

The Role of Law in Social Change

The 20th Century was a time of remarkable social progress. Segregation laws were struck down and replaced with civil rights legislation aimed to protect the liberties of all citizens, regardless of their color. Progress was achieved in many forms, but most would agree that the battles are not over. Current battles over affirmative action, immigration issues and racial profiling remind us that while we may have come so far, we still have progress to achieve. One question then, is what role does the law play in furthering social change? This paper examines this question through the views of three historical figures: Thurgood Marshall, Martin Luther King Jr., and Malcolm X. Each fought for social change, and each held distinct views on the role of the law in those struggles. While there may be no definitive answer to these questions, the exploration of the issue may provide guidance for new generations of activists, and new generations of attorneys who wish to ensure that the battle for social progress is never abandoned.

I. Thurgood Marshall: Gradualist Revolutionary

For more than twenty-five years before he joined the judiciary, Thurgood Marshall was probably the most important advocate in America, one who used his formidable legal skills to end the evils of discrimination . . . Of no other lawyer can it so truly be said that *all* Americans owe him an enormous debt of gratitude.

- Justice William Brennan Jr., writing a tribute to Justice Thurgood Marshall, 1991.

Among the three figures explored in this paper, Thurgood Marshall may be the least well known. He led a different life from famous revolutionaries like Malcolm X and Martin Luther King Jr. King and Malcolm X both died young, the victims of assassins.¹ They became martyrs

¹ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY xvii (1998).

to the nation's racial wars.² Thurgood Marshall lived to the age of eighty-four and was no one's martyr.³ He advanced through the system, to eventually hold the highest office possible for a lawyer: a seat on the Supreme Court of the United States.⁴

A. Background

Marshall was born July 2, 1908, in Baltimore, Maryland.⁵ He was named after his paternal grandfather, a former slave who had fought in the Civil War with a black regiment – one of 186,000 blacks to fight in the union army.⁶ Soldiers were required to have first and last names, so he took the name Thoroughgood to comply.⁷ Marshall got tired of the long name and shortened it to “Thurgood” by the time he was in second grade.⁸ At school, Marshall's elementary school principal would punish students by sending them to the school's basement with a copy of the Constitution and orders to memorize a passage before returning to the classroom.⁹ Marshall often got in trouble and by the time he left elementary school, he knew the entire Constitution by heart.¹⁰

Marshall credited his father with steering him to a legal career, not by explicitly telling him to become a lawyer, but by challenging the logic of Marshall's every point.¹¹ Marshall's father made him prove every statement he made, even if they were discussing the weather.¹²

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 30 (1992).

⁶ *Id.* at 31.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 37.

¹⁰ *Id.*

¹¹ *Id.* at 38.

¹² *Id.*

Marshall's father also instilled in him a fiery backbone by telling him "Anyone calls you 'nigger,' you not only got my permission to fight him – you got my orders to fight him."¹³

Marshall attended Lincoln University in Chester, Pennsylvania, the nation's oldest black college.¹⁴ While in school, Marshall participated in his own forms of civil disobedience, taking seats with his black friends in the white orchestra section of a theatre instead of sitting in the section of the theatre reserved for blacks.¹⁵ Marshall desegregated the small town theatre and left the incident unharmed.¹⁶ He later stated that this incident in Oxford, Pennsylvania started his civil rights career.¹⁷ When it came time to choose a law school in 1930, Marshall applied to the University of Maryland's Law School but was turned down because of his race.¹⁸ Marshall then proceeded to attend Howard University Law School, where he studied under his eventual friend and mentor, Charles Hamilton Houston.¹⁹

Upon graduating law school, Marshall opened up his own private practice in Baltimore.²⁰ Finding it difficult to make ends meet, Marshall jumped at the chance when offered an opportunity by his mentor, Houston, to move to New York and work at the NAACP.²¹ Marshall worked at the NAACP for 25 years, before accepting an appointment by the Kennedy administration to become the second black judge on the U.S. Court of Appeals.²² Marshall served on the Second Circuit Court of Appeals for four years before accepting an appointment by President Lyndon Johnson to become the U.S. Solicitor General, the second highest ranking

¹³ *Id.* at 40.

¹⁴ *Id.* at 43.

¹⁵ *Id.* at 44-45.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 48.

²⁰ *Id.* at 70.

²¹ MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 19, 1936-1961 (1994).

²² DAVIS & CLARK, *supra*, note 5, at 234.

lawyer in the Government.²³ President Johnson later elevated Marshall to the Supreme Court, where he served for twenty-four years.²⁴ Marshall was the first black man to ever sit on the high court.²⁵

B. Marshall's Ideology: Law as the Primary Tool for the Social Engineer

Move, but move within the Constitution, and find new ways of moving nonviolently within the Constitution, bearing in mind that there are many of us in this country who are not going to let it go down the drain. We are not going to continue to stand for anarchy, which is anarchy which is anarchy.²⁶

- Thurgood Marshall, at the induction of Dillard University in New Orleans, 1969.

Marshall recognized at an early age that the law could be a powerful force for social change. When Marshall attended Howard University Law School, Charles Hamilton Houston was teaching Howard students to become “social engineers.”²⁷ As social engineers, lawyers had to decide what sort of society they wished to construct, and then use legal rules as tools to realize this vision.²⁸ This also included an appreciation of the social setting in which the law operated.²⁹ Accordingly, lawyers had to be able to explain to lawmakers how the laws operated in society.³⁰ Houston encouraged his students to draw on information from sociologists, historians and other students of social life.³¹ Marshall practiced this art with tremendous skill during his career, often citing social science, stories and even acting out hypothetical scenes in front of judges to illustrate how the law was affecting the average person on the street.³²

²³ *Id.* at 244-45.

²⁴ *Id.* at 3.

²⁵ *Id.* at 277.

²⁶ *Id.* at 289.

²⁷ TUSHNET, *supra*, note 21, at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² DAVIS & CLARK, *supra*, note 5, at 255-56.

Critical to Marshall's belief in the ability of lawyers to be "social engineers" was a conviction in the goodness of the American legal system.³³ He noted that "lawsuits bring home to many people the fact that Negroes have rights as Americans which must be respected."³⁴ Marshall believed that that fate of civil rights for black Americans rested with the judicial, not the legislative, branch of government.³⁵

Marshall recognized that the struggle for social change could not be won overnight, but instead had to be a long gradual journey.³⁶ True social progress could only be attained in steps, so Marshall did not seek to ruffle feathers or capture media attention Malcolm X and MLK. While Malcolm X and MLK were leading protest movements in the streets, Marshall fought within the existing system, in the courthouses. Marshall fittingly labeled himself the "original gradualist."³⁷

As a practicing lawyer, Marshall won many victories for social change. His first major civil rights victory came in 1935 when he won a suit to integrate the University of Maryland's law school, the same school that had rejected Marshall's application for law school because of his race.³⁸ Marshall won victories for black soldiers in Korea, in criminal law and on voting rights.³⁹ For all of his victories as a lawyer, Marshall will always be best known for winning Brown v. Board of Education of Topeka in 1954.⁴⁰ This led the way for complete desegregation in American public education and became the catalyst for Marshall and other civil rights lawyers to dislodge most legalized segregation in America.⁴¹

³³ *Id.* at 180.

³⁴ *Id.*

³⁵ *Id.* at 73.

³⁶ *Id.* at 202.

³⁷ *Id.* at 183.

³⁸ *Id.* at 11.

³⁹ *Id.* at 11-12.

⁴⁰ *Id.*

⁴¹ *Id.*

Through his work as an attorney, Marshall used the law as a tool to push society in the direction that he and many others desired. However, the aftermath of Brown raised serious questions about the power of law to effect social change. After deciding Brown, the Supreme Court encountered massive resistance from Southern States who refused to integrate their schools.⁴² Some of the resistance came in the form of organized governments, with Arkansas passing a state constitutional amendment in 1956 calling upon the legislature to oppose “in every constitutional manner the unconstitutional desegregation decisions of . . . the United States Supreme Court.”⁴³ Resistance to Brown also came in the form of outright vigilantism, with rural areas seeing a resurgence, both of the Ku Klux Klan, and of beatings and lynchings.⁴⁴ The NAACP similarly came under attack when states passed laws to force the organization to make public its membership and contributors’ list, information that could be used to threaten NAACP supporters.⁴⁵ When all was said and done, it took a full 20 years for desegregation to really take hold, which raises serious doubts about the effectiveness of law as a vehicle for social change. Despite these setbacks, Marshall maintained his unending faith in the American legal system.⁴⁶

In the December of 1955, Martin Luther King Jr. led the Montgomery bus boycott, a mass action by fifty thousand black Alabamans that grabbed headlines across the nation.⁴⁷ Rather than embrace this mass protest movement, Marshall lashed out at King.⁴⁸ Marshall refused to advocate for the deliberate breaking of laws that resulted in the arrests of hundreds of young blacks.⁴⁹ Marshall was part of the old guard that had been fighting for social progress for decades, while King was part of the young upstart revolutionaries that preferred civil

⁴² *Id.* at 185.

⁴³ *Id.*

⁴⁴ *Id.* at 185-86.

⁴⁵ *Id.*

⁴⁶ TUSHNET, *supra*, note 21, at 5.

⁴⁷ DAVIS & CLARK, *supra*, note 5, at 200-01.

⁴⁸ *Id.* at 202.

disobedience to legal action.⁵⁰ Marshall declared that “desegregation was men’s work and should not be entrusted to children.”⁵¹ Marshall could not condone the intentional breaking of laws and he disapproved of the “jail without bail” tactic employed by many black students.⁵² Marshall felt that the purpose of the NAACP was to “get people out of jail, not get them in.”⁵³

Marshall’s reluctance to embrace King’s tactics may have stemmed partially from the fact that he had personally seen black communities in Columbia, Tennessee, Harlem, and Detroit torn apart by white mobs, and he was fearful that King’s organized black resistance would lead to similar white backlash.⁵⁴ To Marshall, there appeared to be no substitute for the NAACP’s effort to get the courts to end legal segregation.⁵⁵ Congressman John Lewis, who was involved in King’s movement stated many years later that he believed Marshall criticized King not because he wanted people simply to be patient, but because he believed that protesting was not the right way to achieve change.⁵⁶ Marshall felt that the courts were the best way for achieving social change, and that blacks could push for social change without putting themselves in harm’s way.⁵⁷ Blacks didn’t need to have people spitting on them, pulling them off lunch-counter stools, and putting lighted cigarettes out in their hair.⁵⁸

Despite the fact that Marshall had many disagreements with King, he still agreed to lend some support to King’s movement by saying that the NAACP would defend protest members who were arrested.⁵⁹ In fact, Marshall was one of the first lawyers to rush to King’s defense

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ TUSHNET, *supra*, note 21, at 305.

⁵² DAVIS & CLARK, *supra*, note 5, at 214.

⁵³ *Id.*

⁵⁴ WILLIAMS, *supra*, note 1, at 247.

⁵⁵ *Id.*

⁵⁶ DAVIS & CLARK, *supra*, note 5, at 218.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 202.

when King was arrested on charges of “disturbing the peace and failure to move on.”⁶⁰ When Marshall and the NAACP Legal Defense Fund argued the legality of sit-ins to the Supreme Court in Garner v. Louisiana, it illustrated the welding of Marshall’s gradualism to King’s direct resistance.⁶¹

This is not to say that Marshall did not believe in social movements at all, for he had helped to organize social protests of his own, such as a boycott of neighborhood Baltimore stores that refused to hire blacks.⁶² When the storeowners sued the NAACP in federal court for interfering with their business, Marshall helped to defend the boycotters and the NAACP’s right to protest.⁶³ Marshall recognized that protests could have their place in pushing for social change, but he always felt that the legal system was the best forum in which to push a social agenda.⁶⁴

Many commentators consider Marshall’s Supreme Court career to be overshadowed by his achievements as an attorney.⁶⁵ However, once he became the first African-American to sit on the high court in 1967, Marshall continued to fight for social change as best he could.⁶⁶ Marshall detested the death penalty and sought to have it abolished because he felt that it was excessive punishment disproportionately applied to the poor and minorities.⁶⁷ While on the Warren Court, Marshall combined with other liberal justices to greatly expand the power of federal courts, stressing the rights of individuals, especially the rights of those individuals

⁶⁰ *Id.* at 204.

⁶¹ *Id.* at 219-20.

⁶² *Id.* at 75.

⁶³ *Id.*

⁶⁴ TUSHNET, *supra*, note 21, at 5.

⁶⁵ MARK V. TUSHNET, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES x (2001).

⁶⁶ *Id.* at x-xi.

⁶⁷ DAVIS & CLARK, *supra*, note 5, at 318-19.

accused of crimes.⁶⁸ However, as time went on, Marshall saw many of his liberal colleagues retire only to be replaced by more conservative justices that sought to undo much of what Marshall had helped to accomplish, both as a justice and as an attorney.⁶⁹ Marshall knew that whatever progress had been achieved through the law, could also be undone by changing the law.⁷⁰ Marshall feared that the Court's conservative trend would reverse many of the civil rights gains made during the 1950's and 1960's in the same way that the conservative retrenchment of the 1870's – 1890's had undone much of what Reconstruction had accomplished.⁷¹ Marshall stayed on the court for twenty-four terms, growing bitter towards the end that the Court was using power instead of reason to undo prior decisions and further it's conservative values.⁷² Marshall retired on June 27, 1991. Fittingly, his last opinion was a dissenting opinion in a death penalty decision, Payne v. Tennessee.⁷³

C. Marshall's Legacy: Enduring Faith in the American Legal System.

Oh, we're going to have our setbacks, we're bound to have them, but it'll work. You'll never find a better Constitution than this one, I know.⁷⁴

- Thurgood Marshall, WUSA-TV's "Searching for Justice: Three American Stories," 1987.

Marshall left behind the powerful message that one could achieve social reforms by working within the legal system. Marshall found "striking" the "role that legal principles have played throughout America's history in determining the condition of Negroes. Negroes had been enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they

⁶⁸ *Id.* at 279.

⁶⁹ *Id.* at 351.

⁷⁰ *Id.*

⁷¹ *Id.* at 351-52.

⁷² TUSHNET, *supra*, note 21, at 314.

⁷³ *Id.*

⁷⁴ *Id.* at 5.

had begun to win equality by law.”⁷⁵ Marshall felt that this progress was dramatic, and would continue.

Marshall disagreed sharply with the nonviolent protest tactics employed by Martin Luther King Jr.⁷⁶ Marshall also rejected Malcolm X’s calls for militant liberation.⁷⁷ However, the militants added credibility to Marshall’s moderate call for working for change within the system.⁷⁸ Before Malcolm X and King arrived on the scene, Marshall had himself been labeled a radical for calling upon blacks to seek redress through the courts.⁷⁹ For whites, King’s activism increased Marshall’s appeal and Malcolm X’s emergence made Marshall an even more acceptable alternative.⁸⁰ The latter part of Marshall’s life saw him witness a conservative retrenchment that sought to undo much of the progress he had fought for.⁸¹ The decision to appoint Clarence Thomas, a conservative black judge who disagreed with Marshall on many key issues, including affirmative action, was particularly a slap in the face.⁸² However, Marshall remained ever vigilant in his faith in the American legal system.⁸³

Marshall believed firmly that integration was the answer to achieving equality for minorities, and he saw the law as the primary tool to promote this goal.⁸⁴ He won the landmark case of Brown v. Board, overturned numerous segregation laws, and played a vital role in the integration of America’s public schools.⁸⁵ Marshall was a gradualist who told young people to

⁷⁵ *Id.*

⁷⁶ DAVIS & CLARK, *supra*, note 5, at 374-75.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 351-52.

⁸² WILLIAMS, *supra*, note 1, at 393.

⁸³ TUSHNET, *supra*, note 21, at 5.

⁸⁴ WILLIAMS, *supra*, note 1, at xvi.

⁸⁵ TUSHNET, *supra*, note 65, at x.

look to the future, for there was a lot more to be done.⁸⁶ Marshall's legacy was his message that while imperfect, the American legal system is a forum through which one could achieve tangible social change.

II. Martin Luther King Jr.: Advocate of Direct Nonviolent Resistance

I have a 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."⁸⁷

- Martin Luther King Jr., speaking at the Lincoln Memorial during the march on Washington D.C., 1963.

Martin Luther King Jr. was the most popular leader of the civil rights movement in America during the 1950's and 1960's.⁸⁸ He was a charismatic figure who preached nonviolence and spoke with tremendous oratorical force.⁸⁹ King led numerous boycotts and mass protests during his life.⁹⁰ Perhaps his finest moment came when he delivered his famous "I have a dream" speech at the Washington Monument in 1963.⁹¹ King was showered with awards and prizes throughout his life, including the prestigious Nobel Peace Prize.⁹² He was assassinated at the young age of 39.⁹³

A. Background

Martin Luther King Jr. was born on January 15, 1929 in Atlanta, Georgia.⁹⁴ King grew up in a very religious household, his father was pastor of the Ebenezer Baptist Church, and his mother was the daughter of a minister.⁹⁵ His father had always been interested in civil rights,

⁸⁶ *Id.* at 4.

⁸⁷ ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. 90 (1995).

⁸⁸ *Id.* at 1.

⁸⁹ RICHARD DEATS, MARTIN LUTHER KING, JR.: SPIRIT-LED PROPHET 10 (2000).

⁹⁰ *Id.*

⁹¹ FAIRCLOUGH, *supra*, note 87, at 90-91.

⁹² *Id.* at 1.

⁹³ *Id.*

⁹⁴ MARTIN LUTHER KING JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 1 (1998).

⁹⁵ *Id.* at 3-5.

and had served as president of the NAACP in Atlanta.⁹⁶ Like many black children growing up in the South during that time period, King experienced racism at an early age.⁹⁷ From the age of three King had a white playmate that he spent a great deal of time with.⁹⁸ However, King noticed that their friendship began to break as soon as they entered separate schools.⁹⁹ King experienced an awful shock when the child told him that his father had demanded that he could no longer play with King.¹⁰⁰ This incident prompted King to discuss the event with his parents, and made him aware of the existence of a race problem for the first time.¹⁰¹

King attended Atlanta's Morehouse College at the age of fifteen where he read Henry David Thoreau's essay "On Civil Disobedience" for the first time.¹⁰² After receiving his bachelor's degree in sociology at Morehouse, King enrolled at Crozer Theological Seminary in Chester, Pennsylvania.¹⁰³ It was at Crozer that he first lived in an integrated social setting for any length of time.¹⁰⁴ Whites made up two-thirds of his class, and he made many white friends.¹⁰⁵ After this experience, King never wavered in his conviction that integration enriched people's lives.¹⁰⁶ It was at Crozer that King first began to search for a method to eliminate social evil.¹⁰⁷ He listened to lectures on pacifism, but remained doubtful about its practicability.¹⁰⁸ King finished his formal education at Boston University, earning a doctorate in systemic theology in 1955.¹⁰⁹

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 7.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 13-14.

¹⁰³ FAIRCLOUGH, *supra*, note 87, at 11.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ KING, *supra*, note 94, at 17.

¹⁰⁸ *Id.* at 23.

¹⁰⁹ *Id.* at 30.

King moved Montgomery, Alabama in 1954 to become the pastor of Montgomery's Dexter Avenue Baptist Church.¹¹⁰ Montgomery gave King his first experience in what was to become a career of organized protests.¹¹¹ Rosa Parks, a forty-two-year-old black seamstress, refused to sit in the area of the bus reserved for blacks. Parks was arrested and taken to jail.¹¹² In response, King helped organize the Montgomery Bus Boycott, whereby black citizens refused to ride any public transportation until there was an end to segregated seating.¹¹³ The boycott won national media attention, and King was anointed as the leader of a new social movement.¹¹⁴ King led many other protests throughout his life, inspiring a generation of people to fight for civil rights.¹¹⁵ For his efforts, he was awarded the Nobel Peace Prize.¹¹⁶ When Kennedy proposed the landmark Civil Rights Bill in June of 1963, King led a march on Washington D.C. in support of the historic legislation.¹¹⁷ It was at this time that he delivered his famous "I have a dream" speech before a captivated crowd at the Washington monument.¹¹⁸ King was gunned down by an assassin in Memphis, TN on April 4, 1968.¹¹⁹

B. King's Ideology: Changing the Law Through Mass Protests

We have discovered a new and powerful weapon – nonviolent resistance.¹²⁰

- Martin Luther King Jr., at a victory meeting at the Hold Street Baptist Church in Montgomery, Alabama, 1956.

When King was thrust to the forefront of national attention during the

¹¹⁰ DAVIS & CLARK, *supra*, note 5, at 200.

¹¹¹ *Id.*

¹¹² *Id.* at 199.

¹¹³ *Id.* at 200-01.

¹¹⁴ *Id.*

¹¹⁵ KING, *supra*, note 94, at 136-37.

¹¹⁶ FAIRCLOUGH, *supra*, note 87, at 1.

¹¹⁷ *Id.* at 85-89.

¹¹⁸ *Id.* at 90-91.

¹¹⁹ *Id.* at 1.

¹²⁰ DAVIS & CLARK, *supra*, note 5, at 205.

Montgomery bus boycott, the NAACP had already been fighting for social change for decades.¹²¹ The NAACP had won a huge victory for desegregation only months earlier in Brown v. Board of Education.¹²² King understood this and acknowledged the important role that the NAACP had played in furthering social progress by their battles in the courts.¹²³ However, King also felt that action in the courts would not be enough.¹²⁴ The law had to be changed, and to do this, one had to take the battle to the lawmakers, in addition to fighting through litigation.¹²⁵ Herein lay the power of mass protests, King's primary weapon of choice. King recognized that mass protests could pressure the federal government to take action.¹²⁶

Mass protests transformed the political climate in the 1950's and 1960's, raising the issue of civil rights to a prominence it had never before commanded.¹²⁷ When Kennedy announced a landmark civil rights bill in 1963, many felt that it would fail to get through Congress.¹²⁸ King, however, believed that the bill could pass if there was enough support from the grass roots, and from the Kennedy administration.¹²⁹ Mass protests were King's primary tool for pushing this social agenda.¹³⁰ This grassroots movement captured national attention and brought pressure to bear upon lawmakers.¹³¹

During the landmark Montgomery bus boycott, King adopted nonviolence as an unshakeable principle.¹³² He forbade his drivers and bodyguards from carrying firearms, and

¹²¹ FAIRCLOUGH, *supra*, note 87, at 1.

¹²² *Id.* at 202.

¹²³ *Id.*

¹²⁴ FAIRCLOUGH, *supra*, note 87, at 40-42.

¹²⁵ *Id.* at 84-85.

¹²⁶ *Id.*

¹²⁷ *Id.* at 84.

¹²⁸ *Id.* at 85.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 32.

refused to carry a gun himself.¹³³ King knew that a single instance of black violence might cause the disintegration of the boycott.¹³⁴ He therefore had to convince blacks of the futility both of aggressive violence, and also of violence committed in self-defense.¹³⁵ King preached love and nonviolence. He told others “We cannot solve this problem through retaliatory violence. We must meet violence with nonviolence . . . We must have compassion and understanding for those who hate us. We must realize so many people are taught to hate us that they are not totally responsible for their hate.”¹³⁶

King knew that unity demanded discipline, and discipline demanded a refusal to be provoked.¹³⁷ Nonviolence would allow the movement to maintain a level of determined but controlled militancy.¹³⁸ When King and the protestors won the Montgomery bus boycott, it symbolized a breakthrough for blacks.¹³⁹ The victory instilled a feeling that blacks did not have to be afraid of whites, and that blacks could indeed fight back through nonviolent means.¹⁴⁰ King’s tactics of nonviolence caught fire in Birmingham, where by the end of the summer of 1963, blacks had marched by the hundreds of thousands, and about twenty thousand people were arrested.¹⁴¹

The NAACP disapproved of King’s methods, for they could not condone the intentional breaking of the very laws that the NAACP was seeking to change.¹⁴² Thurgood Marshall and the NAACP maintained a great faith in the American legal system that was not shared in other

¹³³ *Id.*

¹³⁴ *Id.* at 36.

¹³⁵ *Id.*

¹³⁶ *Id.* at 25-26.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 38.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 84.

¹⁴² *Id.* at 40.

quarters of the civil rights movement.¹⁴³ However, King’s methods melded with the gradualist methods of the NAACP by feeding the gradualist movement.¹⁴⁴ For example, in the case of the Montgomery bus boycott, mass direct action had generated effective litigation that eventually overturned the bus segregation laws.¹⁴⁵ While King did not share Marshall’s complete faith in the legal system, King did acknowledge that the law was one important tool that should be used in conjunction with mass protests in pushing for social change.¹⁴⁶ King stated that “We must continue our struggles in the courts, and above all, we must continue to support the NAACP. Our major victories have come through the work of this organization. One thing the gradualists don’t seem to understand: We are not trying to make people love us when we go to court, we are trying to keep them from killing us.”¹⁴⁷

A year after King gave his famous “I have a dream” speech and led a mass march on Washington DC to support the civil rights bill, President Johnson signed the bill into law.¹⁴⁸ The bill was a major victory for the civil rights movement.¹⁴⁹ The bill forbade segregation in public facilities and public accommodations.¹⁵⁰ Employers could no longer discriminate on the grounds of race, color, sex, or ethnic origin.¹⁵¹ Additionally, the government could initiate suits to desegregate southern school districts, as well as cut off federal funds to districts that were reluctant to integrate.¹⁵² The role that King played in pressuring the government to pass this landmark legislation was one of his greatest achievements and illustrated his view that the law’s

¹⁴³ *Id.* at 40-42.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 42.

¹⁴⁶ DAVIS & CLARK, *supra*, note 5, at 204.

¹⁴⁷ *Id.*

¹⁴⁸ FAIRCLOUGH, *supra*, note 87, at 93.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

role in social progress was it's ability to be changed when pressure was brought to bear on lawmakers.

C. King's Legacy: An Enduring Dream

Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountaintop. And I've looked over. And I've seen the Promised Land. I may not get there with you. But I want you to know tonight that we as a people will get to the Promised Land. So I'm happy tonight. I'm not worried about anything. I'm not fearing any man. "Mine eyes have seen the glory of the coming of the Lord."¹⁵³

- Martin Luther King Jr., Addressing a rally in Memphis, Tennessee, 1968.

Martin Luther King Jr. inspired a generation of Americans from all walks of life to stand up and resist the evils of discrimination in a nonviolent fashion. While the immediate aftermath of his assassination sparked a wide scale riot that resulted in thousands injuries, King's legacy was the example he left behind concerning the power of grassroots action.¹⁵⁴ King showed millions both in the United States and abroad that mass protests could be a way to achieve social change.¹⁵⁵ Additionally, King demonstrated that these protests did not have to employ violence in order to be effective.¹⁵⁶

On the legal front, the 1968 Civil Rights Act was commonly described as a tribute to King.¹⁵⁷ The act outlawed discrimination in the sale and rental of housing, and made it a crime to kill, injure, or intimidate people who were exercising their civil rights or encouraging others to do so.¹⁵⁸ While it is difficult to prove, some commentators believe that King's death may have swayed wavering members of Congress.¹⁵⁹ King is honored in many ways: we have a national holiday in his honor, numerous streets have been named after King, and his "I Have a Dream"

¹⁵³ *Id.* at 122.

¹⁵⁴ *Id.* at 124.

¹⁵⁵ *Id.* at 132-133.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 125.

speech is frequently replayed for new generations to hear.¹⁶⁰ King believed in the American legal system, but he also knew that a successful social movement would require a coordinated effort between legal challenges and grassroots action.¹⁶¹ King's legacy was that breaking the law in a peaceful, nonviolent way could be an effective way to push for social change.

III. Malcolm X: Fiery Militant

The white man has taught the black people in this country to hate themselves as inferior, to hate each other, to be divided against each other . . . The brainwashed black man can never learn to stand on his own two feet until he is on his own . . . The white man knows that once black men get off to themselves and learn they can do for themselves, the black man's full potential will explode and he will *surpass* the white man.¹⁶²

- Malcolm X, during an interview with Alex Haley, 1963.

No other man in the 1950's and 1960's aroused fear and hatred in the white man as did Malcolm X.¹⁶³ In Malcolm, the white man sensed an implacable foe who could not be had for any price.¹⁶⁴ Malcolm was a man unreservedly committed to the cause of liberating the black man from American society rather than integrating the black man into that society.¹⁶⁵ Malcolm began preaching his message of separation and militancy upon becoming a Muslim and joining the Nation of Islam.¹⁶⁶ Malcolm preached his radical message of separation until he was assassinated at the age of thirty-nine.¹⁶⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 129-30.

¹⁶¹ *Id.* at 40-42.

¹⁶² DAVID GALLEN, MALCOLM X: AS THEY KNEW HIM 111-12 (1992).

¹⁶³ ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X ix (1964).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at ix-x.

¹⁶⁶ *Id.* at xi-xv.

¹⁶⁷ BRUCE PERRY, MALCOLM: THE LIFE OF A MAN WHO CHANGED BLACK AMERICA xi (1991).

A. Background

Malcolm was born Malcolm Little on May 19, 1925 in Omaha, Nebraska.¹⁶⁸ His father was a Baptist minister and an organizer for Marcus Garvey's UNIA (Universal Negro Improvement Association).¹⁶⁹ Malcolm was his father's seventh child and grew up in a household of conflict where his father beat Malcolm's mother and his siblings.¹⁷⁰ Malcolm's father died when he was six, and people suspected that his father had been murdered, though nothing was ever proven.¹⁷¹ Malcolm was placed in a foster home where he attended elementary school, and reform school.¹⁷² Later, Malcolm left and began working odd jobs and eventually became a hustler known as "Detroit Red" on the streets of Harlem and Detroit.¹⁷³ Malcolm was arrested for burglary and sent to prison at the age of 21 in 1946.¹⁷⁴

It was in prison that Malcolm began his transformation, learning about the Nation of Islam and the teachings of Elijah Mohammad.¹⁷⁵ Elijah Mohammad was the supreme minister of the Nation of Islam.¹⁷⁶ The Nation taught that Negroes in America were lost sheep, lost for four hundred from the Nation of Islam, and the Nation had come to redeem them.¹⁷⁷ Malcolm taught himself through books, taking full advantage of the extensive libraries at Charlestown and Norfolk prison.¹⁷⁸ He copied every single word and its definition from the dictionary.¹⁷⁹ When

¹⁶⁸ *Id.* at 2.

¹⁶⁹ HALEY, *supra*, note 163, at 3.

¹⁷⁰ *Id.* at 7.

¹⁷¹ *Id.* at 13.

¹⁷² *Id.* at 30.

¹⁷³ *Id.* at 125.

¹⁷⁴ *Id.* at 176.

¹⁷⁵ *Id.* at 198-219.

¹⁷⁶ *Id.* at 240.

¹⁷⁷ *Id.* at 238.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 198-99.

Malcolm left prison in 1952, he took the name Malcolm X to reject the name given to him by his ancestor's slave master.¹⁸⁰

Malcolm joined the Nation of Islam upon leaving prison, rising through its ranks to and becoming a Muslim minister.¹⁸¹ Malcolm helped with recruiting efforts, and with his assistance, the Nation of Islam grew in size many times over.¹⁸² Through his tireless work, Malcolm became the leading organizer and spokesman for Elijah Mohammad's Nation of Islam in America.¹⁸³ Malcolm's messages on racial separation, black power and black pride became the backbone for the black revolutionary movement.¹⁸⁴ When Malcolm commented that the assassination of President Kennedy was a case of "chickens coming home to roost," he was suspended by the Nation for 90 days.¹⁸⁵ Malcolm separated with the Nation, formed his own organization, and made a pilgrimage to Mecca.¹⁸⁶ Upon returning from his pilgrimage, Malcolm softened his previous stance on whites, no longer making sweeping indictments of all white people.¹⁸⁷ Malcolm continued to preach and lead until he was gunned down in a Harlem auditorium on February 21, 1965.¹⁸⁸

B. Malcolm X's Ideology: Freedom By Any Means Necessary

When you are begging for civil rights, you're putting it in Uncle Sam's lap. You're taking it to Uncle Sam's courts. You're taking the criminal to the criminal - asking the criminal to solve the crime. Whereas, when you're attacking this thing at the level of human rights, you can take it to the United Nations. You can take Uncle Sam, the one who's really guilty, to the UN and accuse him or charge him with violating the UN Charter on Human Rights.¹⁸⁹

¹⁸⁰ *Id.* at 229.

¹⁸¹ *Id.* at 231.

¹⁸² *Id.* at 258.

¹⁸³ EUGENE VICTOR WOLFENSTEIN, *THE VICTIMS OF DEMOCRACY: MALCOLM X AND THE BLACK REVOLUTION* 3 (1981).

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.* at 5.

¹⁸⁶ HALEY, *supra*, note 162, at 386-89.

¹⁸⁷ *Id.* at 416.

¹⁸⁸ WOLFENSTEIN, *supra*, note 183, at 3.

¹⁸⁹ PETER L. GOLDMAN, *THE DEATH AND LIFE OF MALCOLM X* 157 (1979).

- Malcolm X, on The Barry Gray Show, April 11, 1964.

Malcolm X articulated black rage in a manner unequaled in American history.¹⁹⁰ Malcolm spoke out of love for his own great love for black people.¹⁹¹ He preached that black people must not look at themselves through white people.¹⁹² Malcolm believed that blacks had to help themselves, and that they could not trust anyone else to lift them out of despair.¹⁹³ Malcolm did not fully trust the police, and he knew that blacks would have to stand up for themselves in order to achieve justice. One early event during Malcolm's work as a minister exemplifies his views. In April of 1957, Harlem police officers beat and arrested Hinton Johnson, a black Muslim who had protested when the officers had begun physically beating a black suspect.¹⁹⁴ Malcolm heard about this, made some phone calls, and organized a group of Muslims to march upon the police station. One officer estimated that the crowd numbered at 2600.¹⁹⁵ In response to this dramatic turnout, the police station released Johnson, who was immediately taken to the hospital for medical treatment.¹⁹⁶ The event demonstrated Malcolm's conviction that black people could not rely on the system to protect them - blacks had to protect themselves.¹⁹⁷

Malcolm claimed that he shared the ideology of King when he said that they both wanted freedom for black people.¹⁹⁸ However, they differed sharply in their methods.¹⁹⁹ King and

¹⁹⁰ JOE WOOD, MALCOLM X: IN OUR OWN IMAGE 48 (1992).

¹⁹¹ *Id.*

¹⁹² *Id.* at 49.

¹⁹³ *Id.*

¹⁹⁴ GOLDMAN, *supra*, note 189, at 56.

¹⁹⁵ *Id.* at 57.

¹⁹⁶ HALEY, *supra*, note 163, at 269.

¹⁹⁷ *Id.* at 269-70.

¹⁹⁸ JAMES H. CONE, MARTIN & MALCOLM & AMERICA: A DREAM OR A NIGHTMARE 246 (1991).

¹⁹⁹ *Id.* at 247.

Marshall believed firmly that integration was the key to winning freedom.²⁰⁰ Malcolm, in contrast, advocated complete separation between white and black people.²⁰¹ Malcolm later backed away somewhat from this radical goal, instead emphasizing his goal of winning freedom and respect for blacks: a goal that was shared by King and Marshall.²⁰²

Malcolm also differed from King and Marshall in that he harbored a deep mistrust of the American legal system.²⁰³ While King had spent some time in jail, he could not come close to approaching the seven years that Malcolm had served.²⁰⁴ Malcolm distrusted the courts as a means by which to achieve social change because he felt that the courts were merely an extension of white dominance over blacks.²⁰⁵ Malcolm criticized the weakness of the court system as a tool for social change by pointing out that fully nine years after the integration order issued by the Supreme Court in Brown v. Board of Education, there was only eight percent compliance.²⁰⁶ In Malcolm's view, blacks had to help themselves by becoming masters of their own destiny, not by relying on a flawed legal system.²⁰⁷

Because he distrusted the American courts, Malcolm felt that the only court that would be fair to the plight of black Americans was a court higher than any in America, the United Nations.²⁰⁸ Malcolm saw the United Nations' censures against Angola and South Africa for their denial of human rights as precedent cases for a formal accusation against the United States.²⁰⁹ Malcolm wanted to elevate his struggle from the level of civil rights to the level of human rights

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ GOLDMAN, *supra*, note 189, at 157.

²⁰⁴ CONE, *supra*, note 198, at 53.

²⁰⁵ GOLDMAN, *supra*, note 189, at 157.

²⁰⁶ GALLEN, *supra*, note 162, at 112.

²⁰⁷ *Id.* at 111-12.

²⁰⁸ GOLDMAN, *supra*, note 189, at 157.

²⁰⁹ HALEY, *supra*, note 163, at 415.

so that it would become an international battle.²¹⁰ Malcolm explored the possibility of bringing the United States before the Commission on Human Rights but found many obstacles.²¹¹ For one, America had considerable UN political power by virtue of their financial support for the organization.²¹² Similarly, Malcolm found that his African and Arab supporters were only sympathetic to a point, and would not stick their necks out to help him bring a UN case against America.²¹³

Malcolm did not expect any specific tangible remedies as a result of a UN case against America.²¹⁴ He knew that mass UN armies would not land in America to deliver oppressed people to salvation.²¹⁵ However, he believed in symbolic action.²¹⁶ One of Malcolm's lifelong objectives was to expose whites to themselves for their sins against people of other colors.²¹⁷ Bringing the United States before the UN on charges of denying human rights would be a perfect way to accomplish this goal.²¹⁸ A UN censure would also allow Malcolm to expose whites as a minority in the world whose power was irrevocably declining.²¹⁹

Malcolm never achieved his goal of bringing a UN case against America.²²⁰ However, in the autumn of 1964 the US found itself on the defensive for its military actions in the Congo.²²¹ Many African delegates attacked the US for its military intervention and drew parallels between the oppression of blacks in the US with America's behavior in the Congo.²²² Adlai Stevenson, the U.S. Ambassador to the United Nations responded that America had no apologies to make as

²¹⁰ GOLDMAN, *supra*, note 189, at 157.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 158.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 241.

a force for social justice, and that while whites had indeed sinned against nonwhites through history, “the antidote for white racism is not black racism.”²²³ Putting America on the defensive for its record on human rights was the only victory Malcolm lived to see in his UN campaign against the United States.²²⁴

C. Malcolm X’s Legacy: Black Rage

And if I can die having brought any light, having exposed any meaningful truth that will help to destroy the racist cancer that is malignant in the body of America-then, all of the credit is due to Allah. Only the mistakes have been mine.²²⁵

Malcolm X, speaking with Alex Haley, 1965

Malcolm left behind few tangible accomplishments.²²⁶ He did not win any court cases, he did not overturn any laws, he did not pass any new laws. Malcolm’s enduring legacy was his message to people of all colors. He did not preach conformity with the system like Marshall.²²⁷ He did not preach love for one’s enemies like King.²²⁸ Malcolm preached self-love, self-respect, and self-defense.²²⁹

Malcolm’s legacy can perhaps be best examined through his effect on other ideologies of the time. In contrast to Marshall and King, Malcolm was the extreme radical, calling for a black cultural revolution.²³⁰ While King appealed to people’s higher instincts, Malcolm appealed to their viscera.²³¹ Malcolm helped push for social change by offering people a different vision for America. In 1965, Malcolm visited Selma, Alabama in an effort to meet King. While in Selma,

²²¹ *Id.* at 240.

²²² *Id.* at 241.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ HALEY, *supra*, note 163, at 440.

²²⁶ GOLDMAN, *supra*, note 189, at 395.

²²⁷ DAVIS & CLARK, *supra*, note 5, at 289.

²²⁸ GOLDMAN, *supra*, note 189, at 227.

²²⁹ *Id.* at 228.

²³⁰ JACK RUMMEL, MALCOLM X: MILITANT BLACK LEADER 101 (1989).

²³¹ GOLDMAN, *supra*, note 189, at 400.

Malcolm spoke to other leaders and told King's wife "If the white people realize what the alternative is, perhaps they will be more willing to hear Dr. King."²³²

Malcolm frightened white America like no other man of his time, and he founded the black power movement, a movement that continues in various forms today.²³³ Malcolm held up a mirror to the faces of whites so that people could see the difference between what white people said and what white people did.²³⁴ By offering a radical ideology, Malcolm made it easier for most people to accept what King and Marshall represented. While he may have left behind few tangible victories, he left behind a different vision. Regardless of whether people accepted or rejected it, his vision delivered a powerful impact.

IV. Conclusion

Marshall, King and Malcolm offered different ideas on the role that the law can play in pushing for social change. Marshall believed that the law was the primary tool to push for social change. King believed that the law was one important tool, but that mass direct action would also be required. Malcolm believed that the law could not be trusted so long as one was discussing the American legal system. It is significant to note that each figure had an impact on another. Marshall was considered a radical until King came along. King's teachings made it easier for people to accept Marshall. Similarly, King was considered extreme until compared with Malcolm, and Malcolm's fiery message made it easier for people to accept King. In short, what King did for Marshall, Malcolm did for King. Similarly, while there may be no conclusive answer to what role law plays in furthering social change, it is perhaps best understood as one alternative among different options. The law may not be the fastest tool for achieving social

²³² CLAYBORNE CARSON, MALCOLM X: THE FBI FILE 42 (1991).

²³³ WOLFENSTEIN, *supra*, note 183, at 23.

change, but when viewed as a substitute for mass protests, armed revolution, or anarchy, moving for social change within the law may become the most acceptable alternative.

²³⁴ GOLDMAN, *supra*, note 189, at 400.