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Remembering the Freedom Riders: An Interview with the Honorable Ernst H. Rosenberger

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Remembering the Freedom Riders: An Interview with the Honorable Ernst H. Rosenberger

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This interview was conducted by Erik Lane on September 12, 2014 at New York Law School. He is the Editor-in-Chief of the 2014–2015 *New York Law School Law Review*, J.D. Candidate, 2015.

Khalil El Assaad, Executive Editor of the 2014–2015 *New York Law School Law Review*, J.D. Candidate, 2015, is the author of the Introduction.

REMEMBERING THE FREEDOM RIDERS

I. INTRODUCTION

In 1961, over 400 Americans, black and white, Northerners and Southerners, from every age group and religious affiliation, decided to challenge the segregationist status quo by riding interstate buses through the Deep South. For exercising their basic civil rights—rights with which the state could not constitutionally interfere¹—these people endured mob violence, severe beatings, and imprisonment. They were called the Freedom Riders because they rode through the country on an eight-month nonviolent journey in search of freedom and equality. A journey that ultimately changed the course of history.²

A. May 4, 1961: The Ride to Freedom

On May 4, 1961, following the example of the 1947 Journey of Reconciliation,³ and responding to the U.S. Supreme Court's decision in *Boynton v. Virginia*,⁴ an interracial group of thirteen activists left Washington, D.C. on a Freedom Ride destined for New Orleans. Expecting to meet resistance from segregationists in the South, the Freedom Riders hoped to incite uproar, thereby provoking the federal government into enforcing the *Boynton* ruling.⁵

At the time, bus companies in the South seated blacks in the back of the bus, allowing whites only to sit in the front. The Freedom Riders' protests took the form of sitting in buses where they were not supposed to—blacks in the front, and whites in the back.⁶ When they stopped along the way, black Riders used facilities and accommodations designated for whites and vice versa.⁷

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1. In 1946, the U.S. Supreme Court declared segregation in interstate bus travel unconstitutional. *Morgan v. Virginia*, 328 U.S. 373 (1946); see also *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956) (finding statutes and ordinances which required segregation on motor buses unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment). Moreover, federal law entitled the Freedom Riders to travel on desegregated interstate buses. See *Keys v. Car. Coach Co.*, 64 M.C.C. 769 (1955) (interpreting the Interstate Commerce Act as prohibiting the segregation of passengers on the basis of race when traveling across state lines).
 2. See generally JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965* (Penguin Books 2002) (1987).
 3. In 1947, the Congress of Racial Equality (CORE) and the Fellowship of Reconciliation decided to test the Supreme Court ruling in *Morgan v. Virginia* by staging the “Journey of Reconciliation,” which consisted of black and white activists riding together through the upper-South, though still reluctant to travel to the Deep South. The Journey of Reconciliation was short-lived, as even the relatively moderate upper-South was heavily opposed to integration. See WILLIAMS, *supra* note 2, at 92.
 4. The *Boynton* decision extended *Morgan*'s constitutional rule as a matter of statute under the Interstate Commerce Act by prohibiting race-based discrimination in diners, restrooms, and other facilities associated with interstate travel. See *Boynton v. Virginia*, 364 U.S. 454 (1960).
 5. WILLIAMS, *supra* note 2, at 92.
 6. *Id.*
 7. See *id.*

B. The Anniston Firebombing and the Birmingham Conspiracy

On Mother's Day, May 14, the Freedom Riders divided into two groups to ride across Alabama.⁸ The first group was stopped in Anniston where an angry mob stoned the Riders' Greyhound bus and slashed its tires. Before it could escape town, the bus was firebombed.⁹ The other group fared no better; once it reached Birmingham, the Riders were severely beaten by the Klans.¹⁰ The Birmingham police denied knowledge of the attack and claimed that officers had not been posted at the bus depot because of the Mother's Day holiday. It was later revealed that the local authorities were well aware of the planned attack but had intentionally shirked their law enforcement obligations.¹¹

Undeterred by mob violence, the Freedom Riders were determined to see their journey all the way through to New Orleans.¹² Yet, in the wake of the Anniston and Birmingham incidents, the Freedom Ride appeared at an impasse. Not wanting to lose a second bus to firebombing, the Greyhound bus company refused to carry the Freedom Riders further south, and the drivers seemed equally unwilling to risk their lives. But under intense public pressure, Greyhound eventually agreed to carry the Freedom Riders, whose safe passage (from Birmingham) to Montgomery had been assured by then-Alabama Governor John Malcolm Patterson.¹³

C. The Montgomery Attack

The Freedom Riders left Birmingham on May 20, 1961. Despite Governor Patterson's promise to provide safe passage, police protection vanished as soon as the Riders entered the Montgomery city limits.¹⁴ They were attacked by an angry white

8. *Id.*

9. *Id.*

10. *See id.* (noting that "one of [the Riders], William Barbee, was paralyzed for life"). "The United Klans of America, Inc., was the largest Klan organization of the 1960s and 1970s. During the era of the civil rights revolution, it was notorious for its many brutal acts of violence, including a number of murders." *The Ku Klux Klan: Legacy of Hate*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/issue_combating_hate/uka/#VCTYYitdX4M (last visited Jan. 15, 2015).

11. *See* RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 120 (abr. ed., Oxford Univ. Press 2006). A local journalist was quoted as saying, "the riots have not been spontaneous outbursts of anger but carefully planned and susceptible to having been easily prevented or stopped had there been a wish to do so." *Id.* at 115. For a more thorough account of the local police's complicity in the Birmingham incident, see Gary May, *40 Years for Justice: Did the FBI Cover for the Birmingham Bombers?*, DAILY BEAST (Sept. 15, 2013), <http://www.thedailybeast.com/articles/2013/09/15/40-years-for-justice-did-the-fbi-cover-for-the-birmingham-bombers.html>.

12. James Peck, a white activist who needed fifty stitches as a result of the Birmingham attack, remarked, "it is particularly important at this time when it has become national news that we continue and show that nonviolence can prevail over violence." WILLIAMS, *supra* note 2, at 92–93.

13. *See* ARSENAULT, *supra* note 11, at 120–35; WILLIAMS, *supra* note 2, at 95.

14. WILLIAMS, *supra* note 2, at 95.

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mob who beat them and anyone who came to their aid, including Justice Department official, John Seigenthaler, who was left unconscious in the middle of the street.¹⁵

When news of the Montgomery attack became public, Attorney General Robert Kennedy ordered federal marshals into the city.¹⁶ The following day, a mass-meeting was held in the First Baptist Church of Montgomery, where Martin Luther King, Jr. addressed the crowd in support of the Freedom Riders.¹⁷ As night fell, a mob of over three thousand white men encircled the church, breaking the church's windows with rocks and setting off tear-gas grenades to prevent blacks from leaving.¹⁸ With local police making no attempt to restore order, the Kennedy administration threatened to dispatch federal troops. A reluctant Patterson, under compulsion of a court decree,¹⁹ declared martial law and sent the Alabama police force to disperse the white mob and escort people safely from the church.²⁰

D. "Cooling-Off Period" and Riding to Mississippi

After the violent siege in Montgomery, Robert Kennedy called for a "cooling-off period."²¹ The Freedom Riders, however, were intent on continuing their journey into the Deep South. James Farmer, head of the Congress of Racial Equality (CORE), objected to Kennedy's request: "[We have] been cooling-off for 350 years, and [] if we cooled off any more, we'd be in a deep freeze."²² The next stop on the Freedom Ride was Jackson, Mississippi.

15. HENRY HAMPTON & STEVE FAYER, *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S*, at 87 (unabr. ed., Random House Publ'g Grp. 2011).

16. WILLIAMS, *supra* note 2, at 96.

17. *Id.* at 96–97.

18. *Id.*; see also Bernard Lafayette, Jr., Op-Ed., *The Siege of the Freedom Riders*, N.Y. TIMES, May 19, 2011, at A23.

19. See *United States v. U.S. Klans, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961).

20. HAMPTON & FAYER, *supra* note 15, at 92; WILLIAMS, *supra* note 2, at 97–98.

21. See WILLIAMS, *supra* note 2, at 97–98. By some accounts, it was the Cold War which pressured the Kennedy administration into taking a stand on civil rights. On the other hand, the embarrassment the Freedom Riders caused the administration at the height of the Cold War is said to have prompted Kennedy's call for a "cooling-off period." See generally John M. Murphy, *Domesticating Dissent: The Kennedys and the Freedom Rides*, 59 COMM. MONOGRAPHS 61 (1992). "To the Kennedy [administration], taking the civil rights movement into the streets, where uncontrolled conflict was inevitable, was an embarrassing luxury that the United States could not afford in the context of the Cold War." ARSENAULT, *supra* note 11, at 114.

22. WILLIAMS, *supra* note 2, at 91. See also Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1163 (1963) ("Gradualism has come to be regarded as a dirty word among Negroes."). There is a fundamental difference between waiting for the recognition of a right and waiting for its enjoyment after it has been recognized. *Id.* at 1163–64. Delay is reasonable and to be expected when it comes to the establishment of new legal rights, whether occasioned by the need for public debate or by the time required to impress on the courts the merits of a particular claim of right. See *id.* But when the enjoyment of an already established legal right is deferred on grounds of "gradual reform," gradualism becomes shorthand for obstructionism, which violates a fundamental covenant of civilized society—i.e., "ungrudging acceptance of the present law in return for effective access to the processes of

At the time, Robert Kennedy and Mississippi Senator James O. Eastland had struck a deal whereby Kennedy agreed to keep federal troops away so long as the Freedom Riders were not greeted with mob violence on their ride to Mississippi.²³ Both parties held up their end of the bargain. When the Freedom Riders entered the state of Mississippi on May 24, they received police protection as promised, and no mob accosted them at the Jackson bus terminal.²⁴

But in fact, the very police that purported to protect the Riders actually led them into prison. As one activist, Fred Leonard, recalled, “As we walked through, the police just said, ‘Keep moving.’ We never got stopped. They passed us right on through the white terminal, into the paddy wagon, and into jail.”²⁵ Because of the compromise reached between Robert Kennedy and Senator Eastland, the Freedom Riders found themselves at the mercy of the local courts.²⁶ They were charged with bogus charges such as breaching the peace, and violating segregation ordinances long declared unconstitutional by the U.S. Supreme Court.²⁷ It was thus “clear that the charges against [the Freedom Riders] were groundless and that any conviction would ultimately be reversed on due process grounds, provided they did not abandon the litigation.”²⁸

On May 25, the Freedom Riders were tried before a state court. As their attorney was pleading for their release, the judge “turned his back, [and] looked at the wall.”²⁹ Once the attorney was finished making his case, the judge turned around and sentenced the Riders to two months in the state penitentiary.³⁰

orderly change.” *Id.* at 1164. It is thus not surprising that the attorney general’s call for a cooling-off period was publicly criticized “for ignoring a century of delayed justice.” As one activist lamented, “[h]ad there not been a cooling-off period following the Civil War . . . the Negro would be free today. Isn’t 99 years long enough to cool off, Mr. Attorney General?” ARSENAULT, *supra* note 11, at 192.

23. WILLIAMS, *supra* note 2, at 98.

24. See HAMPTON & FAYER, *supra* note 15, at 93–94.

25. *Id.* at 94.

26. See WILLIAMS, *supra* note 2, at 98.

27. See *Garner v. Louisiana*, 368 U.S. 157 (1961) (finding that defendants’ conviction for disturbing the peace violated the due process clause of the Fourteenth Amendment because, aside from sitting at lunch counters designated for whites, there was no evidence of guilt); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (reversing students’ criminal convictions for breach of peace as invalid under the due process clause).

28. Lusky, *supra* note 22, at 1180. Relying “on the traditional reluctance of the federal courts to interfere with state *court* proceedings,” Mississippi officials sought “to place a very heavy procedural burden upon the Freedom Riders; unless the federal courts could and would prevent it, each Freedom Rider could be made to endure great expense, and a delay of years, in order to obtain vindication of his rights.” *Id.* at 1169. But the Freedom Riders appear to have had an agenda of their own. The Student Nonviolent Coordinating Committee (SNCC) was purportedly “determined to ‘fill up the jails’ in Montgomery, Alabama and Jackson, Mississippi.” JON N. HALE, *A HISTORY OF THE MISSISSIPPI FREEDOM SCHOOLS, 1954–1965*, at 84 (2009). Following this “informal SNCC principle, [the riders] refused to post bond and voted to stay in jail in order to draw attention to conditions in Mississippi.” *Id.* at 85.

29. HAMPTON & FAYER, *supra* note 15, at 94.

30. WILLIAMS, *supra* note 2, at 98.

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Freedom Riders continued to ride through the Deep South, and by the end of the summer, more than 300 had been imprisoned. Many spent their summer in jail.³¹

E. The End of Jim Crow in Public Transportation

The Freedom Riders never made it to New Orleans. But while they may not have reached their destination, they made an important and lasting contribution to the civil rights movement. The Freedom Ride, and the violent reactions it provoked, forced the Kennedy administration to take a firm stand on civil rights. In a May 29, 1961 petition, Robert Kennedy presented the Interstate Commerce Commission with its failure to enforce a desegregation ruling it had issued six years earlier.³² On September 22, the Commission issued regulations implementing its 1955 rulings as well as the Supreme Court *Boynton* decision. These regulations took effect on November 1, 1961, effectively ending Jim Crow in interstate transportation.³³

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II. INTERVIEW WITH THE HONORABLE ERNST H. ROSENBERGER: JUSTICE, LAW PROFESSOR, AND CIVIL RIGHTS ACTIVIST³⁴

Mr. Lane: As you know, we are here to discuss your role in the civil rights movement of the 1960s, specifically your defense of the Freedom Riders in 1961. It is now fifty-three years later. What first comes to your mind from that experience?

Justice Rosenberger: You see, I was born in Germany and, shortly after I was born, things got really bad there. I don't think things would have gone as far as they did, or even come close, if the German lawyers and judges had done what lawyers and judges are supposed to do. One of the prime duties of the judge is to protect the citizens from the overreaching of the state. And judges can't do that if the lawyers aren't bringing things before the court.

31. *Id.*

32. See ARSENAULT, *supra* note 11, at 205–06; see also *Morgan v. Virginia*, 328 U.S. 373 (1946); *Gayle v. Browder*, 352 U.S. 903 (1956); *Keys v. Car. Coach Co.*, 64 M.C.C. 769 (1955).

33. See WILLIAMS, *supra* note 2, at 102.

34. The Honorable Ernst H. Rosenberger was born in Hamburg, Germany in 1931. After his family emigrated to the United States in 1935, he attended public schools in New York City. He served in the U.S. Army for two years before attending the City College of New York. He attended New York Law School, where he served as the Editor-in-Chief of the *New York Law School Law Review*, and received his J.D. in 1958. Justice Rosenberger spent much of the early 1960s volunteering his legal services for the civil rights movement. After several years in private practice, he began his judicial career in 1972 in the Criminal Court of the City of New York. The following year, he was designated acting justice of the N.Y. State Supreme Court, where he stayed until he was elected to the N.Y. Supreme Court in 1976. He was appointed to the Appellate Division, First Department in 1985 and remained there until he retired in 2004. Justice Rosenberger joined Stroock & Stroock & Lavan LLP in March, 2004 as Of Counsel, a position he currently holds.

Mr. Lane: What about the Movement compelled you to become actively involved?

Justice Rosenberger: Well, there wasn't that much of a movement yet when I went to law school. I had been in the army for a couple of years before college, and one of the places I was posted was in Camp Breckinridge, Kentucky, which no longer exists as a military post but rather as a museum and arts center. The geography is a little important to the story. Camp Breckinridge is in northwestern Kentucky, not far south of Indiana. On weekends, we used to go to the closest city of any size that served alcohol. There was Henderson, Kentucky, which was smaller than Evansville, Indiana and just across the river. Evansville served alcohol. Henderson didn't—not legally, anyhow.

We used to go up there on weekend passes. I was coming back on whatever highway it is that goes from Evansville to Camp Breckinridge. It was close, less than fifty miles. And I was sitting on the bus next to another soldier; he was black. As we were sitting on the bus crossing into Kentucky, the driver told my companion to move because he didn't want us sitting next to each other. When my seatmate didn't comply, the driver pulled over to the side of the road and stopped, but we just kept on sitting where we were. I guess the driver waved down a police car. Again, the driver told him to move—he didn't move. The cop came up and told us both, "Get off the bus," but we didn't want to fight with him, so we got off. The driver closed the door and took off, and the cop got in his car and drove off. So there we were in the middle of nowhere, which was really no big deal because it was a Sunday and hitchhiking was very common in those days.

We put our thumbs out and another soldier from Camp Breckinridge pulled over and picked us up. The whole episode didn't take twenty minutes until we were in somebody else's car heading down the highway back to the base. It was not a major incident, but it is something I remember.

So there wasn't a movement as such yet. I can't really say that I had a vision about the civil rights movement, and if there was such a movement anywhere, I didn't know about it. This was probably 1950 or 1951, since I was discharged at the end of '51. I was either nineteen or twenty at the time.

Mr. Lane: After your time in the military, you went to college and then straight to law school. Can you tell us a little about that time in your life and what it was like transitioning out of the military and into school?

Justice Rosenberger: I went to City College, which is in Harlem. And when I got there, City College still had a dormitory, so I lived there. After that, I lived near the college for one or two terms. I was familiar with Harlem as a community and not uncomfortable in it. And then I moved a little further down and got a room at the International House at 123rd Street and Riverside Drive near the college, which was on 138th Street. So I lived in a segregated community, except not in the segregated parts because the International House wasn't segregated; neither was the City College dormitory. It was all familiar to me.

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So I finished college in 1955 and came to New York Law School, which at the time was not that far from here in Tribeca. It was at 244 William Street, which is somewhere near Police Plaza. I went to law school as a day student. I applied for a state scholarship, which was available for college and graduate school; you had to take an exam for it, which made it very competitive. But I got the scholarship, and I went to school during the day and worked either early evenings or late nights at a children's shelter on Mulberry Street. And I lived at the shelter too—the whole time I was in law school. After graduating in 1958, I got a job at a small firm, which taught me a lot in terms of legal practice skills. But after a year, I decided I was ready to leave and I set out to practice for myself.

Initially, I went to the American Civil Liberties Union (ACLU) and other non-profit public interest organizations to volunteer my services. There wasn't much in the line of an official movement back then, no real efforts towards integration. And it was a relatively peaceful period of the Cold War Era, also known as the Khrushchev Thaw. When I got discharged from the army, the Korean War was still on, but it officially ended in 1953, so there wasn't even much in the line of anti-war activity. There was some demonstration activity taking place about that time, like atomic energy testing and so forth, and I represented people who had been arrested for protesting. And I really enjoyed doing that kind of work. I felt it was important, and it was very Constitution-related. As I was coming here today, I saw on the front of one of the buildings around the corner our school's motto: "Learn Law, Take Action." That's what I did here at the law school. I learned law, and when I came out, I took action.

When the Freedom Rides were about to depart in '61, there was some popular support, but some of the organizations which you would have expected to support the Rides initially did not, such as the ACLU and the National Association for the Advancement of Colored People, though they did later on. CORE was really the main organization supporting the Movement.

Mr. Lane: Why do you feel that was? Although it did seem that some groups at the time, even those supporting integration, saw the Movement as radical in the sense of moving too fast and instead advocated a more gradual approach.

Justice Rosenberger: Yeah, it was rather surprising, and I think some of the elements were that it was too much too soon. I'm not sure. But I reached out to CORE and offered to assist.

From the way things worked in Mississippi and how people were arrested, they had trials in local courts that were basically not courts of record, which means no oral proceedings were recorded, and parties usually appeared without counsel. So the avenue of appeal was to post bond, and upon posting bond, a jury trial in a court of record was scheduled; and that's where I came in.

The first of those trials in Jackson, Mississippi was in August of 1961 and that was tried by two out-of-state lawyers who were white and a Jackson, Mississippi lawyer who was black. The two out-of-state lawyers were Carl Rachlin, who was the

general counsel of CORE, and William Kunstler, who later became quite prominent and taught here at New York Law School.

Those two men tried the first jury trial. I arrived in Jackson in early August and had two trials a day, one in the morning and one in the afternoon. So there was an awful lot of *voir dire*. But I tried those, which made me the third out-of-state lawyer for the jury trials. I was followed by another out-of-state lawyer from Macon, Georgia. At that point, the judge said he wasn't going to let any more out-of-state lawyers come in. I believe the judge thought that exercising his discretion and allowing more out-of-state lawyers to intervene would have aided the Freedom Riders—and he surely did not want to do that. He was quite hostile to the whole Movement. He was committed to segregation, and he wasn't going to do anything to help the people who were trying to undo it.

After a few weeks of trying those cases, I came back to New York. In the interim, on one or two of the weekends, I went over to New Orleans to consult with some of the lawyers about the trials that would be coming there because the Movement was quite widespread and the Freedom Riders were scattered across the South.

Mr. Lane: Do you think, especially during a time like the 1960s, that if judges had been appointed they would have been more favorable to the Movement, or are elected judges always more sympathetic towards the public because they can be held more accountable? Or do you think that the hostility towards the Movement was just so rampant that it would not have mattered anyway?

Justice Rosenberger: Well, from my experience, I think both. I started off in 1972 as an appointed judge. I was appointed to the Criminal Court of the City of New York by Mayor John V. Lindsay. Then, four years later, I was elected to the N.Y. State Supreme Court, and then in 1985 appointed by Governor Mario Cuomo to the Appellate Division, First Department.

But elected judges surely would not have been helpful, because only white people voted. I don't know whether Judge Russel Moore, who presided over the Mississippi jury trials, was elected or appointed. Given that the electorate was all white and supported by a large system that enforced segregation, an elected judge wasn't going to be any more sympathetic than an appointed judge.

Mr. Lane: If I may get off topic for a moment, do you think that even today, in a more modern and progressive society, judges' accountability to the public—whether judges are elected or appointed—still plays a significant role in the decisionmaking process of judges? The reason I ask is because I'm from Iowa and, in 2009, a unanimous state supreme court upheld a decision legalizing same-sex marriage.³⁵ When their reelection came up in 2010, three of the six judges lost their seats as a result of that ruling and the manner in which they interpreted the state constitution.³⁶ Should this type of situation counsel for or against the democratic election of judges?

35. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

36. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG. (Nov. 3, 2010), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

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Justice Rosenberger: Judges have been unseated for unpopular decisions in the past. Decisions on abortion rights and other gender equality decisions have had the same effect before the issue of same-sex marriage reached the courts. Judges have been ousted in retention elections even in jurisdictions that have appointed judges.

Long after I finished law school here, I went back to do my LL.M at the University of Virginia School of Law. One of my LL.M classmates was a justice of the supreme court in Idaho. She lost her post as an appointed justice of the state supreme court in a retention election because of an unpopular equal rights decision. Whether they're initially appointed or elected, so long as there are retention elections, judges are still vulnerable.

Mr. Lane: Going back to the Freedom Riders, how does it feel to have taken part in that historical development? Aside from your relationship with CORE, what compelled you to actually leave New York to defend the Freedom Riders?

Justice Rosenberger: How does it feel now? It feels pretty good. I was there for probably ten court days, I think, maybe a few more. Somewhere between two and three weeks. And I did it because I thought it was the right thing to do, and important. I'm glad I did it. But at the time, it didn't feel that good because all of my clients were convicted—although they were later vindicated. It was a little strange down there. I stayed at a motel in Jackson, which probably isn't there anymore. This motel would have me, but a lot of places wouldn't. And it was very strange when they were serving breakfast in a coffee shop and the waitress said, "I'll talk to you. I don't care." It made me realize that some people may have experienced repercussions simply for talking to me. But although some of the Riders had been assaulted and so forth, and they surely were not treated well in the jails and prisons, I felt that as a lawyer down there, there was no actual danger. Any incident which caused any real danger to a visiting lawyer was probably going to bring more trouble than it was worth, as far as Southern segregationists were concerned.

Mr. Lane: Given that hundreds of Freedom Riders were arrested, charged, and detained, how important was it to bail them out? Many of the local bail bondsmen wouldn't likely cooperate, which meant that many of the Riders spent the summer in jail. Do you think that deterred others from joining the Movement?

Justice Rosenberger: You see, that's not really why they stayed in jail as long as they did. They could stay for thirty-nine days and still preserve their rights because they had to post bail within forty days in order to get a new trial. So CORE, as a policy matter, thought it would put greater pressure on the state of Mississippi to have all their jails full in order to use up the state's resources as much as possible. So that was more of a policy decision. It wasn't from being unable to get bail. Although bondsmen probably weren't too eager to cooperate, at the same time it was their business. By and large, folks did stay in for thirty-nine days and posted bail on the last day.

Mr. Lane: At the time, the Movement was condemned in some circles for being radical and uncompromising. How do you feel about that? Was there a more reasonable approach the Freedom Riders could have taken?

Justice Rosenberger: No, I believe they did the right thing. If they hadn't done it, there would probably still be segregated facilities in the South. And as far as litigation goes, the avenue for litigation was the arrests. That's how you got there. People got arrested and that started the case. There wouldn't have been another avenue.

Mr. Lane: In 1961, the country was fairly polarized. There were very different attitudes in the North versus the South, and some of that schism unfortunately remains today. How did people in the North, specifically in New York, react to the Movement? What was your experience in New York before and after spending those three weeks down in Mississippi? And what did your colleagues, friends, and family say?

Justice Rosenberger: Well, my family was completely supportive. They understood. They were born in Germany, same as I was, and had lived the experience. Some people I knew thought it was probably a little too much but, by and large, my friends were supportive. The general attitude was mixed, however. It was not universally supported in the North, which had segregated facilities as well. Although it was not as widespread, there were plenty of all-white things going on. Levittown is one example. There were two towns, one outside New York City in Nassau County and one outside of Philadelphia, which were post-World War II single-family housing developments. Those were all-white. Stuyvesant Town and Peter Cooper Village in Manhattan were also all-white. So it was hardly an exclusively Southern phenomenon.

Mr. Lane: You've said before that the law, and by extension lawyers and judges, are supposed to secure people's rights. But given the nature of the Freedom Riders movement, would you agree that in order to secure their rights, people must sometimes resort to non-legal means, or even illegal means?

Justice Rosenberger: Yes, I would. I think many legitimate activities, which are perhaps illegal at the beginning, gain legal recognition at the end. The activity doesn't change, but what changes is the way in which the law views it; the fact that the law may be initially disapproving doesn't mean that it continues to be unlawful.

Mr. Lane: In 1946, the U.S. Supreme Court ruled in *Morgan v. Virginia*³⁷ that segregation in interstate bus travel was unconstitutional. Although the Freedom Riders were arrested for violating segregation ordinances by riding interstate buses, they were in a sense actually doing what the law allowed them to do. Do you agree?

Justice Rosenberger: That's right. The Freedom Riders were arrested when they got off the bus because they would get off the bus and walk into a segregated facility.

37. 328 U.S. 373 (1946).

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Once inside, they would be directed by the police to leave. When they refused, they would then be arrested for disorderly conduct.³⁸

Mr. Lane: The *Morgan* decision was issued eight years before *Brown v. Board of Education*³⁹ was decided. Why do you think that there were so many years between those two decisions?

Justice Rosenberger: The *Brown* decision essentially established on the record that segregation deprived black children not merely of equal facilities but of equal education. The case came up on a superbly prepared record which took years of groundwork. I think World War II also played a role because although the armed forces were still officially segregated, black soldiers and sailors had been through quite a lot and weren't prepared to come back and be treated as badly as they were.

Mr. Lane: Following the mob violence in Alabama on Mother's Day, May 14, 1961, and in response to the Greyhound bus firebombing in Anniston and the severe beating of Freedom Riders in Birmingham, Alabama Governor John Patterson stated, "When you go somewhere looking for trouble, you usually find it. You just can't guarantee the safety of a fool, and that's what these folks are, just fools."⁴⁰ Given the amount of violence the Freedom Riders were met with, and how they kept going regardless, do you think Patterson was correct in his characterization? Was it foolish of them to ride segregated buses through the Deep South, knowing that they were going to be met with some sort of resistance—whether or not they actually expected the firebombing and that extent of violence?

Justice Rosenberger: I don't think it was foolish, no. I mean that some violence might occur was predictable; I don't think it was a certainty though. There was definitely a thought that it might happen; so they contemplated it, to be sure. But I don't think that being afraid is a good enough reason to forbear doing what you know is right.

Mr. Lane: In terms of federal oversight, how involved do you think the federal government should be in monitoring the states' compliance with the Constitution, especially in terms of individual rights and civil liberties? And how should the balance be struck between the safeguard of those rights on the one hand, and federalism and state sovereignty principles on the other?

Justice Rosenberger: I think the presumption should be that it's not necessary. But whenever there is behavior that makes it necessary, the federal government should

38. See *Bailey v. Patterson*, 199 F. Supp. 595, 612–13 (S.D. Miss. 1961) (Rives, J., dissenting) (recounting the arresting officer's testimony that the black defendants were arrested solely "[b]ecause their presence provoked people and caused them to become disturbed"), *vacated and remanded*, 369 U.S. 31 (1962).

39. 347 U.S. 483 (1954).

40. STEPHANIE FITZGERALD, *STRUGGLING FOR CIVIL RIGHTS* 20 (illustrated ed., Heinemann-Raintree Library 2005).

not hesitate to come in and take action if the states are unwilling. In the first instance, however, it should be left to the states.

Mr. Lane: The Freedom Riders movement was over a half century ago. How do you feel about the pace of change that has occurred since 1961? Do you think the judicial overtones that you described, and the attitude of government in the South at the time, are a thing of the past?

Justice Rosenberger: Oh, it's come a very long way. In judicial, legislative, and executive branches of government, there is nowhere near the segregation that there was. There is probably still some, but I've seen a fairly well-integrated judiciary for a lot of courts in the South. But while the change is great, I think the pace could have been faster. But looking at where things are compared to where things were, we have certainly come a very long way in what is historically a short time.

Mr. Lane: While in Jackson, Mississippi, what was it like dealing with those Riders you defended? Were you well received by the Riders, both white and black? What was the extent of your interaction with them?

Justice Rosenberger: They were going to trial, so there was obviously a lot of interaction, but it was one at a time. Most were still in jail waiting to post bail, some of them as a strategic matter. I would go to the jails and speak to them, and they generally had a good disposition, even though they lived in awful conditions. I think they viewed being in those conditions as part of their overall situation to bring about change. There were some who did not do well in there, and there were times when I recommended that people be bailed out more quickly because they were obviously not doing well enough, both psychologically and emotionally. At least, that was my impression. Also, they were kept in very crowded, unsanitary, and unventilated detention facilities. But for the most part, they were proud of what they were doing. They knew that they could have come out with me and they were willing to stay in prison. They were undertaking this as part of their effort to achieve an end they felt was worth pursuing.

Mr. Lane: How did your involvement and experience with the Freedom Riders translate to your thirty-two years on the bench?

Justice Rosenberger: Well, I think it made me alert to what I felt was my proper role, which was, as I said earlier, to protect the rights of individuals from the overreaching of the state. My experience with the Riders reinforced it. It was an element in building it.

Mr. Lane: At some point, you became a sentencing judge and you voluntarily spent time in jail. What prompted you to do that?

Justice Rosenberger: Since I was going to accept the responsibility of imposing criminal sentences, I thought I should have some idea of what was involved at the

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other end of the process. So I spoke to someone who was in the criminal justice administration for New York State about going into a correctional facility somewhere in New York. I asked if he could arrange a stay for me in Albany, and he said, “Not in Albany, not anywhere in the state of New York.”

The sheriff of San Francisco was a friend. The role of commissioner of corrections is a responsibility which falls within the sheriff’s duties in California. I spoke to him about it; he thought it was a great idea and that my staying at a corrections facility there would serve both of our purposes. I could get the experience I was looking for, and he could find out what actually happens in the facilities he was responsible for, which he couldn’t really get from talking to the wardens and the officers. He arranged things so my file would reflect that I was delinquent on warrants and created a document, which he put in the file so no one would know about our arrangement. And no one knew—not even the wardens or any of the officers. I first went into the men’s detention at the Hall of Justice in San Francisco, which is sort of akin to the Tombs in New York.

From there, I went to San Bruno, which is somewhat south of the city. I stayed there for a total of three or four days. When I went into the Hall of Justice, I was the last man in the cell, which meant I slept on the floor, and then the next day I was out on the bus down to San Bruno. It was an experience. I don’t think I learned anything about the system that I didn’t really know before, but I did learn some interesting things. I learned how to brew coffee and cook food by making a fire in my cell with contraband, which involves taking a roll of toilet paper and twisting it tightly so that it will stand up on end in the toilet, and then lighting the top of the cone so it burns down to the water. I learned other similar things; but beyond that, it permitted me to experience the phenomena, which I thought was important. Not all of my colleagues agreed with me when I came back. The fact that I thought it was right for me didn’t mean that I thought everybody should do it.

Mr. Lane: Were you officially or formally arrested? Since they didn’t know that you were a judge, how were you treated?

Justice Rosenberger: No, no. I surrendered on a warrant. They viewed me as an unemployed warehouseman, and I wasn’t treated badly. I was forty-one years old at the time, so I was a little older than the average inmate, which also meant that I wasn’t bothered as much. I spent my time doing things like chinning myself on the bars and doing sit-ups and stuff like that. So I was at least capable of taking care of myself, which also made it less likely that I would be bothered. I was in a lot better shape when I was forty-one than I am now at eighty-three.

Mr. Lane: How did that experience affect your disposition and role as a sentencing judge?

Justice Rosenberger: It was illuminating. I felt—and I still feel—that as a judge, if you accept the responsibility of imposing sentence, you can’t avoid the responsibility for what happens afterwards.

Mr. Lane: I want to ask you about the German system. Since you left Germany, the legal system has drastically changed. Our system and the German system are now similar in that many (and often the most precious) civil rights are constitutionally enshrined by the highest court in the land. We have the Supreme Court and Germany has the German Constitutional Court. But as legal scholars point out, one fundamental difference is the constitutional value that is accorded primacy and precedence over all others. In the United States, that value is freedom, whereas in Germany, that value is human dignity.⁴¹ Do you agree with that statement, and if so, how would you describe that difference?

Justice Rosenberger: If you take it down to basics, there's not a big difference between the two—that is, freedom and human dignity. Basically, they go together. You can't have one without the other. Since World War II, the two systems have become similar. There is no way to compare the German judicial system today, and the social structure of a state based on freedom and dignity, with the fascist state of Nazi Germany where all authority resided in one person.

Mr. Lane: Finally, and back to the reason for our interview: the fiftieth anniversary of the March on Washington. You were there and heard the now-famous "I Have a Dream" speech in person. What was your experience and what does it mean to you?

Justice Rosenberger: It's strange, I remember where I was standing that day down there. It was another step out of many that led to that ultimate goal of human dignity. And I was glad to have been there and take that additional step. From my point of view, I would have been on the left of the reflecting pool, as you look up towards the steps of the monument, about one-third of the way back from the Lincoln Memorial. It's strange, there are things that stay with you an awful long time. I know where I was sitting in the courtroom at the Appellate Division on 25th Street on the day I was admitted to practice in June 1958 because it, too, was a day of such significance for me.

Mr. Lane: Other people addressed the crowd that day, but King spoke last. What was it like listening to his Speech?

Justice Rosenberger: It was engaging and moving in a way that transcended the words.

41. See Ariel L. Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 45 ISR. L. REV. 25, 25 (2011). The first five words of the German Constitution, otherwise known as Germany's Basic Law of 1949, declare "Human dignity shall be inviolable." *Id.*