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Frage der Gerichtszuständigkeit und lasse im Übrigen mehr Fragen offen, als es beantworte.¹⁷

Letztlich bleibt abzuwarten, wie weitreichend die Wirkungen von *MedImmune Inc. v. Genentech Inc.* sein werden. Jedenfalls zeigt sich an diesem Urteil, dass die schon der *Lear vs. Adkins*-Entscheidung zugrundeliegende Brisanz des Verhältnisses zwischen Patentinhaber und Lizenznehmer nach wie vor aktuell ist und wohl auch in Zukunft bleiben wird.

4. Wirkung der Nichtigkeitsklärung

Hinsichtlich der Rechtskraft eines Nichtigkeitsurteils ist im Unterschied zu Deutschland zu berücksichtigen, dass ein Nichtigkeitsurteil Rechtskraft grundsätzlich nur zwischen den beteiligten Parteien und deren Rechtsnachfolgern entfaltet. Dies hatte zur Folge, dass ein Patentinhaber trotz der Nichtigkeitsklärung seines Patents in einem Verfahren die Verletzung desselben Patents gegenüber einem anderen Beklagten nach wie vor hätte geltend machen können¹⁸. Im Zuge der Entscheidung des Supreme Court *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*¹⁹ aus dem Jahre 1971 darf, wenn das Patent bereits von einem Bundesgericht für nichtig erklärt worden ist, in einem späteren Verfahren,

17 Mayer, VPP-Rundbrief Nr. 2, 2007, S. 64, 70 f.

18 Wehr, GRUR Int. 1973, S. 131, 132.

19 *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 US 313 (1971).

David B. Oppenheimer*

Dr. King’s Legal Legacy: A Critical Analysis

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

* 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, Tübingen, 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 Revisited: 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).

in dem dieses Patent geltend gemacht wird, der Einwand der entgegenstehenden Entscheidung erhoben werden.

IV. Zusammenfassung

Die Möglichkeiten, die mutmaßlichen Verletzern und Dritten offenstehen, die Nichtigkeitsklärung eines Patents gerichtlich durchzusetzen, sind in den USA und in Deutschland sehr unterschiedlich ausgestaltet. In den USA steht die Frage, inwiefern und unter welchen Bedingungen Patentlizenznehmer die fehlende Schutzfähigkeit eines Patents gerichtlich geltend machen können, im Fokus. Dagegen gilt in Deutschland der Grundsatz, dass jedermann die Nichtigkeit eines Patents begehren kann und nur im Falle von konkret vereinbarten Nichtangriffsabreden, so sie denn wirksam geschlossen worden sind, eine Nichtigkeitsklage unzulässig ist. Nichtsdestotrotz werden in beiden Ländern in der Praxis Nichtigkeitsklagen jedoch vor allem durch Wettbewerber des Patentinhabers eingereicht, so dass sich die prozessualen Hürden, die in den USA gelten, in der Praxis nivellieren. Eine prozessuale Erleichterung besteht in den USA verglichen mit der deutschen Rechtslage insofern, als mutmaßliche Patentverletzer die Nichtigkeit eines Patents als Verteidigungseinwand in einem vom Patentinhaber angestrebten Verletzungsverfahren bringen können, während dies in Deutschland ausgeschlossen ist. Die unbefriedigende Situation, die in Deutschland entstehen kann, wenn ein Verletzungsurteil gegen einen Patentverletzer ergeht und anschließend das Patent rückwirkend für nichtig erklärt wird, wird so in den USA von vornherein vermieden.

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. Dr 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*¹ 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.²

1 347 U.S. 483 (1954).

2 On the civil rights movement of the 1950’s and 60’s, and Dr. King’s leadership, See generally, Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (1988).

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 busses until they were desegregated.³ 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.⁵ (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 busses 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

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, *Parting the Waters: America in the King Years*, supra note 3, at 709.

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 bombings¹⁰ and other violence, including the notorious 1961 Mother’s Day beatings of freedom riders¹¹ 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.

⁷ See Martin Luther King, Jr., Letter From Birmingham Jail (1963).

⁸ See NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964).

⁹ Branch, supra note 3, at 690.

¹⁰ Juan Williams, *Eyes On The Prize: America’s Civil Rights Years, 1954-1965* 179 (1987).

¹¹ See Robert Weisbrot, *Freedom Bound: A History of America’s Civil Rights Movement* 55-63 (1990).

¹² Williams, supra note 10, at 181.

¹³ Michal R. Belknap, *Federal Law and Southern Order* 99 (1987).

¹⁴ Branch, supra note 3, at 688-89

¹⁵ Id. at 643.

¹⁶ Martin Luther King, Jr., *Why We Can’t Wait* 53 (1963).

¹⁷ Branch, supra note 3, at 708-09.

¹⁸ King/Walker, supra note 1, at 805-806.

In a decision that Andrew Young later pointed to as the “beginning of [Dr. King’s] true leadership,”¹⁹ Dr. King decided to demonstrate despite the order.²⁰ 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)²¹ toward City Hall.²² 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 in an unlighted cell. 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*.²³

The Birmingham campaign, re-vitalized by Dr. King’s courage on Good Friday, was recast as a children’s campaign.²⁴ 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.²⁵

Bull Connor responded in the Southern segregationist tradition, meeting non-violence with violence.²⁶ With no room in the jails, 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.²⁷ But outside the South, the media depictions of the attacks on the children had a dramatic effect on white public opinion.²⁸ 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.²⁹

Under pressure from the President and the Justice Department, the white business leaders agreed to negotiate with the civil rights leaders.³⁰ On May 10 a settlement was reached. The fitting rooms in the stores would be de-segregated immediately. Public rest rooms and drinking fountains would follow within 30 days, with lunch counters in another 30 days. Department stores would start hiring Black sales clerks. A bi-racial committee would be formed to discuss de-segregating the parks and schools, and hiring Black city employees. Money would be raised so that the 2,000 demonstrators still in jail could be released.³¹

On May 21, President Kennedy asked the Justice Department to begin drafting a civil rights law.³² On June 11, as Governor

George Wallace stood in the doorway at the University of Alabama to prevent black students from registering (and then stepped aside)³³ the President announced to the nation that he would support a civil rights act, citing the events in Birmingham as a demonstration that the time had come for such legislation.³⁴ The following day, Medger Evers, the head of the NAACP in Mississippi was assassinated.³⁵ On June 19, as Medger Evers was buried in Arlington National Cemetery, the President fulfilled his pledge, introducing the bill that would, after his death, become the 1964 Civil Rights Act. President Kennedy saw and described the Civil Rights Act as a second Emancipation Proclamation.³⁶

The following day, June 20th, Congressman Emanuel Celler (D. NY), chair of the House Judiciary Committee, introduced the President’s bill, H.R. 7152.³⁷ That August, Dr. King stood on the steps of the Lincoln Memorial and gave his most famous speech, the “I Have A Dream” address, demanding passage of the bill. In the wake of President Kennedy’s assassination, the civil rights bill passed the House and (following a long filibuster by Senate Democrats) passed in the Senate on June 19, 1964, one year to the day from President Kennedy’s sending the administration bill to Congress.³⁸ It was signed into law by President Johnson on July 3, 1964.

The 1964 Civil Rights Act:³⁹

- 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 [Title II].
- Prohibits discrimination on the basis of race, color, religion or national origin in public education [Titles III, IV].
- Creates a United States Civil Rights Commission, [Title V], an Equal Employment Opportunity Commission [Title VII], and a Community Relations Service [Title X].
- Prohibits discrimination on the basis of race, color, religion or national origin in the use of public funds [Title VI].
- Prohibits discrimination on the basis of race, color, religion, sex or national origin in private employment [Title VII].

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.⁴⁰ 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

19 Voices of Freedom: An Oral History of the Civil Rights Movement 130 (Henry Hampton and Steve Fair eds., 1990).

20 Branch, supra note 3, at 728-30.

21 Id. at 890-91.

22 Petition for writ of certiorari, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) at 5-6.

23 For a copy of the Letter From Birmingham Jail see <http://www.theking-center.org/prog/non/Letter.pdf> (last visited August 6, 2007).

24 King/Walker, supra note 1, at 818; Branch, supra note 3, at 750-54.

25 King/Walker, supra note 1, at 818-19; Branch, supra note 3, at 758.

26 Branch, supra note 3, at 759.

27 City Firemen Again Hose Down Rock-Throwing Demonstrators, *Birmingham News*, May 4, 1963, at 2.

28 King/Walker, supra note 1, at 820-821.

29 Compare Poorly Timed Protest, *Time*, Apr. 1963 at 30-31; Editorial, Racial Peace in Birmingham?, *N.Y. Times*, Apr. 17, 1963, at 40; with Outrage in Alabama, *N.Y. Times*, May 5, 1963, Section 4 at 10E.

30 Branch, supra note 3, at 780-81.

31 David J. Garow, *Bearing The Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference* (1986) at 258-59.

32 Branch, supra note 3, at 807-08.

33 See Claude Sitton, *Alabama Admits Negro Students; Wallace Bows to Federal Force*, *N.Y. Times*, June 12, 1963 (reprinted in *Reporting Civil Rights, Part One* (2003) at 824).

34 See Transcript of the President’s Address, *N.Y. Times*, June 12, 1963, at 20.

35 See Claude Sitton, *N.A.A.C.P. Leader Slain in Jackson; Protests Mount*, *N.Y. Times*, June 13, 1963 (reprinted in *Reporting Civil Rights, Part One* (2003) at 831).

36 See Transcript of the President’s Address, *N.Y. Times*, June 12, 1963, at 20.

37 See Hugh Davis Graham, *The Civil Rights era: Origins and Development of National Policy 1960-1972* (Oxford University Press 1990) at 89, 125.

38 Id.

39 42 United States Code section 2000; public law 88- 352 (1964).

40 For an excellent discussion of the Selma campaign, see Juan Williams, *Eyes On The Prize: America’s Civil Rights Years, 1954-1965* 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 protester 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 programming, which just happened to be a broadcast of the film *Judgment at Nuremberg*, 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.⁴¹ 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;⁴² King complied, and the Bill was passed in July, and signed by the President on August 9, 1965. By the following summer, thousands of black residents of Selma had registered to vote. Black voter registration in the South rose from 1,463,000 in 1960 to 4,302,000 in 1982.⁴³ In Alabama, it rose from 6,600 to 437,000.⁴⁴

V. Dr. King in Chicago – Direct Action and the 1968 Fair Housing Act

Following the passage of the Voting Rights Act, Dr. King decided to take his movement north. In the summer of 1965 he visited New York, Cleveland, Boston and Washington, looking

for the right setting, before deciding on Chicago.⁴⁵ Chicago was famously segregated, with its housing and school lines rigidly black or white, and local officials intransigent in the face of calls for desegregation. Again at the invitation of local activists, King decided to move to Chicago by early 1966 and lead a campaign against segregation and inadequate housing, named a “war on slums.” It emphasized rent strikes, building take-overs, and forcing real estate brokers to open white neighborhoods to black tenants and buyers.

In January of 1966 Dr. King moved to Chicago, renting an (initially) unheated flat in the black ghetto Lawndale. (The owner sent a bevy of workers to fix up the apartment when he realized his new tenant’s identity.) As King rallied Chicagoans to join him in his campaign for decent and integrated housing, President Johnson called for a new civil rights bill, to address housing discrimination and violence against civil rights workers. But through 1966 and 1967, the President couldn’t muster the support to pass the proposed bill.

In the summer of 1966 Dr. King led a series of open housing marches through many of Chicago’s white neighborhoods. White residents responded with rocks, bricks and bottles, hurled as missiles at King and his followers. On one occasion, Dr. King was injured by a brick that struck him on the head. In response to the demonstrations the mayor of Chicago and the local real estate board agreed to support open housing, but the President’s bill remained dead in the water.

In 1967, Dr. King moved on from Chicago, expanding his campaign goals from civil rights for black Americans to a broader anti-war and anti-poverty message. In 1968, his advocacy took him to Memphis, Tennessee, where the sanitation workers (all of whom were black) were on strike. It was in Memphis, on April 4, 1968, that Dr. King was assassinated. In the wake of his murder, President Johnson again sent the Congress an open housing bill. It was passed and signed into law on April 11, just one week after Dr. King’s death, as the Civil Rights Act of 1968 (“Fair Housing Act”). It prohibits discrimination in the sale or rental of housing based on race, color, religion, national origin or sex.

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%).⁴⁶
- 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.⁴⁷

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.

43 1982-83 Statistical Abstract of the United States, table 799.

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.

46 2006 Statistical Abstract of the United States, table 677.

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,⁴⁹ 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” phenomena). 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 proposition⁶¹ 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.

48 Id. at table 702.

49 Id. at table 632.

50 Id. at table 604.

51 Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* (Harvard Civil Rights Project 2006).

52 Id.

53 Pager, Devah, “The Mark of a Criminal Record.” *American Journal of Sociology* 108(5): 937-975 (2003).

54 Alan B. Krueger, *Economic Scene*; Sticks and stones can break bones, but the wrong name can make a job hard to find, *The New York Times*, Dec. 12, 2002.

55 Margery A. Turner et al., *Urban Inst. Report 91-9, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring* (1991) at 41 tbl. 4.4.

56 Jenny Bussey and John Trasvina, *Racial Preferences: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California*, *Discrimination Research Center* (2003).

57 David A. Harris, *The Stories, The Statistics, and The Law: Why “Driving While Black” Matters*, 84 *Minnesota Law Review* 265-326 (1999).

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.)

59 Mark A. Cohen, *Preliminary Report on the Racial Impact of FMCC’s Finance Charge Markup Policy* (2004), http://www.nclc.org/initiatives/cocounseling/FMCC_Cohen.pdf; *Review of Nissan Car Loans Finds that Blacks Pay More* (2001) <http://www.racematters.org/blackspaymore-formissans.htm>

60 Debbie Gruenstein Bocian et al, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, *Center for Responsible Lending* (2006).

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 Stephan and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (1997).