BOOK NOTE

GORDON MARTIN'S *COUNT THEM ONE BY ONE*—THE HARD-FOUGHT STRUGGLE IN PURSUIT OF LIBERTY AND JUSTICE FOR ALL

COUNT THEM ONE BY ONE: BLACK MISSISSIPPIANS FIGHTING FOR THE RIGHT TO VOTE. By Gordon A. Martin, Jr. Jackson, Miss.: University Press of Mississippi. 2010. Pp. xii, 272; 14 p. of plates: ill. $40.00 (cloth).

INTRODUCTION

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.[1]

The text of the Fifteenth Amendment seems simple enough: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[2] But in the 1960s in southern Mississippi, a black man holding a graduate degree from New York's Columbia University was still unqualified to vote—even a black man who had previously enrolled in a course

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[1] McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (discussing disenfranchisement for false pretenses under § 241 of the Mississippi Constitution, which denies the right to vote for certain enumerated crimes); *see also* GORDON A. MARTIN, JR., COUNT THEM ONE BY ONE: BLACK MISSISSIPPIANS FIGHTING FOR THE RIGHT TO VOTE 228 (2010).

[2] U.S. CONST. amend. XV, § 1.

with the son of then-President Dwight D. Eisenhower.[3] In light of attempts by the state to conceal this discrimination under such guises as poll taxes and literacy tests, it was apparent and astonishing how much effort the Mississippi power structure exerted to suggest that the disenfranchisement of black voters was *not on account of* their race or skin color. *Count Them One by One: Black Mississippians Fighting for the Right to Vote*, by the Honorable Gordon A. Martin, Jr.,[4] details one battle with Forrest County Registrar Theron C. Lynd over black voter registration in Mississippi in the 1960s, and the heroic black witnesses involved who opened the door for subsequent civil rights legislation.[5]

The functional ability to exercise the right to vote—to make one's voice heard—is fundamental to the concept of a representative democracy.[6] But, even in the wake of *Brown v.*

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[3] MARTIN, *supra* note 1, at 173. Well before Judge Martin's experience in Mississippi, commentators recognized that Mississippi had employed tactics to avoid the proscriptions in the Fifteenth Amendment while at the same time suppressing the black vote. *See* William Alexander Mabry, *Disfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318, 332–33 (1938) ("A survey of the Mississippi constitution of 1890 reveals no direct disfranchisement of the Negro. The Fifteenth Amendment precluded any open discrimination against the blacks as a race. Yet one can scarcely read the debates of the convention and the press discussions without concluding that the intention of those in authority was to accomplish by indirect means what the Federal Constitution forbade doing directly. . . . [R]egistration officials were given wide discretionary powers in determining one's ability to read or understand a section of the constitution. Here was an opportunity for almost unlimited partiality . . . ."); *see also* United States v. Mississippi, 229 F. Supp. 925, 985–87 (1964) (three judge panel) (Brown, J., dissenting) (summarizing what transpired at the constitutional convention for the 1890 constitution); Barry E. Hawk & John J. Kirby, Jr., Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051, 1079 n.88 (1965).

[4] Adjunct Professor of Law, New England School of Law, Boston; Associate Justice (ret.), District Court Department, Massachusetts Trial Court; former First Assistant United States Attorney, United States Attorney's Office for the District of Massachusetts.

[5] *See generally* United States v. Lynd, 349 F.2d 790 (5th Cir. 1965); United States v. Lynd, 349 F.2d 785 (5th Cir. 1965); United States v. Lynd, 334 F.2d 13 (5th Cir. 1964); United States v. Lynd, 321 F.2d 26 (5th Cir. 1963); United States v. Lynd, 301 F.2d 818 (5th Cir. 1962). While the Lynd saga encompassed a records request under the Civil Rights Act of 1957, a preliminary injunction hearing, an appeal to the Fifth Circuit, a contempt hearing, and finally a trial on the merits, the preliminary injunction hearing and subsequent appeal to the Fifth Circuit represent the bulk of Judge Martin's story. *See Lynd*, 301 F.2d 818.

[6] *See* Bartlett v. Strickland, 556 U.S. 1, 10 (2009) (plurality) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our

Board of Education,[7] there was a great disparity in our nation, particularly in the South, between the law as decreed by the Supreme Court and the reality for black Americans, in terms of rights and remedies available.[8] In fact, failure has marred much of the Fifteenth Amendment's history; the laws enforcing it suffered from either repeal or inherent shortcomings, which placed the burdens of litigation on the Department of Justice and disenfranchised voters.[9]

By 1965, it was utterly undeniable that, despite the passage of the Fifteenth Amendment nearly a century earlier, the right to vote remained illusory for many American citizens.[10] With respect specifically to *United States v. Lynd*, the Commission on Civil Rights recognized that "[d]espite 2 years of intensive litigation and great efforts by the Department, fewer than 1 percent of the voting-age Negroes in Forrest County [were] registered."[11] The disappointing figures required a realization that "case-by-case proceedings, helpful as they ha[d] been in isolated localities, ha[d] not provided a prompt or adequate remedy for widespread discriminatory denials of the right to vote."[12] In an effort to make

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citizens: the right to vote."); United States v. Atkins, 323 F.2d 733, 743 (5th Cir. 1963) ("The right to vote is one of the most important and powerful privileges which our democratic form of government has to offer.").

[7] 347 U.S. 383 (1954).

[8] Shortly after the Court decided *Brown v. Board*, Mississippi's Governor invited numerous black leaders to the state capital to request that they "accept voluntary segregation." MARTIN, *supra* note 1, at 89. They unequivocally rejected the proposal. *Id.* at 89–90.

[9] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508–09 (2009).

[10] *See Nw. Austin*, 129 S. Ct. at 2508–09 (noting that the first century of enforcement of the Fifteenth Amendment "can only be regarded as a failure," and that the civil rights legislation during the 1950s and 1960s was insufficient to remedy the problem). Discussing the legislative history of the Voting Rights Act of 1965, the Supreme Court has noted that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[11] UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS '63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, at 20 (describing the unsatisfactory outcome of the *Lynd* case as one of the more successful Mississippi examples of civil rights litigation in the 1963 report).

[12] *Id.* at 13. A broader view on the litigation in this era leads to even more disappointing conclusions: "In eight years of litigation after governmental suits in 46 counties, only 37,146 Negroes had been registered in those counties out of 548,358

this right a reality, Congress enacted the Voting Rights Act of 1965.[13]

The Voting Rights Act was but one civil-rights-protecting law in a chain of many.[14] It generally followed the series begun by the 1957 Civil Rights Act, which established the Civil Rights Division of the Justice Department. The complaints of black plaintiffs in the private lawsuit *Peay v. Cox*, also originating in Forrest County, bolstered legislative support for the 1957 Act.[15] Just as the support of the *Peay* plaintiffs aided the passage of the 1957 Civil Rights Act, the efforts of the DOJ civil rights attorneys, along with the witnesses in early voter registration cases such as *Lynd*, helped pave the road to the VRA.[16] Lawmakers designed the Voting Rights Act to vest traditionally disparaged minorities with the dignity deserving of an American citizen: a voice in their government through the right to vote. The accomplishments of the Act are difficult to overstate.[17]

Judge Martin's account stands as a rebuttal to whatever accusations there were of insufficient need at the time of the

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voting age Negroes who resided in them." Hawk & Kirby, *supra* note 3, at 1195–96 (citing *Hearings on S. 1564 Before Senate Committee on the Judiciary*, 89th Cong., 1175–445 (1965)).

[13] Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971–1973p (2006)); *see Katzenbach*, 383 U.S. at 315–17 (noting that the Voting Rights Act of 1965 was a dramatic shift from the earlier civil rights legislation as it placed the impetus not on the victim—disenfranchised black citizens—but on the governmental bodies responsible for the disenfranchisement).

[14] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883); Civil Rights (Ku Klux) Act of 1871, ch. 22, 17 Stat. 13; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (second Enforcement Act, amending the Force Act of 1870); Force Act of 1870, ch. 114, 16 Stat. 140 (first Enforcement Act); Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* Michael A. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (discussing early civil rights legislation).

[15] *See* MARTIN, *supra* note 1, at 5.

[16] *See supra* note 5.

[17] Additionally, the utility in enshrining these stories is difficult to overstate. As Professor Brian Landsberg recognized: "[W]e are in . . . a struggle for . . . memory. If David Irving can deny the Holocaust, so will some future historians deny or try to explain away the United States' record of racial discrimination." Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877, 883 (2003) (footnote omitted).

passage of the Voting Rights Act of 1965.[18] The need for the new law was attributable to both deficiencies in the prior civil rights acts as well as the extent to which states subverted the rights of blacks in the South. In his book, Martin illustrates through factual accounts how these well-regarded individuals he encountered deserved to vote more than many of the registered white Mississippians. Additionally, he describes the hard-fought battle against the guardians of the status quo, which included employers, educators, politicians, and judges.[19] The heroes of Judge Martin's story were not merely those with high moral character, but those who were dedicated to their family, faith, community, and their country. The later of these is perhaps the most inspiring: fidelity to a nation that had so long been misused as an apparatus for oppression.

I. ONE MAN STANDING IN THE WAY: *UNITED STATES V. LYND*

The rhythm of *Count Them One by One* eloquently transports the reader to this historical era. First, Judge Martin recreates the tension of Mississippi in the 1960s by contextualizing the story of the *Lynd* trial in the greater context of the civil rights movement and politics in America at the time. Next, Judge Martin tells his story and the stories of the witnesses bold enough to testify to assert their rights as American citizens to vote. Finally, Judge Martin brings closure to the experience for both himself and the reader. This closure, however, is bittersweet because it forces the reader to face the reality that despite some gains, the United States is still plagued with inequality.

At the time of the *Lynd* trial, Americans were just beginning to witness the passage of civil rights legislation; the Civil Rights

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[18] *See* Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade, 1962–1965*, 57 S.C. L. REV. 889, 917 (2006) ("Unlike the Civil Rights Act of 1964, which had met with such fierce opposition from southerners in Congress that deliberations dragged on for nearly a year before the bill passed, the . . . [Voting Rights Act of 1965] encountered mild resistance." (citing STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 320–21 (1999))).

[19] Former First Assistant Attorney in the Civil Rights Division John Doar recalled finding in Alabama, Louisiana, and Mississippi "a complex legal and social network designed to protect and preserve the caste system." John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Act of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 4 (1997).

Acts of 1957 and 1960 were the first of their kind since the passage of the Fifteenth Amendment and the Civil Rights Act of 1880. This trial illustrated the ossifying resistance that the South mounted against the civil rights movement, and the inadequacies of the early civil rights legislation in dealing with such defiance. This case, challenging as it was, served as a record for the more comprehensive legislation to remedy the disenfranchisement of the southern states. The degree of state involvement in disenfranchising black voters was vast, and included abuses of discretion by local registrars, legal representation for local officials willing to resist the federal government, and systemically unfair barriers to voting registration.[20]

Judge Martin's title frames the issue: this was a fight, legislatively as well as judicially. Prior to the 1959 ascendancy of one of Martin's primary protagonists, Registrar Theron C. Lynd, the black residents of Forrest County suffered the rejections of Registrar Luther Cox.[21] The struggle with Cox resulted in a lawsuit, *Peay v. Cox*, which the court ultimately dismissed.[22] But, the affidavits and experiences of these *Peay* plaintiffs influenced the passage of the Civil Rights Act of 1957 and the creation of the Civil Rights Division that would eventually employ Martin as a staff attorney.[23]

This was a fledgling division in the Department of Justice, however, and early on it floundered against the power structure of

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[20] *See* MARTIN, *supra* note 1, at 59 ("'I, along with the entire staff of this office [of the attorney general of Mississippi], stand ready to render to you any assistance and service that this office can render.'" (quoting Attorney General's Papers, Box 17480, Folder 15, Mississippi State Archives)); *see also supra* note 3.

[21] *See* MARTIN, *supra* note 1, at 3–4. Luther Cox, who was of no relation to the subsequently appointed federal judge Harold Cox, was notorious for frustrating would-be black voters with questions that could elicit conflicting views among legal scholars and unanswerable riddles, such as "[h]ow many bubbles are in a bar of soap?" *Id.* at 3. Lynd was largely irrelevant on a personal basis, given the fact that the other candidates he faced in the registrar election expressly proclaimed they would suppress the black vote as well. *Id.* at 37–38.

[22] Peay v. Cox, 190 F.2d 123 (5th Cir. 1951).

[23] MARTIN, *supra* note 1, at 5; s*ee also id.* at 23–25 (detailing the political negotiations that transpired in the lead-up to passage of the 1957 Act). The Civil Rights Division, created by the 1957 Act, essentially built upon the preexisting Civil Rights Section that had existed in the Department of Justice hierarchy under the Criminal Division. *Id.* at 20.

Mississippi.[24] Despite the optimism that might have followed passage of the 1957 Act, Martin recounts that its predecessor, the Civil Rights Section in the Criminal Division, had been systemically inadequate and that it was "shocking to observe the paper shuffling that went on as a substitute for law enforcement."[25] Once created, the Civil Rights Division suffered from an absence of leadership and enthusiasm. This all changed with the arrival of Attorney General Robert Kennedy. Kennedy initiated a new era of leadership that transformed the division into a decisive entity, and it was the leaders he appointed who recruited Judge Martin for the looming civil rights battles.[26]

The division itself was not alone in its youth, and its leadership no doubt found comfort in the energy and optimism of the young lawyers it recruited, such as Judge Martin.[27] Tracing back as early as his serendipitous attendance at an elite preparatory school, Martin had long sought to address the Southern disenfranchisement he saw as "the single greatest social wrong in [our] country."[28] Although his career defining and history-making journey began when he himself had little experience, Judge Martin was nonetheless an integral part of the division that John Doar later described as driven by a philosophy of hope: "This kind of hope is . . . not a willingness to invest in an enterprise that is obviously heralded for early success, but rather the ability to work hard for something because it makes sense, not because it stands a chance to succeed."[29]

The political dealings that resulted in the division's creation and much of the early civil rights legislation are not lost in the story. In fact, in many ways the politics of the era played a pivotal role. On the one hand, Eisenhower and Kennedy were able to successfully appoint civil rights protecting judges to the Second

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[24] *See* Doar, *supra* note 19, at 1; Landsberg, *supra* note 17, at 897–98.

[25] MARTIN, *supra* note 1, at 20.

[26] *See id.* at 33–35; *see also* Doar, *supra* note 19, at 2–4.

[27] The stamina and flexibility of these young attorneys undoubtedly enabled them to complete the up to three-week excursions into the southern states to develop the cases for trial. *See* MARTIN, *supra* note 1, at 41.

[28] *Id.* at 43.

[29] *See* Doar, *supra* note 19, at 5 (attributing the concept of this philosophy to President Vaclav Havel of Czechoslovakia). Judge Martin graduated from law school barely two years prior to joining the division. MARTIN, *supra* note 1, at 43.

and Fifth Circuits. On the other hand, however, they left Mississippi and the division to deal with Judge Harold C. Cox of the Southern District of Mississippi.[30] Alarmingly, Judge Martin even details a meeting between Attorney General Kennedy and Harold Cox prior to his judicial appointment, at which time Kennedy directly challenged Cox as to whether he would adhere to the law.[31] Thus, in exchange for the early legislation and several beneficial appointments, the civil rights movement faced a judge intent on serving as a structural impediment to the work of the division.[32]

Judge Martin's familiarity with the *Lynd* case is unsurpassed even by the court record. His recitation effectively explicates portions of the transcripts, internal discussions within the division, mental thoughts and impressions of a division attorney, and even the personal notes of opposing counsel that have since been consolidated in the M.M. Roberts Collection at the University of Southern Mississippi. Additionally, as a staff attorney for the division, his rapport with the witnesses merged into friendship, which only further enhanced his portrayal of the *Lynd* case. As a homage to their heroic and courageous efforts—and no doubt to their relationship as well—Martin voluminously shares the unique stories of the *Lynd* witnesses, both prior to and following the life-changing trial.

In preparing this case for trial, the division attorneys faced what was later referred to as the "well-nigh impossible task of showing the true facts . . . that certain serious discriminations had taken place during the term of office of the defendant Lynd."[33] Martin and other division attorneys had assembled a collection of more than a dozen black witnesses, whom Forrest County's

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[30] For a discussion of the negotiations leading up to Kennedy's decision to appoint Cox, see MARTIN, *supra* note 1, at 53–58, 203–04. Had he failed to appoint Cox, chairman of the Senate Judiciary Committee, Mississippi's own James O. Eastland, would have refused to confirm Thurgood Marshall to the Second Circuit. *Id.* at 203–04.

[31] *Id.* at 53–54 ("I said that the great reservation that I had was whether he'd enforce the law and whether he'd live up to the Constitution . . . ." (quoting ROBERT F. KENNEDY, ROBERT KENNEDY, IN HIS OWN WORDS: THE UNPUBLISHED RECOLLECTIONS OF THE KENNEDY YEARS 109 (1988))).

[32] *See infra* notes 47–49 and accompanying text. For an early catalogue of Judge Cox's civil rights record, see Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 107 n.87 (1963) (citing cases).

[33] United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962).

registrar had rejected, to testify in their fledgling case.[34] Additionally, after a pre-trial strategy change, the witness list also included several white witnesses that Lynd registered despite lesser qualifications than the black witnesses or without the requirement of interpreting any section of the constitution.[35]

One would anticipate that witnesses holding undergraduate- and graduate-level degrees, among other well-educated individuals, clearly qualified to register to vote under practically *any* requirement. This was, however, Mississippi in the 1960s. Not only did a state actor deny them the right to vote, but mere presentation of the evidence of this discrimination was a challenge before the racially intolerant Judge Cox.[36] Furthermore, the state of Mississippi repeatedly buffeted the division attorneys by changing voting laws during this time, which "demonstrated a conscious policy of disfranchisement of Negroes, manifested by reactions to federal court decisions and congressional voting legislation."[37]

Mississippi had long since authorized three principal impediments to black would-be voters dating back to its last constitutional convention: a residency requirement, a poll tax, and a literacy test.[38] Alongside these *constitutional* impediments, black Mississippians also suffered under a grossly inadequate educational system including a lack of bussing, regularly un- and under-paid teachers, and public schooling that stopped at the

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[34] MARTIN, *supra* note 1, at 45–46.

[35] *Id.* at 45, 179–89.

[36] Judge Joseph C. Hutcheson, Jr. of the Fifth Circuit even openly acknowledged Judge Cox's seemingly disruptive agenda during oral arguments: "[Judge Cox] either had a lack of experience for an injunction, and didn't understand what it was, or he was just trying to prevent an appeal. Nobody ever tried a temporary injunction like that in the history of the world, at least in my world." MARTIN, *supra* note 1, at 204 (citation omitted) (internal quotation marks omitted).

[37] Hawk & Kirby, *supra* note 3, at 1082 (discussing numerous new laws, including an authorization to destroy voting records in direct conflict with the requirements of the Civil Rights Act of 1960).

[38] *Id.* at 1079–80 (citing MISS. CONST. art. XII, § 241 (amended 1968) (requiring two years of residency); art. XII, § 243 (repealed 1975) (annual poll tax); art. XII, § 244 (repealed 1975) (literacy test)); *see also* MISS. CONST. art. XII, § 241-A (repealed 1965) (requiring good moral character). Following the efforts of the *Peay* plaintiffs in *Peay v. Cox*, 190 F.2d 123 (5th Cir. 1951), Mississippi enhanced § 144 to require interpretation regardless of literacy. Hawk & Kirby, *supra* note 3, at 1081.

eighth grade for much of the black voting-age population.[39] The institutional and legal barriers for black Mississippians greatly perpetuated disenfranchisement because registrars almost universally registered whites without requiring them to interpret a section of the constitution, whereas they assigned blacks, when allowed to register at all, lengthier and more complex sections.[40] Judge Brown of the Fifth Circuit even noted that "[Lynd] rejected many Negroes who gave answers worthy of a law review editor on ex post facto laws."[41]

Other technical challenges in presenting this case were legion. The division attorneys prepared the case away from their homes and in a culture unlike their own: "the back roads; the operations of county registrar's offices; the states' registration laws; 100 years of history; the identity of the local leaders; the way the court's family in each judicial district functioned—the clerk, the judge's secretary, the marshals, the U.S. Attorney, the court reporter—you name it."[42] Aside from institutional complexities, division attorneys and even judges[43] were well aware that

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[39] *See* MARTIN, *supra* note 1, at 88–89, 169. Furthermore, civic *leaders* in the state, such as the defense attorney in the *Lynd* case, M.M. Roberts, also positioned themselves when possible into positions to perpetuate discrimination. For example, Roberts utilized his connections with then-Governor Ross Barnett to secure a position on the Board of Trustee of the Institutions of Higher Learning where he pressured university administrators and faculty who challenged the white status quo. *Id.* at 83–84.

[40] *See* United States v. Lynd, 301 F.2d 818, 822 n.1 (5th Cir. 1962) ("[B]y any objective standard those [sections] supplied to the Negro applicants were longer, more complicated, and more difficult. Ten white witnesses testified that they were not required to write or interpret any provision of the Mississippi constitution."). Martin cataloged many of the sections that Cox and Lynd had required the black witnesses to interpret. MARTIN, *supra* note 1, at 207 (discussing black witnesses and the interpretation of MISS. CONST. art. III, § 13); *id.* at 9 (art. III, § 14); *id.* at 141 (art. IV, § 72); *id.* at 208 (art. IV, § 112); *id.* at 51 (art. V, § 118); *id.* at 107, 140 (art. V, § 121); *id.* at 143, 163 (art. VI, § 165); *id.* at 71–72, 205 (art. VII, § 178); *id.* at 147 (art. VIII, § 211); *id.* at 113 (art. XI, § 233); *id.* at 106, 158 (art. XV, § 273). The sections the registrar required the white witnesses to interpret, when required to at all, were comparatively simpler. *Id.* at 45, 107 (discussing white witnesses and the interpretation of MISS. CONST. art. III, § 30); *id.* at 181 (art. V, § 116); *id.* at 51 (art. V, § 118); *id.* at 51 (art. V, § 128); *id.* at 188 (art. V, § 143); *id.* at 181 (art. X, § 226); *id.* at 189 (art. XIV, § 258).

[41] United States v. Lynd, 349 F.2d 790, 792 n.4 (5th Cir. 1965).

[42] Doar, *supra* note 19, at 4.

[43] MARTIN, *supra* note 1, at 209 (quoting Judge John Brown of the United States Court of Appeals for the Fifth Circuit).

Southern discrimination was not limited to skin color.[44] These outsiders represented a concerted threat powered by the federal government that sought to uproot the unlawful restriction of black voting and the Southern caste system.[45] As a Boston native, a Catholic, and a diligent Civil Rights Division attorney, Judge Martin was not unreasonable in his apprehension since, as he recalls, "any white Mississippian not a Baptist had cause for concern."[46]

What should have been a relatively simple case—testimony as to what did or did not occur upon attempting to register—was complicated inexorably by the procedural morass Judge Cox allowed to occur. Hardly a year into his appointment, Cox was "duly reversed and lectured"[47] by the Fifth Circuit for frustrating the attorney general's records requests made pursuant to the 1960 Act.[48] Furthermore, at the outset of the division's preliminary injunction case, Judge Cox limited testimony to witnesses who had been turned away while Lynd was in office; an approximately two-year window of time.[49]

Judge Martin's description of the trial proceedings exposes it for the farce that it was. For example, Cox aided the defense in questioning—and similarly the witnesses in testifying—when he interjected: "What you are saying is that the criteria you use for

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[44] *See id.* at 39–40 (contextualizing his own arrival in the South as just two years prior to the murder of Freedom Summer workers James Chaney, Andrew Goodman, and Michael Schwerner).

[45] *See id.* at 55–56 n.9 (citing HORTENSE POWDERMAKER, AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH app. A (Russell & Russell 1969) (1939)) (discussing a landmark study of the complex social caste system prevalent in many southern areas, specifically in Judge Cox's home county).

[46] MARTIN, *supra* note 1, at 49.

[47] *Id.* at 59.

[48] *See* Civil Rights Act of 1960, Pub. L. No. 86–449, §§ 301–306, 74 Stat. 86, 88–89 (codified at 42 U.S.C. §§ 1974-1974e (2006)); Kennedy v. Lynd, 306 F.2d 222, 227–29 (5th Cir. 1962) (requiring production of election records requested by the attorney general). In what appeared almost retaliatory, Cox dismissed the collateral and legitimate records request from the attorney general on the basis that the division had subsequently sought to enjoin Lynd for his discrimination. *See* MARTIN, *supra* note 1, at 46, 58–59.

[49] United States v. Lynd, 301 F.2d 818, 820 (5th Cir. 1962) ("[T]he trial court required that all but 40 of [the 63 witnesses] be eliminated because the incidents as to which they were identified occurred prior to this date."); MARTIN, *supra* note 1, at 46, 48–49.

both white and colored are alike?"[50] Additionally, the equitable notion of preliminary relief was eviscerated from the hearing when Cox allowed the defense to cross-examine the division's witnesses, but postpone their own side of the case for thirty days to *prepare*; effectively lodging a month-long wedge into the government's case.[51] Cox's ultimate denial of any resolution at the end of the hearing prompted an immediate appeal by the division, and a surprisingly swift and involved intervention from the Fifth Circuit that served as the initial bookend in Judge Martin's experience in Forrest County.[52]

II. THE BATTLE IS FAR FROM OVER

Years after his experience as a young Civil Rights Division attorney, Judge Martin returned to Mississippi to reconnect with the people and events that unquestionably shaped the foundation for his career in public service.[53] It is from his memories, interviews, and diligent research that this memorial of normal men and women acting heroically emerged. Many of the witnesses went on to live fulfilling lives in a gradually improving Southern culture. Tragedy, both natural and unnatural, cut other lives short. Vernon Dahmer, whom Klan conspirators murdered for his civil rights efforts, was only recently vindicated by the 1998 conviction of Sam H. Bowers.[54] As Judge Martin acknowledges, however, the struggle for equality is not over.[55]

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[50] MARTIN, *supra* note 1, at 192 (interjecting into the division's direct examination of registrar Lynd).

[51] *Id.* at 198, 204; *see also supra* note 37. Cox also restrained the division from leading its own hostile, white witnesses while conversely permitting the defendants to lead those witnesses that were clearly friendly to them. MARTIN, *supra* note 1, at 182–84.

[52] The Fifth Circuit took the unusual step of issuing an order directly from the bench instead of remanding, certainly to thwart further procedural delays. MARTIN, *supra* note 1, at 206. This choice, however, resulted in the Fifth Circuit panel traveling to Hattiesburg shortly after issuing its order to conduct a contempt hearing. *Id.* at 208.

[53] *See supra* note 4.

[54] Rick Bragg, *Jurors Convict Former Wizard in Klan Murder*, N.Y. TIMES, Aug. 21, 1998, at A1; *see also* MARTIN, *supra* note 1, at 220–21.

[55] MARTIN, *supra* note 1, at 233. In fact, the continued existence of some provisions of the Voting Rights Act of 1965, which were originally set to expire after five years, depend upon periodic reenactment by Congress. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (extending provisions by twenty-five years and

The facts illustrate a sad reality of stagnation in the years after the civil rights movement.[56] For example, in the South today, blacks suffer under many more impediments than whites due to "institutional racism."[57] The southern states also disproportionately imprison far more blacks than whites.[58] Because southern states execute more of their prisoners than their northern counterparts, blacks in the South are more likely to face the death penalty.[59] Additionally, the death penalty is most frequently administered in black-assailant white-victim scenarios.[60] Aside from physical incarceration, blacks in the South are also more likely to live below the poverty line than whites, imprisoning them economically.[61]

Despite the persistent problems in eliminating inequality, states continue to mount legal challenges against civil rights era

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subsequently renamed the "Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006," Act of July 1, 2008, Pub. L. No. 110-258, 122 Stat. 2428); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (extending twenty-five years); Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (extending seven years); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (extending five years). Furthermore, the growing legion of challenges to the constitutionality of many of the more dramatic provisions of the act suggests it may not endure in perpetuity. *See infra* notes 62–65 and accompanying text.

[56] For a recent commentary on this topic, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[57] Scholars have described this type of racism thusly: "Though less open and blatant than in the past, racism is said to have subtly embedded itself in institutions that continue to disadvantage blacks." JOHN ARTHUR, RACE, EQUALITY, AND THE BURDENS OF HISTORY 161 (2007) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987)). *But see* DERRICK A. BELL JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (arguing factors other than race contribute to poverty rates).

[58] DAVID BROWN & CLIVE WEBB, RACE IN THE AMERICAN SOUTH: FROM SLAVERY TO CIVIL RIGHTS 325 (2007); *see also* Chauncee D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1016–20 (2009) (evaluating minority imprisonment rates).

[59] BROWN & WEBB, *supra* note 58, at 325 (citation omitted) (citing *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Apr. 18, 2012)).

[60] *Id.*

[61] *Id.* at 326; TIMOTHY J. MINCHIN & JOHN A. SALMOND, AFTER THE DREAM: BLACK AND WHITE SOUTHERNERS SINCE 1965, at 290–94 (2011) (discussing economic conditions in the South).

legislation as the Supreme Court in recent years has increasingly signaled its suspicion of the constitutionality of some provisions of the Voting Rights Act.[62] Several states, including Alabama, Arizona, Florida, and North Carolina, are presently challenging the constitutionality of provisions of the Voting Rights Act.[63] Furthermore, Mississippi has passed an amendment to its constitution and enacting legislation requiring voters to present identification prior to casting their votes.[64] The attorney general recently struck down a similar voter identification law in South Carolina, creating speculation as to the viability of Mississippi's election law change.[65]

The route to recovery itself is frequently unclear. In Noxubee County, Mississippi, the Department of Justice ironically used the Voting Rights Act to dismantle black dilution of white votes.[66] Although perhaps an effort tinted with good intentions, "what [the defendants] view[ed] as an honorable goal of electing black

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[62] *See* Perry v. Perez, 132 S. Ct. 934, 942 (2012) ("This Court recently noted the 'serious constitutional questions' raised by § 5's intrusion on state sovereignty." (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009))); Robert Barnes, *Voting Rights Provision in Peril*, WASH. POST, Feb. 10, 2012, at A3 [hereinafter Barnes, *Voting Rights*] (discussing the rise of challenges to the preclearance provisions of Voting Rights Act of 1965); Robert Barnes, *Justices Toss Texas's Minority-Backed Electoral Maps*, WASH. POST, Jan. 21, 2012, at A4.

[63] *See* Order, Shelby Cnty., Ala. v. Holder, No. 11–5256 (D.C. Cir. Oct. 6, 2011), (Doc. No. 1333740) (granting unopposed motion for expedited appeal); *see also* Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011); LaRoque v. Holder, No. 10–0562, 2011 WL 6413850 (D.D.C. Dec. 11, 2011) (pending before the D.C. Circuit Court); Arizona v. Holder, 1:11-cv-01559 (D.D.C.) (pending before the D.C. District Court); Florida v. United States, 1:11-cv-01428 (D.D.C.) (pending before the D.C. District Court). Additionally, Georgia previously challenged the constitutionality of the Voting Rights Act in the alternative to its request for preclearance, but the court dismissed the case when preclearance was granted. *See* Order, Georgia v. Holder, No. 11–1788 (D.D.C Jan. 3, 2012).

[64] *See* H.R. 921, 2012 Leg., Reg. Sess. (Miss. 2012); Jessica Bakeman & Deborah Barfield Berry, *Voter ID Still Faces Hurdle*, CLARION-LEDGER, Nov. 11, 2011, at A1; s*ee also* JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE: THE TRUTH ABOUT VOTER FRAUD 6 (2007), *available at* http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("The most common example of the harm wrought by imprecise and inflated claims of "voter fraud" is the call for in-person photo identification requirements.").

[65] *See* Warren Richey, *In Voter ID Case, South Carolina Fights Back Against Obama Administration*, CHRISTIAN SCI. MONITOR, Feb. 8, 2012, http://www.csmonitor.com/USA/Justice/2012/0208/In-voter-ID-case-South-Carolina-fights-back-against-Obama-administration; *see also* Complaint, South Carolina v. United States, No. 1:12-cv-00203 (Feb. 07, 2012).

[66] United States v. Brown, 561 F.3d 420, 433–35 (5th Cir. 2009).

candidates," it was at its core nothing more than unlawful discrimination.[67] Further, partisan implications often cloud the civil rights discussion, a complication Judge Martin himself succumbs to when he suggests the election of Democrats is a necessary component to progress.[68] The trouble is that the Department of Justice's preclearance enforcement under the Voting Rights Act can easily appear to be motivated by political gamesmanship as opposed to laudable protection.[69] While this may be unavoidable or undesirable as a result of the congressional choice,[70] it nonetheless encourages criticism of the Voting Rights Act when a Democrat's attorney general refuses to pre-clear certain changes, an ambiguity unwelcome in the already challenging arena of racial dialogue.[71]

Undoubtedly, this is attributable to the absence for decades of a comprehensive civil rights education in Mississippi's public schools.[72] The prior "savior narrative" taught to students oversimplified the efforts during the civil rights movement and undermined the impetus for continued improvement.[73] There is hope for improvement, however, with the recent passage and

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[67] *Id.* at 435.

[68] MARTIN, *supra* note 1, at 233 (suggesting the future of racial progress in Mississippi involves electing Democrats, but failing to recognize the imprecision in such broad based political party stereotyping).

[69] Barnes, *Voting Rights*, *supra* note 62.

[70] *See generally* Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 513, 521 (2007) ("While it [is] hard to conclude that the Act was administered in a partisan way from 1970 through 1995, that explanation remains a possibility, especially after 2000."); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 677–79 (2002) (decrying the problems that would accompany the use of nonpartisan committees for redistricting); Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L & POL'Y REV. 324, 335–42 (2007) (attempting to define what should constitute a *partisan* enforcement decision).

[71] *See supra* note 65 and accompanying text. *But see supra* note 63 (noting the attorney general pre-cleared Georgia's changes).

[72] *See* Associated Press, *Civil Rights a Year-Round Lesson in Miss. Schools*, CLARION-LEDGER, Jan. 16, 2012, at A5.

[73] *See id.* ("It's important for students to learn more than the 'savior narrative' of 'Rosa (Parks) sat down, Martin stood up and now everyone is free' . . . . 'What we want to do is complicate that narrative and make it more historically accurate . . . .'" (quoting Susan Glisson, Director, William Winter Institute for Racial Reconciliation at the University of Mississippi)).

implementation of legislation requiring a civil rights curriculum.[74] Part of the stated intent of the civil rights education legislation is that "Mississippi's central role in the civil rights struggle needs to be formalized and taught as a beacon of hope for all of our citizens."[75] While the struggle for equality is not over, we appear to be moving in the right direction.

CONCLUSION

Legislative acts and judicial opinions affect our lives in sometimes radical ways, but these instruments rarely detail the full story. The instrumental characters, the context of their story, their lives; too often these elements are left unsung. Honorable Gordon A. Martin, Jr., tells these stories with both diligence and exhaustive attention to detail. In doing so, he dignifies the efforts of these witnesses, without whose testimony we might not have the Voting Rights Act of 1965. These men and women, just as their storyteller, bear witness to the marks of greatness that result from attempting, let alone completing, such a great moral and ethical conquest. Much is still unwell in our country, and in particular the southern region. But Judge Martin's story should stand as an example for us all: our society would benefit from more men like Martin, Vernon Dahmer, and the other *Lynd* witnesses who had the courage to stand for justice and live their lives fighting and dying for equality. If compassion were as plentiful as hate; if Americans had historically pursued freedom instead of oppression; if we all exhibited the courage of these attorneys and witnesses, then what type of world could we imagine for future generations? *Count Them One by One* challenges us all to ask these questions and, hopefully, seek the answers.

Andrew Scott Harris[*]

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[74] *See* Miss. Laws 2006, Reg. Sess., ch. 436. S.B. 2718, § 2 (codified at MISS. CODE ANN. §§ 37-13-191 to -195 (2007)); *see also* Chauncey Spears, *Social Studies Framework*, MISS. DEPT. OF EDUC., http://www.mde.k12.ms.us/ACAD/ID/Curriculum/ss/index.html (last visited Apr. 18, 2012).

[75] MISS. CODE ANN. § 37-13-191 (2007).

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