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VINDICATING MARTIN LUTHER KING, JR.: THE ROAD TO A COLOR-BLIND SOCIETY

By
Mary Frances Berry*

As V. P. Franklin has reminded us, African-American intellectuals have consistently tried to vindicate the race from conceptions in the larger society that we are inferior.¹ Martin Luther King, Jr. by example was a “race vindicator,” and he saw the civil rights movement as contradicting arguments that southern blacks were satisfied with their condition. The overwhelming response of the southern black masses to King’s call for mobilization in the civil rights movement showed the falsity of such views. In the spirit of “race vindication,” this essay seeks to absolve King from the charge made by conservative ideologues that he endorsed the “color blind society” thesis.²

Martin Luther King, Jr., as the preeminent leader of the black protest tradition and an American icon, has become the favorite color-blindness cudgel to use against African-Americans in the political and legal arena. White and black conservatives wrap themselves in the mantle of King as they denounce affirmative action, and consign majority black congressional districts to the trash heap. A principal tactic of these enemies of the African-American search for remedies to discrimination is to quote from Martin Luther King’s famous 1963 speech recounting his dream of a nation where his children would “not be judged by the color of their skin, but by the content of their character.” In using this quotation they abuse him, freeze him in time, define him as a one dimensional man, distance him from his other statements and the context of his times. They then argue that by using the color-blindness ideal, we will hasten the day when racial discrimination is ended.

The most important people who undermine the civil rights of African-Americans behind a veil of color-blindness sit on the Supreme Court. Those on the five-end of a series of 5-4 Supreme Court decisions against the interest of African-Americans in the last few years express this view. Justice Sandra Day O’Connor in *Shaw v Reno* in 1993, explaining why a 5-4 majority struck down Congressman Melvin Watt’s North Carolina district as unconstitutional, said: “Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.”³

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The Color-Blind Doctrine from Plessy to King

In the fullness of time we can see what Justice John Marshall Harlan predicted in his 1896 *Plessy v. Ferguson* dissent is accurate. African-Americans are today as effectively held in thrall by Harlan's prescription of a color-blind Constitution as we were with Justice Henry Billings Brown's endorsement of separate but equal in the majority decision in the same case. According to Harlan's formulation, "in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."⁴

However, right before this often quoted color-blind statement, Harlan assured white Americans that nothing he said threatened their power or status. "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for *all* [emphasis added] time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." If white America enforced the principle of color-blindness, it need not fear African-American progress, equality, or power.⁵

Between Harlan's dissent and the day Martin Luther King made his speech at the March on Washington, in a time of stark legal and de facto segregation, color-blindness seemed a legal refuge for blacks. African-Americans praised Harlan and wept when he died because color-blindness seemed most likely to lead to the promised land. They felt much as I did the day *Brown v. Board of Education* was decided, when I told my high school teacher Minerva Hawkins "everyone will go to school together and everything will be fine." She, of course, was more prescient when she said "not so fast Mary Frances, not so fast."⁶

Martin Luther King, Jr., like Justice Harlan, followed in the path of the Frederick Douglass wing of the anti-slavery movement, which sought equality under the Constitution through arguing the color-blind principle from the earliest abolitionist days. Because it fit their agenda of political equality as a route to economic and social equality, the color-blind constitution was their main weapon; and Albion Tourgee, Homer Plessy's lawyer, argued the same in attempting unsuccessfully to win the case.

After the National Association for the Advancement of Colored People (NAACP) was founded, civil rights lawyers, including Charles Hamilton Houston, Thurgood Marshall, and others, used Harlan's opinion to assail segregation. They advanced constitutional color-blindness because they were seeking remedies for separate and unequal. Soon after *Brown*, the limitations emphasized by Harlan in the argument for color-blindness became clear. The civil rights revolution did not do the job. Equal opportunity for many African-Americans remained out of reach. The window of opportunity briefly opened by the civil rights movement and the color-blind principle was slammed shut. Many schools remained segregated and unequal, and employment and business opportunities remained limited.

Civil rights lawyers began to see what Harlan had predicted about the practical weakness of color-blindness as a remedy. They began to differentiate between arguments against racial discrimination, and those in favor of affirmative action remedies, which might take "race" into account. Title VII of the Civil Rights Act of 1964 responds to this distinction. Civil rights advocates insisted that while color-blindness was a goal, remedies for discrimination could use race to get beyond the effects of racism against African-Americans; or for that matter use sex to get beyond sex discrimination against women.

When civil rights proponents began arguing remedies beyond "neutrality," they were denounced by those who did not mind desegregating lunch counters, but not the best jobs and educational opportunities in the society as a whole. African-Americans were accused of inconsistency and of violating the promise of *Brown* and Harlan's color-blind pronouncement.

Civil rights advocates, who were trying to erase discrimination fomented by ignoring African-American distinctness, were told that focusing on group discrimination violates "American individualism." Arguments about undermining merit were made by persons who had rarely themselves been required to meet a merit standard. African-American attempts to desegregate schools were confronted by white flight and complaints that the problem was not desegregation, but busing, oftentimes by people who sent their children to school everyday on buses, including mediocre white private academies established to avoid integration. This opposition and the insistence on over-busing African-American children killed most attempts to desegregate the public schools.

Martin Luther King, Jr.: For the Record

Since 1965 color-blind jurisprudence has been increasingly a stalking horse for black exclusion. It has been protective coloration for continued racism and denial of opportunity to poor and middle class African-Americans. Essentially, Harlan's prediction about the limitations of the color-blind approach in overcoming white supremacy and ending the perpetuation of discrimination has been realized.

In truth civil rights lawyers are not defying the legacy of Martin Luther King when they advance race-conscious remedies while maintaining the goal of non-discrimination or color-blindness in the law. To be sure in 1963, Martin Luther King told the world of his dream—a nation where his children would "be judged by the content of their character." However, King knew that not judging by skin color was a goal and was not the entire route to African-American progress. That is why he also spoke of affirmative action and reparations and structural economic changes to relieve poverty and disadvantage. He was not an either or thinker, and neither are civil rights lawyers and African-Americans in general. Remedies are tailored to specific problems. African-Americans know what many historians have written, that the Constitution was made by a group of white men to benefit them, and the task since 1788 has been, through amendment and attempts at enforcement, to make it apply to those who have been excluded.

Martin Luther King's position on what we call "affirmative action" was consistent with the view of civil rights proponents today. He did not use the words "affirmative action," but his words make it clear that he cannot be understood as having rejected the principle. Thus King wrote in *Why We Can't Wait*, published in July 1964, a year after the March on Washington, the color-blind pronouncement was only one goal.

It is impossible to create a formula for the future which does not take into account that our society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special for him now, in order to balance the equation and equip him to compete on an equal basis?⁷

King also observed that "whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask for nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner."⁸

King continued; "America must seek its own way of atoning for the injustices she has inflicted upon her Negro citizens. I do not suggest atonement for atonement's sake or because there is a need for self-punishment. I suggest atonement as the moral and practical way to bring the Negro's standards up to a realistic level." No one can read *Why We Can't Wait* and honestly say King's 1963 March on Washington speech opposed what we call affirmative action. Indeed, it is difficult to say that King would oppose what conservatives today call "preferential treatment."⁹

It is also clear from reading *Why We Can't Wait* that King believed in anti-poverty programs and "affirmative action in employment" for African-Americans. He also supported affirmative action and anti-poverty programs for the white poor. "The moral justification for special measures for Negroes" he said, "is rooted in slavery." Many poor whites were the derivative victims of slavery, even if discrimination against African-Americans "has confused so many by prejudice that they have supported their own oppressors." King understood the nexus between racial discrimination and economic exploitation and promoted the hope for coalition movements between blacks and whites.¹⁰

King described the package of social and economic benefits given to World War II veterans, including housing loans, medical care, and subsidized education; and pointed out that veterans "received special points to place them ahead in competition for civil service jobs." King proposed a "Bill of Rights for the Disadvantaged" patterned after these veteran's benefits.¹¹ King regarded these programs as compensation, especially for African-Americans. He declared that:

[N]o amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America down through the centuries. Not all the wealth of this affluent society could meet the bill. Yet a price can be placed on unpaid wages. The ancient common law has always provided a remedy for the appropriation of the labor of one human being by another. This law should be made to apply to American Negroes. The payment should be in the form of a massive program of special, compensatory measures which could be regarded as a settlement in accordance with the accepted practice of common law. Such measures would certainly be less expensive than any computation based on two centuries of unpaid wages and accumulated interest.¹²

Martin Luther King and the civil rights movement he symbolizes were not revolutionaries. His and the movement's views of the Constitution and law were in the tradition of abolitionists, such as Frederick Douglass, in contrast with William Lloyd Garrison and Wendell Phillips, who agreed with Chief Justice Roger B. Taney, that the Constitution permitted slavery. Thus Garrison and Phillips viewed the document as a "covenant with hell." The civil rights movement and Martin Luther King, however, followed the line of Frederick Douglass and sought to define the Constitution as "anti-slavery." Douglass and later the leaders of the modern civil rights movement defined their goals within the traditional American ethos because they wished to articulate a reform impetus that could be widely shared.¹³

Frederick Douglass said the Constitution ought to be interpreted to abolish slavery; that slavery was inconsistent with American ideals. He and other radical abolitionists created an entire line of argument to support their claims, relying on natural law, the preamble to the Constitution, and the Declaration of Independence, none of which had the force of law. They, of course, lost the ideological debate, and ultimately the Constitution had to be amended to abolish slavery. The civil rights movement similarly relied on such a tradition emphasizing Americans' own stated ideals. Often, participants in the movement attempted to identify with those ideals and to insist that the nation should live up to them. It was also a distinctly American movement, making appeals to traditional American culture and values.¹⁴

Malcolm X, Louis Farrakhan, and other black nationalists follow in the footsteps of Martin Delany, Henry McNeal Turner as well as Phillips and Garrison in denouncing the Constitution, while Martin Luther King, Jr. affirmed it. Interestingly, Supreme Court Justice Clarence Thomas partakes of both traditions. He accepts the Constitution-affirming tradition of King as well as the "blacks-do-not-need-whites-to-succeed" rhetoric of Malcolm and Farrakhan, but he ends up opposing King's remedial vision, while living an integrationist lifestyle and finding affirmation from conservatives who seek to impede the realization of both visions. Perhaps it was Thomas' route to the Supreme Court, as opposed to King and Malcolm's being pilloried and assassinated, that explains the obvious differences.

Martin Luther King always framed his ideas and ideals within the American ideological mainstream. In the March on Washington speech he characterized his dream as "deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal." Pursuing the theme of vindication, he thought one day the nation would know "that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream." King unabashedly relied on the Declaration of Independence, calling it an unparalleled document proclaiming "profoundly and eloquently the sacredness of human personality."

The Increasing Significance of Class

The civil rights movement in general and King in particular did not attack class distinctions directly, which would have been inconsistent with the American tradition. He

accepted the work ethic and the idea of helping those who work hard, not those able-bodied, out of work persons who have always been considered "the unworthy poor." His vision was similar to that found in President Franklin D. Roosevelt's 1944 State of the Union address. Roosevelt urged a "second Bill of Rights," including "the right to earn enough to provide adequate food and clothing and recreation," "the right of every family to a decent home," "the right to adequate medical care and the opportunity to achieve and enjoy good health," and "the right to a good education."¹⁵

In 1963 the prominence given Michael Harrington's *The Other America* and John F. Kennedy's campaign emphasis on poverty in West Virginia made discussion of "the worthy poor" particularly salient. Harrington's book, the civil rights movement, and Kennedy's assassination helped to stimulate President Lyndon Johnson's "war on poverty." From the civil rights movement evolved King's emphasis on the poor and the impact of class on individuals' lives, and extended to King's last policy program, the calling of a "Poor People's March" to dramatize the plight of the disadvantaged. King realized that "there are millions of poor people in this country who have very little, or even nothing, to lose. If they can be helped to take action together, they will do so with a freedom and a power that will be a new and unsettling force in our complacent national life." He hoped to bring "the poorest citizens from ten different urban and rural areas to initiate and lead a sustained, massive, direct-action movement in Washington." They would stay in Washington until the legislative and executive branches of the government took serious and adequate action on jobs and incomes. He wanted the "bad check" left over and uncashed from the 1963 March on Washington cashed. He hoped the public would join in supporting a demand for the "right to jobs or income—jobs, income, the demolition of slums, and the rebuilding by the people who live there of new communities in their place; in fact, a new economic deal for the poor."¹⁶

Color-Blind or Color Conscious?

Martin Luther King, Jr. was a minister, and a black church man, and he understood the need for black institutions until racial discrimination ended, and black empowerment had become a reality. He was also an integrationist who believed in the universal brotherhood of man, but he understood the economic realities of African-American life and the need for substantive remedies.¹⁷

Martin Luther King, Jr. knew that whatever the need for provocative or appealing rhetoric, the society has never been color-blind, and the Constitution from the beginning permitted discrimination on the basis of color and sex. The Constitution consciously perpetuated slavery and the subjugation of African-Americans as reflected in its proslavery compromises. It remained a "color-conscious" document, despite the Civil War, emancipation, and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments.

Societal and constitutional color consciousness made race-conscious remedies necessary. The brief submitted by the NAACP Legal Defense and Educational Fund in the 1978 Bakke case describes how color conscious remedies were enacted by the same Congress which wrote the Fourteenth Amendment in 1866. That Congress enacted a

series of social welfare laws expressly delineating the racial groups entitled to participate in or benefit from each program. It did so over the objection of critics who opposed targeting a single racial group. The most far-reaching of the programs was the 1866 "Freedmen's Bureau Act," enacted less than a month after Congress approved the Fourteenth Amendment.¹⁸

The Fourteenth Amendment appeared to provide legal equality. However, while corporations used it successfully for protection against regulation by state governments, federal and state officials still enforced laws that called for the subordination of African-Americans. Indeed, in the 1896 *Plessy v Ferguson* decision, the Court majority affirmed racial discrimination, which is why Justice Harlan had to dissent in order to insist that the Constitution is color-blind. Not until *Brown v Board of Education* in 1954 did the Court reverse "separate but equal" as a legal doctrine. However, race-conscious discrimination, requiring race-conscious remedies, continued to plague African-Americans in Martin Luther King's time and today.¹⁹

King and others in the civil rights movement were not opposed to affirmative action and they were not opposed to racial classifications. Participants in the civil rights movement were emphatically *not* committed to color-blindness. To conclude otherwise is ahistorical. Despite the evidence in his behavior and writings, not just civil rights opponents, but thoughtful scholars, such as William Julius Wilson, still write in 1996 that King did not "ever endorse racial preferences."²⁰

Martin Luther King, Jr. suffers the fate of every human being — when you are dead you belong to the ages. People can distort your positions and use them for their own purposes. The questions King asked himself were in many ways the same ones we ask today. How do we provide real equal opportunity for African-Americans to overcome the burden of race? How do we assist those disadvantaged by poverty? One of King's answers was affirmative action based on race, another was affirmative action based on poverty. Given the persistence of racism in American society, the answers to these questions for some may include the goal of color-blindness. However, for the victims of racial oppression, specific social, economic, or legislative remedies are required.

NOTES

¹ V. P. Franklin, *Living Our Stories, Telling Our Truths: Autobiography and the Making of the African-American Intellectual Tradition* (New York: Oxford University Press, 1996), p. 15.

² James M. Washington, ed. *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* (New York: Harper and Row, 1986), p. 219.

³ *Shaw v Reno* 509 U.S. 630, (1993), p. 659.

⁴ *Plessy v Ferguson* 163 U.S. 537 (1896).

⁵ *Ibid.*

⁶ Personal Reminiscences; *Brown v Board of Education* 347 U.S. 483 (1954).

⁷ Martin Luther King, Jr. *Why We Can't Wait* (New York: Penguin Books, 1964), p.134.

⁸ *Ibid.*; see Anthony Cook, "Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.," *Harvard Law Review* 103 (1990): 985. Cook argues that King knew that more than color-blindness was required; see also David Garrow, *Bearing The Cross: Martin Luther King, Jr., And The Southern Christian Leadership Conference* (New York: William Morrow, 1986), p. 310.

⁹ King, *Why We Can't Wait*, p. 135.

¹⁰ *Ibid.*, p. 138.

¹¹ *Ibid.*, p. 137

¹² Ibid.

¹³ William Wiecek, *The Sources of AntiSlavery Constitutionalism in America 1760-1848* (Ithaca: Cornell University Press, 1977), pp. 249-75.

¹⁴ Ibid.

¹⁵ Franklin Roosevelt, "Message to the Congress on the State of the Union" (January 11, 1944), reprinted in *13 Public Papers and Addresses of Franklin D. Roosevelt*, Samuel I. Rosenman ed., (New York: Harper and Brothers, 1950), pp. 32, 41; cited in Cass R. Sunstein, "What the Civil Rights Movement Was and Wasn't, With Notes on Martin Luther King, Jr. and Malcolm X," *University of Illinois Law Review* 191 (1995): 193.

¹⁶ Washington, ed., *A Testament of Hope*, pp 217, 651; Michael Harrington, *The Other America: Poverty in the United States*, (New York: Macmillan, 1969); Sunstein, "What the Civil Rights Movement Was," p. 194.

¹⁷ Harold Cruse, *Plural But Equal: A Critical Study Of Blacks And Minorities In America's Plural Society* (New York: W. Morrow, 1987), pp. 238-41, 256-57. For discussion of King's support for black institutions, despite his emphasis on color-blindness and integration; see Kenneth B. Nunn, "Rights Held Hostage: Race, Ideology, and the Peremptory Challenge" *Harvard Civil Rights-Civil Liberties Law Review* 63 (1993): 71-72.

¹⁸ *Bakke v California* 438 U.S. 265 (1978); Eric Schnapper, "The Legislative History of Affirmative Action," *Virginia Law Review*, 71 (1985): 753.

¹⁹ *Brown v Board of Education* 347 U.S. 483 (1954) and *Plessy v Ferguson* 163 U.S. 537 (1896).

²⁰ William Julius Wilson, "Class Consciousness," *New York Times Book Review*, July 14, 1996, sect. 7, p. 11. This is a review of Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action* (New York: A New Republic Book/ Basic Books, 1996). This work invokes King in support of the premise that affirmative action should be based on class alone, and not race.