perspective offered by King, the result would have differed. The first step in direct action analysis is "the collection of facts to determine whether injustices are alive."[90] Here, injustices thrived. Justice Douglas in his dissent noted that the pool closing worked a greater hardship on the poor than it did on the rich and similarly harmed Blacks more than it did Whites.[91] Justice Marshall criticized the majority for looking only to the facial effect of the law (*i.e.*, it closed the pools to Whites and Blacks alike),[92] rather than recognizing that its true purpose and effect was to deprive Blacks of equality of access to public pools.[93] Both these justices urged the Court to focus on, rather than shy away from, the actual denial of rights and equality clearly present here.

The dissenters also pointed to the chilling effect of allowing this injustice to continue. Justice Douglas argued that the lesson of the pool closing was that " 'the price of protest is high.' "[94] In response to the demands for integration of the public facilities, the city had deprived all its residents of public pools. Such risk of deprivation could quell any desire to seek integration in other public facilities.[95]

The dissenters rejected the idea that this injustice should be allowed to persist. Its purpose was clearly to establish apartheid,[96] and its effect was to deprive Black citizens of access to public pools. As Justice White stated, "it is beyond cavil that on such facts the city [was] adhering to an unconstitutional policy."[97]

King labels the second step in direct action "negotiation." In practical application, the protesters would here negotiate with those in power. Applying this "negotiation" to *Palmer*, one would analyze and balance the relevant interests. One must determine if other constitutional rights, such as free speech rights and free exercise rights, are at risk.[98] Such was not the case in *Palmer*. The city justified its action only by claiming that not closing the pools would work economic hardship on the city and would cause disorder and violence.[99] As the dissent observed, neither assertion was supported by the record.[100] In fact, the city of Jackson had already integrated its public golf courses and parks with minimal cost and no violence.[101]

88. *Id.* at 219.
89. *Id.* at 226.
90. King, *supra* note 1, at 290.
91. *Palmer*, 403 U.S. at 235.
92. Note that the Court expressly rejected similar logic in Loving v. Virginia, 388 U.S. 1 (1967).
93. *Palmer*, 403 U.S. at 272 (Marshall, J., dissenting).
94. *Id.* at 231 (quoting dissenters in the court of appeals).
95. *Id.*
96. *Id.* at 235 (Douglas, J., dissenting).
97. *Id.* at 240.
98. This would come into play, for instance, if the state sought to prohibit racist speech. The Supreme Court has recently struck down such an ordinance as an overbroad regulation of free speech. *See* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992).
99. *Palmer*, 403 U.S. at 224.
100. *Id.* at 255.
101. *Id.*

After recognizing an injustice and considering the relevant constitutional interests at stake, one must then turn to the last two factors in direct action analysis: self-purification and direct action. King describes self-purification as an assessment of the costs of remedying the injustice and an acceptance of those costs.[102] Applying this facet of direct action analysis to our fact situation entails developing a creative solution to the problem, accepting the costs of that solution, and acting to put the solution to work. The actor can be either the legislature or the courts.

In the *Palmer* context, the Court could have ordered the city to re-open the pools. Although the city and the majority of the Court expressed concern that a Court would order a municipality to operate public pools, as Justice Marshall noted, the Court order would not have locked the city into forever maintaining public pools.[103] The court order would have remained subject to court supervision. If a legitimate reason for closing the pools later arose, the city could then have sought such relief from the courts.

In the *Palmer* case, there was ample evidence of a thriving injustice: the continued denial of access to public facilities to a particular race. Remedying the injustice would not have impinged upon anyone else's constitutional rights. Further, the Court could have remedied the problem through a court order. The Court could have easily remedied this problem without departing from established constitutional doctrine. The Supreme Court should have acted in *Palmer v. Thompson*; it should have said "Now," not "Wait."

IV. CONCLUSION

Nonviolent direct action can still work. However, we must first abandon our tolerance of racial injustice. We must approach matters of race with honesty and courage. We must stop saying "Wait" and start insisting "Now."

In his final sermon,[104] Rev. Martin Luther King, Jr. preached the story of a man who had been robbed and left wounded on the side of a dangerous road. Many passed him by; one man stopped to help. Reverend King said that the difference between those who passed by and he who stopped was this: those who passed by asked themselves, "If I stop to help this man, what will happen to me?" The man who stopped instead asked himself, "If I do not stop to help this man, what will happen to him?"[105]

For too long now, we have asked ourselves the wrong question. It is time we asked ourselves what will happen to others and ourselves if we do not stop. It is time we developed a "dangerous unselfishness."[106] It is time we stopped to recognize injustices; to evaluate all relevant constitutional interests and then to act creatively to remedy the injustice.

102. *See* King, *supra* note 1, at 291.

103. *Palmer*, 403 U.S. at 273.

104. Address by Martin Luther King, Jr., "I See the Promised Land" (Apr. 3, 1968), *reprinted in* A TESTAMENT OF HOPE, *supra* note 1, at 279 (King delivered this prophetic sermon on Apr. 3, 1968, the night before he was assassinated).

105. *Id.* at 285.

106. *Id.* at 284.

There is a time for everything under the sun.[107] There is a time to tear down and a time to build. There is a time to mend. And there is a time for justice.

That time is Now.

BY SCOTT CLARK*

107. *See Ecclesiastes* 3:1-8 (New International Version).

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