Dr. King's Legal Legacy: A Critical Analysis

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I. Introduction

The civil rights era of the 1940’s, 50’s and 60’s was a period of enormous social change in the United States, with dramatic reforms of U.S. Constitutional law and statutory law. While the transformation of the U.S. Constitution’s equality provision through the overturning of the “separate but equal” doctrine should be credited largely to the work of lawyers (principally Thurgood Marshall). But the statutory changes must be substantially credited to the social movement for civil rights and the advocacy of that movement’s activist ministers, principally the Rev. Dr. Martin Luther King Jr. Dr. King’s leadership, and his willingness to confront the illegitimacy of segregation and discrimination through direct action and nonviolent civil disobedience, led directly to the Civil Rights Acts of 1964, 1965 and 1968. This essay discusses the events that precipitated the passage of these statutes, and then assesses their success some forty years later. I conclude that while the movement toward racial equality in the United States has progressed, it has moved slowly, and much remains to be done.

II. King’s Approach to Law Reform

In the 1940’s and much of the 1950’s, the strategy of the civil rights leadership focused on law reform. The most important civil rights organization at that time was the National Association for the Advancement of Colored People (NAACP), and its most celebrated victories were legal victories won by its Legal Defense Fund (LDF). Thurgood Marshall, the LDF chief counsel, had designed the litigation strategy that led to the Supreme Court’s holding in Brown v. Board of Education that racial segregation in public education was unconstitutional. The NAACP was committed to implementing the Brown decision and to filing lawsuits challenging Jim Crow laws and practices throughout the South (and, less frequently, in the North and West).

But a parallel movement began taking shape among black Americans in the mid-1950’s, led by social activists, many of them ministers, not lawyers. That movement rejected the strategy of law reform litigation in favor of confronting the moral wrong of segregation, discrimination and racial inequality through direct action, often in the form of non-violent civil disobedience. In 1955, the Rev. Dr. Martin Luther King Jr. became the leading voice in support of direct action tactics, and the nature of the civil rights movement began to change.17

17 Mayer, VPP-Rundbrief Nr. 2, 2007, S. 64, 70 f.
18 Wehr, GRUR Int. 1973, S. 131, 132.

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* Professor of Law and Associate Dean for Faculty Development, Golden Gate University School of Law. This essay is based on a series of lectures sponsored by the DAJV which I presented in February 2007 in Freiburg, Tubingen, and Heidelberg. I am grateful to all of my hosts for the warm welcome I received, and to my friend and colleague Winfried Brugger for arranging the visit. The essay borrows substantially from other work I have published. In particular, I rely on The Story of Green v. McDonnell Douglas, chapter 1 in J. Friedman, Ed., Employment Discrimination Stories (Foundation Press 2006); McDonnell Douglas v. Green Revised: Why Non-Violent Civil Disobedience Should Be Protected From Employer Retaliation By Title VII, 34 Columbia. Human Rights Law Review 635 (2003); Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964, 29 University of San Francisco Law Review 645 (1995); Martin Luther King, Walker v. City of Birmingham, and the Letter From Birmingham Jail, 26 University of California Davis Law Review 791 (1993), and a forthcoming essay, Why France Needs to Collect Racial Identification Data . . . in a French Way (2007).
On December 1, 1955, a 42 year old seamstress (and committed social activist) named Rosa Parks refused to give up her seat to a white man on a Montgomery, Alabama city bus. Parks was arrested and convicted of violating the segregation laws, which required blacks to sit in the back of the bus, and to yield their seats to whites if the white section was full. Parks' refusal, and her conviction four days later, inspired a mass meeting of Montgomery's black community. Dr. King, a 26 year old minister who had recently arrived in Alabama, was unanimously elected to lead a protest, and under his leadership the community decided to boycott the buses until they were desegregated. The direct action civil rights movement was born.\(^4\)

The Montgomery bus boycott propelled Dr. King to a national stage, and the boycott, along with the sit-in, pray-in, stall-in, read-in, and other forms of direct action non-violent civil disobedience, became the preferred method of protest for civil rights activists. Between 1956 and 1962, Dr. King, still in his twenties, was the leading voice of the civil rights movement. His organization of minister-activists, the Southern Christian Leadership Conference (SCLC), founded in 1957, was the social movement counterpart to the NAACP's law reform movement.\(^3\) (And usually it was NAACP LDF lawyers whom the SCLC ministers turned to when they were arrested and jailed.)

Dr. King toured the country, speaking out for civil rights, and for direct action. In 1957 and 1958, he was in Little Rock to help the nine black children, and their families, who in the face of mobs of violent whites, and under the protection of federal troops, de-segregated Central High School. In 1960 Dr. King embraced and inspired the college students who sat-in at a lunch counter in Greensboro that catalyzed students across the country to begin similar sit-in campaigns. That same year he helped found the Student Non-Violent Coordinating Committee (SNCC) to help organize college students to join and lead the movement. Dr. King was a key leader of the freedom rides of 1961 (organized by CORE), where black (and a few white) civil rights activists from the North tried to de-segregate the interstate buses and bus terminals of the South. But by 1962 many activists saw Dr. King's leadership as waning. He had suffered a series of strategic defeats, most notably in 1961-62 in Albany Georgia, where a direct action campaign to de-segregate the city's schools, parks and busses had collapsed under the weight of dissension among the activist-leaders, on how to respond to injunctions issued against the protests. Dr. King's commitment to non-violence, in the face of white violence directed at the movement, had undermined his reputation among militants. His image had moved from that of a courageous confrontationalist to a compromiser, while groups like SNCC in the South and CORE in the North were increasingly militant.\(^6\)

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\(^3\) Id. at 128-205.

\(^4\) To appreciate what America looked like as the bus boycott began, consider this. On the day it commenced it was reported in Montgomery's leading paper, the morning Advertiser, but it was not the leading race relations story. What was? A story from Georgia about the Governor's decision to prohibit Georgia Tech from playing "in the upcoming Sugar Bowl, because its opponent, the University of Pittsburgh, was discovered to have a lone Negro on the team as a reserve running back, and because Sugar Bowl officials had agreed to allow Pittsburgh fans to be seated on a non-segregated basis." Georgia Tech students rioted in protest, and the Governor backed down. Id. at 134.

\(^5\) Id. at 221-222.

\(^6\) As King's biographer Taylor Branch writes: "Of the handicaps early in the Birmingham crisis, perhaps the most serious was King's image as a reluctant and losing crusader. He had been largely out of the public eye for eight months, since his retreat from Albany. His name had faded. He appeared to be a worthy symbol from the 1950's who had overreached himself trying to operate as a full-fledged political leader." Taylor Branch, Parling the Waters: America in the King Years, supra note 3, at 709.

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III. Dr. King In Birmingham – Direct Action And The 1964 Civil Rights Act

In late 1962 Dr. King was invited to come to Birmingham by local civil rights and church leaders, principally Rev. Fred Shuttlesworth.\(^7\) Rev. Shuttlesworth led the Alabama Christian Movement for Human Rights (ACMHR) (founded in 1956, when the State of Alabama succeeded in banning the NAACP from the State)\(^8\) and served on the board of the SCLC.\(^9\)

Birmingham was widely known as "Bombingham" for its bombings\(^10\) and other violence, including the notorious 1961 Mother's Day beatings of freedom riders\(^11\) and the chain whipping of Rev. Shuttlesworth when he tried to enroll his children at a white school following Brown v. Board of Education.\(^12\) Between 1957 and 1962 there were sixteen to twenty reported bombings directed at black churches and civil rights leaders, including two at Rev. Shuttlesworth's church, one of which destroyed his home.\(^13\)

At Rev. Shuttlesworth's invitation, Dr. King assigned SCLC executive director Rev. Wyatt-Walker and chief aide Rev. Andrew Young to start planning a series of non-violent direct action demonstrations directed at persuading the white business leaders of Birmingham to abandon their support for segregation.\(^14\) Local government was seen as intransigent, with Birmingham's segregation laws the strictest in the nation. But if boycotts, sit-ins and mass arrests in the business district could slow down trade during the busy Easter season, perhaps local business leaders would join with the Black leadership out of economic self-interest.

Rev. Shuttlesworth tried a similar plan with some success the prior summer.\(^15\) A boycott by Black patrons had reduced business substantially, and in response many businesses agreed to remove their "white only" signs from dressing rooms and drinking fountains. But when Public Safety Commissioner Eugene "Bull" Connor threatened to enforce the segregation laws by arresting and prosecuting the white business owners, the signs went back up.\(^16\)

The demonstrations began on Wednesday, April 3, with picketing and sit-ins at downtown department stores.\(^17\) There were marches, sit-ins and arrests each day for the next week, but the numbers participating were below expectations, and Dr. King feared that the campaign was failing. Then, on Holy Thursday, April 11, he was faced with a decision that would change the direction of history.

The prior night, April 10, the Birmingham City Attorney submitted an ex-parte application for an injunction forbidding Dr. King and over one hundred other activists from all public demonstrations. A temporary injunction was immediately issued, and served on Dr. King on Thursday morning.\(^18\) Until then, those arrested were merely charged with violating the segregation laws or with parading without a permit. But now they would be charged with contempt of court for violating a court order.
In a decision that Andrew Young later pointed to as the "beginning of [Dr. King's] true leadership," Dr. King decided to demonstrate despite the order. The following afternoon, Good Friday, he led a march of fifty-two demonstrators from the Sixteenth Street Baptist Church (where four girls would be murdered in a bombing a few months later) toward City Hall. Within a few blocks, they were stopped and arrested for marching in violation of the injunction. Dr. King was handcuffed, dragged to a paddy wagon, and delivered to the Birmingham jail, where he would spend Easter weekend in solitary confinement.


Bull Connor responded in the Southern segregationist tradition, meeting non-violence with violence. With no room in the jail, he attacked the young marchers with police dogs and high intensity fire hoses. In Birmingham, the attacks were popular with local whites; they gathered to cheer as the police turned the water cannons on the demonstrators. But outside the South, the media depictions of the attacks on the children had a dramatic effect on white public opinion. A few days earlier, Time magazine and the New York Times were criticizing Dr. King as an unwelcome outsider in Birmingham; now they were editorializing against the police violence.

Under pressure from the President and the Justice Department, the white business leaders agreed to negotiate with the civil rights leaders. On May 10 a settlement was reached. The fitting of Dr. King's true leadership, meeting non-violence with non-violence, this time in Selma

Bull Connor volunteered to be trained in non-violence and skip school to demonstrate despite the injunction. Dr. King was handcuffed, dragged to a paddy wagon, and delivered to the Birmingham jail, where he would spend Easter weekend in solitary confinement. He used his time there to write what is now widely regarded as the most important essay of the civil rights movement, and one of the most influential statements of principal ever published — the Letter From Birmingham Jail.

The Birmingham campaign, re-vitalized by Dr. King's courage on Good Friday, was recast as a children's campaign. Thousands of Birmingham's Black teenagers (and a few pre-teens) volunteered to be trained in non-violence and skip school to demonstrate, facing expulsion from school as well as jail sentences. On May 2, 1963 well over a thousand young people marched, with nearly a thousand arrested. In a single day the jails were full, and thousands more students were ready to march and go to jail.

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Under pressure from the President and the Justice Department, the white business leaders agreed to negotiate with the civil rights leaders. On May 10 a settlement was reached. The fitting of Dr. King's true leadership, meeting non-violence with non-violence, this time in Selma. As in Birmingham, Dr. King was invited to Selma by local civil rights organizers; they had been trying to register black voters there for years, only to be met by local white officials with intransigence, hostility and violence.

IV. Dr. King in Selma – Direct Action And the 1965 Voting Rights Act

In the wake of the 1964 Act, Dr. King (by now a Nobel laureate) turned his attention to the problem of voting rights. In 1965, direct action and civil disobedience once again led to police violence, this time in Selma Alabama. As in Birmingham, Dr. King was invited to Selma by local civil rights organizers; they had been trying to register black voters there for years, only to be met by local white officials with intransigence, hostility and violence.

Prohibits discrimination on the basis of race, color, religion or national origin in access to public accommodations, including hotels, restaurants, theaters, transportation, stores, and other privately or publicly owned places open to the public.

Prohibits discrimination on the basis of race, color, religion or national origin in public education.

Creates a United States Civil Rights Commission.

Prohibits discrimination on the basis of race, color, religion or national origin in the use of public funds.

Prohibits discrimination on the basis of race, color, religion, sex or national origin in private employment.

32 See Transcript of the President's Address, N.Y. Times, June 12, 1963, at 20.
34 See Transcript of the President's Address, N.Y. Times, June 12, 1963, at 20.
36 Id.
38 For an excellent discussion of the Selma campaign, see Juan Williams, On The Prize: America's Civil Rights Years, 1934-1965 252-287 (1987).
violence. And again as in Birmingham, non-violence was met with violence, stirring the conscience of the nation.

In Alabama, as in much of the South, only a tiny number of eligible black citizens were registered. In a mirror image of Birmingham, King’s eloquent advocacy and direct action non-violent civil disobedience, this time by black school teachers, again led to his arrest for illegally marching. Again the school children of the town rallied in support, marching on the jail where Dr. King was being held. Hundreds of children were arrested, and reports of mistreatment filtered from the jail and were widely reported in the national press. By the end of the week, President Johnson promised to propose a Voting Rights Act.

In the days that followed, police violence in Selma escalated. Outraged by a civil rights demonstrator who compared him to Hitler and his officers to Nazis, the sheriff badly beat the protestor in front of national TV cameras. A demonstration against police violence led to a police riot, with many demonstrators and news reporters beaten, and one young demonstrator shot and killed by the police. Another march was proposed, from Selma to the State capital Montgomery, some fifty miles away.

The march on Montgomery began on Sunday March 7. It proceeded about 6 blocks before the 600 marchers were met by the local police and Alabama State troopers. The police attacked the crowd, injuring many. The story attracted great national interest. ABC television broke away from its regular programing, which just happened to be a broadcast of the film *Judgment at Nuremburg*, to broadcast live the police attacking the demonstrators.

In the week that followed, President Johnson sent the Voting Rights Act to Congress, as demonstrators, black and white, streamed into Selma. Among them was a white Unitarian minister who was attacked and killed, bringing even more attention from the national press. On Sunday March 21 the demonstrators marched again, with King leading them, 4,000 strong with nearly as many federal troops and national guardsmen. By the fifth and final day of the march, the crowd had swelled to 25,000.

Through the spring and summer, Congress debated the proposed bill. When the House and Senate conference committee couldn’t agree on the language of the poll tax ban, the United States Attorney General phoned Dr. King to ask him to endorse a compromise in order to push the bill through committee; King complied, and the Bill was passed in July, and signed by President on August 6, 1965. By the following summer, thousands of black residents of Selma had registered to vote.

VI. A Critical Analysis of the Success of the Civil Rights Acts

The 1964 Civil Rights Act, 1965 Voting Rights Act, and 1968 Fair Housing Act were certainly Dr. King’s legal legacy. In their wake, the United States has less inequality, and greater racial integration, than in the 1960s. Yet a quick look at the Census Bureau’s annual report, the Statistical Abstract of the United States, reveals that much remains to be done. For example:

- A black family is nearly three times as likely as a white family to earn under $15,000/year (22% - 8%), while a white family is over twice as likely as a black family to earn over $100,000/year (21% - 9%).
- The median family income of a white family is $55,768, while it is just $34,272 for an Hispanic family and $34,369 for a black family.

41 The minister was one of two white civil rights workers murdered during the Selma demonstrator. The other, a white Catholic lay activist from Chicago, was killed by the Ku Klux Klan the day of the demonstration’s triumphant end.

42 See David J. Garow, supra at 435.


44 Id.

45 For an excellent discussion of the Chicago campaign, see David J. Garow, Bearing The Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference (1986) at chapters 8-9.


47 Id. at table 679.
• The median family net worth of a white, non-Hispanic family is $121,000, while the median family net worth of a non-white or Hispanic family is $17,000.48

• Blacks are 12% of the workforce, but only 6% of the college professors or physicians, 5% of the lawyers, and 3% of the architects and pharmacists. However, they are 22% of the home care aids, 28% of the security guards, and 30% of the postal clerks and refuse collectors.50

• While 58% of US public school students are white, with 17% black and 19% Latino, on average, white students attend schools that are 78% white, while black and Latino students attend schools that are only 29% white. By contrast, 73% of black students attend schools that are over 50% non-white, with 38% attending schools that are over 90% non-white.51

• Majority minority schools have the worst facilities (buildings, labs, libraries, athletic facilities), the least qualified teachers, the worst overcrowding, and the least financial support.52

U.S. social scientists collect substantial data that further illustrates the impact of race in American life. The most common methodology is “audit studies” in which teams of white and black auditors pose as job-seekers (or home-seekers, car buyers, etc.). By comparing the treatment of the auditors, the examiner can determine whether discrimination is occurring. Such studies can be directed at a community or industry, or at a single employer or seller. Other studies rely on direct observation, in which race (or whatever feature is being examined) is recorded based on the visual observations of the examiner. Other studies, while less precise, may rely on neighborhood, measuring whether a difference in treatment can be detected between residents of minority neighborhoods and residents of majority neighborhoods. For example:

• In one audit study conducted in Wisconsin, employers given a choice between two job candidates, one a black high school graduate, the other a white high school drop out who had spent the past year in jail, preferred the white candidate.53

• In another audit study, when resumes are equal except for the name, employers strongly preferred candidates named Kristen (a common name for whites) over those named Tamika (a common name for blacks).54

• In a third audit testing employer hiring practices in Chicago and Washington D.C., the researchers found that when equally qualified job applicants apply for identical entry level jobs the white applicants were two to three times as likely to be offered the job as the black applicant. When both were offered a job, the white applicant was frequently offered a higher starting salary; the black applicant was never offered a higher salary than the white.55

• An audit study of hiring practices in California revealed that temporary employment agencies preferred white workers over equally qualified black workers by a 2-1 ratio in San Francisco and a 4-1 ratio in Los Angeles.56

• Two observational studies of police practices focused on stops of non-white drivers (the “driving while black” phenomenon). The studies revealed that in New Jersey, blacks were 15% of the speeders, but 46% of the drivers pulled over for speeding. In Maryland, whites were 78% of the drivers, but only 23% of those pulled over.57

• An audit study reported in the Harvard Law Review revealed that automobile dealers in Illinois charge black customers substantially more than white customers.58

• Other observational studies of automobile dealers examined the interest rate charged to buyers of new cars who finance their purchase (as most U.S. buyers do). They revealed that dealers charge higher interest rates to black buyers.59

• In a comprehensive national study of racial discrimination in housing, blacks were discriminated against 22% of the time (higher rent, false claim of unavailability, etc.) in rentals, and 17% of the time in sales.

• Over 70% of urban & suburban African Americans live in neighborhoods that are racially isolated from whites.

• Observational studies looking at black home buyers found that they were more likely to be steered to “sub-prime” loans, with higher interest rates, as compared to white home buyers with identical credit ratings.60

These data play a critical role in revealing the depth and breadth of racial inequality in the United States. They help illustrate the truth of the otherwise controversial proposition that racial discrimination remains a serious problem over forty years after the 1964, 1965 and 1968 Civil Rights Acts.

In conclusion, it is apparent that Dr. King’s legal legacy is mixed. His forceful and eloquent advocacy, and his martyrdom, led to remarkable changes in American law and society. But much remains to be done.

58 Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harvard Law Review 817 (1991) (white men offered cars at $818 over dealer cost while black men asked for $1,534 over dealer cost and black women asked for $2,169 over dealer cost; Ayers estimates that blacks pay an extra $150,000,000 annually for new cars because of race-based price discrimination.)
61 Despite these data, many Americans believe that racial discrimination and inequality have been largely eliminated from American life. For a book supporting that view, see Stephen and Abigail Thernstrom, America in Black and White: One Nation, Indivisible (1997).