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Dr. King's Speech: Surveying the Landscape of Law and Justice in the Speeches, Sermons, and Writings of Dr. Martin Luther King, Jr.

Carlton Waterhouse†

The belief that an essential relationship exists between law and justice has been recognized since the time of the ancient Greeks. In fact, the concept extends well beyond Western philosophy and jurisprudence. Distinct from other aspects of justice, the relationship between law and justice considers the nature of law and its dictates, as well as the responsibility of citizens to obey it. Although Dr. Martin Luther King, Jr. lacked the developed legal analysis of jurisprudence scholars, he made a meaningful contribution to the intellectual discourse of his time by forcing the discussion on broader society and centering it on racial segregation—a critical issue of his day. This Article places Dr. King's views of law and justice within a historic and contemporary context by exploring the theory of law and justice and how it shaped and inspired Dr. King's leadership of the Civil Rights Movement. The Article begins by addressing a consideration of the special relationship between "law and justice." It then explores the three philosophical commitments that formed Dr. King's vision of law and justice: American democratic principles, Personalism, and natural law. Lastly, this Article considers Dr. King's vision in comparison to two schools of critical jurisprudence: Critical Legal Studies and Critical Race Theory. Dr. King saw clear contradictions in the legal system that violated the demands of law and justice. This Article identifies and explores the valuable insights provided by Dr. King's vision of law and justice while still pointing out the oversights and contradictions present in it.

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"[T]he arc of the moral universe is long but it bends toward justice."[1]

–Dr. Martin Luther King, Jr.

Introduction

From whence springs the meaning of justice? Upon what foundation rests its cornerstone? These questions and more pervade recent discourses about justice. Likewise, with increasing frequency, legal scholars and philosophers debate the viability of justice arguments due to fundamental disagreements about the nature of the world and the societies in which we live.[2]

Without the benefit of a legal education or a survey of legal philosophy, Dr. Martin Luther King, Jr. weighed into a historic debate in legal scholarship regarding the nature of law and the responsibility of citizens to obey it.[3] Is law simply the pronouncement of authority with the power to sanction?[4] Is it the historically contingent legislation of democratic regimes?[5] Is it divine directive revealed to prophets and the faithful, binding upon all?[6] Or is it a fundamental ordering of the universe made clear to all through unimpeded reason?[7] King's views on law and justice were developed and presented through sermons, addresses, books, and other writings.[8] Although lacking the developed legal analysis of jurisprudential scholars, King made a meaningful contribution to the jurisprudential discourse of his time by opening the discourse to broader society and centering it on a critical issue of his day.[9]

Despite his lack of legal training, King benefited from an excellent education and the unique ability to connect with both the

1. Martin Luther King, Jr., Where Do We Go From Here? (Aug. 16, 1967), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 245, 252 (James M. Washington ed., 1991) [hereinafter ESSENTIAL WRITINGS].

2. *See* NANCY LEVIT ET AL., JURISPRUDENCE: CLASSICAL AND CONTEMPORARY, at ix–x (2d ed. 2002).

3. *See* Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963), *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 289, 289–303.

4. *Id.* at 293–94.

5. *Id.* at 292.

6. *Id.* at 293–94, 299–300.

7. *Id.* at 299, 301.

8. *See, e.g.*, Martin Luther King, Jr., *Bold Design for a New South*, NATION, Mar. 30, 1963, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 112, 112–16; Martin Luther King, Jr., *Nonviolence and Racial Justice*, CHRISTIAN CENTURY, Feb. 6, 1957, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 5, 5–9.

9. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 283–86 (1986).

Black masses of the South suffering the hardships of segregation, and the Northern Whites committed to the ideals of liberalism.[10] Given the time and interest, King very well could have made a more meaningful contribution to our understanding of law and justice. While alive, King was not afforded the same luxuries of abstract contemplation taken for granted by many ancient and contemporary philosophers, and his ruminations were ultimately cut short by a sniper's bullet.[11] King's writings and addresses nonetheless reveal a man genuinely concerned with the theological and philosophical questions of his day.[12] Critical scholarship endeavors to recognize and identify the insights and inconsistencies, limitations and lucidity in the words and ideas of men and women like King, whose lives, like rudders, changed the course of history.[13] Through engagement with their writings, we should come to better understand them and ourselves.[14]

This Article strives to identify, understand, and critically evaluate King's views on law and justice. Part I of the Article begins with a brief consideration of the relationship between law and justice. After considering some background on the subject, the Article explores how the democratic principles of the United States, natural law, and Personalism shaped King's understanding and articulations on the subject. Part II of the Article examines King's proclaimed views in light of the insights of two schools of critical jurisprudence: Critical Legal Studies and Critical Race Theory. The analysis concludes with a reflection on the poignancy of the challenges to King's vision of law and justice in light of historical developments of the last forty years.

I. Law and Justice

The intersection of law and justice has a unique form, distinct from the many other types of justice more commonly spoken about.[15] Broader than restorative justice, distributive

10. *Id.* at 44.

11. *Id.* at 623–34.

12. *See id.* at 523 (describing King's contemplation of scripture as a "spiritual mandate" to work together in furtherance of civil rights).

13. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii–xxxii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY]. There is, of course, disagreement over the merit of claims raised by some critical legal scholarship questioning the integrity of American jurisprudence. *See* RONALD DWORKIN, LAW'S EMPIRE 271–75 (1986) (addressing challenges raised by critical legal scholarship to the integrity of the American legal system).

14. CRITICAL RACE THEORY, *supra* note 13, at xiii–xvi.

15. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 122 (David Ross

justice, retributive justice, compensatory justice, and procedural justice, the intersection of law and justice incorporates and facilitates one or more of the above aspects of justice.[16] However, unlike the above concepts, the intersection of law and justice—the legal delivery of justice—depends on the juridical system of a nation or a society.[17] Ideally, law should serve the ends of justice.[18] In his speeches and writings, King made the justness of laws and the legal system itself of primary importance.[19]

As a social system, law is broad reaching. Laws govern and structure the relationships individuals maintain with one another, as well as the relationships that individuals have with groups.[20] Further, law establishes the relationship that individuals and groups have with the nation or state.[21] Laws range from legislative efforts to prescribe the boundaries of commercial and other relationships, to governing a person's ability to be compensated by another for some wrongful injury. In the United States, laws even dictate and regulate the creation, operation, and

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trans., Oxford Univ. Press 8th ed. 1971) ("For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice; for legal justice is the discrimination of the just and the unjust.").

16. Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (Mar. 5, 2007), http://plato.stanford.edu/entries/justice-distributive/. See Oscar Ross Ewing, *The New Legal Justice*, 24 YALE L.J. 441 (1915) for a thoughtful consideration of the concept and its development in Western thought.

17. I expand on this concept in a journal article addressing the interdependent political nature of American society and its justice system. *See* Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events*, 26 B.C. THIRD WORLD L.J. 207, 212 (2006) ("Neither the American judiciary nor its legislatures has provided [B]lacks with a consistent level of protection against, or remediation of, racial injustice. In America, race law is never settled; it remains, instead, in constant flux [dependent] on the prevailing attitude of the majority.").

18. The substance of the ideal that should be used to define the relationship between law and justice is the primary subject of contemporary jurisprudence. LEVIT ET AL., *supra* note 2, at ix–x.

19. King memorably said:

> When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This was the promise that all men, yes, [B]lack men as well as [W]hite men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 217, 217; *see also* Martin Luther King, Jr., Nobel Prize Acceptance Speech (Dec. 10, 1964), *in* ESSENTIAL WRITINGS, *supra* note 1, at 224, 224 ("I accept this award [on] behalf of a civil rights movement which is moving with determination and a majestic scorn for risk and danger to establish a reign of freedom and a rule of justice.").

20. THOMAS AQUINAS, AQUINAS: POLITICAL WRITINGS 81–82 (R.W. Dyson ed., 2002) [hereinafter AQUINAS: POLITICAL WRITINGS].

21. *See id.*

dissolution of marriage.[22] Law determines suitable parties, the duration of the relationship, and even the boundaries of acceptable conduct.[23] Over the course of American history, in particular states, Blacks and other "non-Whites" were legally prohibited from marriage, cohabitation, or sexual relationships with Whites; state anti-miscegenation laws even made such acts felony offenses.[24]

A. Justice and Legal Equality

One basic requirement of a law that corresponds with justice is "equality before the law."[25] This requirement is expressed by the Greek philosopher Aristotle in his writings on justice:

> For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.[26]

In this passage, Aristotle makes reference to what he calls rectificatory justice.[27] This term relates to an individual's treatment by a judge in a legal dispute.[28] As a fundamental matter, Aristotle maintains that justice requires equality before the law, for it is only by looking at parties equally that the law resolves disputes with the impartiality required by justice.[29] As an example, Aristotle asserts that the facts at issue are paramount

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22. *See, e.g.*, S.C. CODE ANN. § 20-1-10 (1962) (prohibiting marriage among "mentally incompetent persons," people of the same gender, and close relatives); S.C. CODE ANN. § 20-1-80 (1962) (barring a married person from entering into a second marital relationship while married); S.C. CODE ANN. § 20-3-10 (1962) (stating the grounds for divorce as adultery, desertion, and physical cruelty, among others).

23. *See, e.g.*, statutes cited *supra* note 22.

24. *See, e.g.*, Law of Feb. 10, 1955, ch. 126, 1955 N.D. Laws 157, §§ 1–4 (showing the repeal of North Dakota's miscegenation statutes §§ 14-0304, 14-0305, 14-0326, and 14-0327, enacted in 1943, which banned marriage between a White person and a Black person, defined who would be considered to be Black, and provided penalties for anyone issuing a marriage license to, or performing a marriage between, a Black person and a White person); *see also* N.C. GEN. STAT. § 14-181 (1939) (repealed 1973); Jackson v. State, 23 Ala. App. 555 (1930) (punishing "the mixture of races in marriage, or living together in a state of adultery, or fornication, by a [W]hite person and a [N]egro, or descendant of a [N]egro" as a felony under § 5001 of the Alabama Code of 1923).

25. *See* ARISTOTLE, *supra* note 15, at 114–15.

26. *Id.*

27. *Id.* at 115.

28. NICHOLAS BUNNIN & JIYUAN YU, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 593 (2004).

29. ARISTOTLE, *supra* note 15, at 115.

but not the character or the reputation of the individuals.[30] A good man who has defrauded a bad man is equally liable as a matter of justice because both are equally liable for any crime that they commit.[31] In Aristotle's view, the actions of individuals should govern the outcome of legal disputes, not their personal characteristics.[32]

This notion of equality before the law has threads through Western philosophy and jurisprudence, and blossomed in the Declaration of Independence and the United States Constitution.[33] The Declaration of Independence points to this concept in considering the rights of all men: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[34] As a matter of law, the Constitution requires that cases and controversies, as well as the rights of citizens, must be adjudicated and adjudged without respect of persons.[35] However, the extension of equality before the law to Blacks was not widely recognized at the time of the Declaration's signing.[36] In the wake of the Revolutionary War that soon followed, many Northern states abolished the enslavement of Blacks and removed some legal distinctions based on race as contrary to the principles underlying American democracy.[37] Despite these strides, most states failed to extend full equality before the law to Blacks.[38] When the question of the legal equality

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30. *Id.*

31. *Id.*

32. *Id.* For a discussion of equality in the western tradition, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

33. *See* U.S. CONST.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. THE DECLARATION OF INDEPENDENCE, *supra* note 33, at para. 2.

35. See the Fifth Amendment to the U.S. Constitution, which reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

36. *See* Dred Scott v. Sanford, 60 U.S. 393, 410 (1861) ("[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the Declaration of Independence]."); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 371 (1978) ("The success of the first Revolution in no way altered the degraded status of most [B]lack Americans . . . . [n]or did it free the more than half-million slaves in the colonies.").

37. HIGGINBOTHAM, *supra* note 36, at 381–89.

38. *Id.* at 371–75.

of Blacks came before the Supreme Court in *Dred Scott v. Sanford*,[39] the highest court of the land addressed whether Blacks were entitled to rights equal to those of Whites.[40] Writing for the majority of the justices, Chief Justice Taney resolved the question, writing:

> The question before us is, whether the class of persons described in the plea in abatement [enslaved and free Blacks] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and *were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.* On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[41]

In the decision, the majority ruled that a formerly enslaved Black man who gained his freedom through residence in a state prohibiting slavery, could not bring suit in federal court as a citizen of the United States when he was re-enslaved by his former master after returning to the Antebellum South.[42] The Court based the decision largely on its understanding that neither the Declaration of Independence nor the Constitution contemplated the inclusion of enslaved or free Blacks as those who were endowed with rights recognized and established by those documents.[43]

Roughly eight decades after the Declaration of Independence was signed, the Fourteenth Amendment spoke directly to the issue.[44] Stating that all persons born or naturalized in the United States and subject to its jurisdiction shall be citizens, and that no state shall deny the equal protection of the laws to any person

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39. 60 U.S. 393.

40. *Id.* at 404–05.

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.* at 407. Discussing the prevailing opinion at the time the Declaration of Independence was signed, Justice Taney wrote:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the [W]hite race, either in social or political relations; and so far inferior, that they had no rights which the [W]hite man was bound to respect; and that the [N]egro might justly and lawfully be reduced to slavery for his benefit.

Id.

44. U.S. CONST. amend. XIV.

within its jurisdiction, the Amendment directly overruled the Supreme Court's decision in *Dred Scott* and established, in principle, that all men were entitled to equality before the law.[45] However, following a brief period of reconstruction, equal protection before the law was a dead-letter principle in the South as legislatures and judges abridged the rights of Blacks with impunity.[46] Through the use of state and local laws designed to maintain a subordinate status for Blacks, Southern White legislatures returned Blacks to a degraded status using Jim Crow laws that prohibited Blacks from free access to education, political participation, employment, and public accommodations.[47]

B. Justice and Racial Inequality

As a historical matter, equality before the law has evaded Blacks across generations.[48] From the time of the American colonies to the birth of King, the relationship between law and justice for most Whites was different than the relationship experienced by Blacks.[49] In the early colonies and in the Antebellum South, Blacks, both bound and free, were prohibited from using the legal procedures available to Whites, including the basic right to testify against a White man or woman in court.[50] At the onset of the New Deal, Blacks were functionally denied the benefits of federal programs made available to Whites.[51] In the post-Reconstruction South, Blacks were legally bonded out to Whites after being arrested on spurious charges.[52] As discussed

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45. *Compare Dred Scott*, 60 U.S. at 407, *with* U.S. CONST. amend. XIV.

46. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 17–37 (2004) (discussing how the Supreme Court endorsed segregation on trains, state-mandated segregation, and segregation in public schools).

47. *Id.*

48. See Carlton Waterhouse, *supra* note 17, at 229–51 for a discussion of racially biased laws against Blacks from 1619 to 1963.

49. *See* ROBERT P. GREEN, JR., EQUAL PROTECTION AND THE AFRICAN AMERICAN CONSTITUTION EXPERIENCE: A DOCUMENTARY HISTORY 33–34 (2000) (discussing how freedoms guaranteed in the Constitution, like liberty, were realized by White Americans but not their Black counterparts).

50. *See* HIGGINBOTHAM, *supra* note 36, at 413 n.109. Blacks were only allowed to testify in criminal cases where the charge was brought against another Black person, or in civil cases where all parties were Black. *Id.*

51. *See* PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION 87–101 (2001) (providing a history of the effects of the New Deal on Blacks and noting that it "represented a federal sanctioning of [W]hite privileges and [B]lack discrimination in employment, housing, schools and the franchise").

52. *See* William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 53–54 (Feb. 1976) (discussing how vagrancy

above, through most of King's life, Jim Crow laws denied Blacks equal access to jobs, housing, education, and medical care.[53]

As a result, the American legal system embodied a substantial contradiction leading up to the Civil Rights Movement: grand ideals of law and justice that promised equality before the law clashing with the reality of the biased creation and implementation of laws towards Blacks and other minorities.[54] In 1954, the dawn following the long night of this legal contradiction began to break when the Supreme Court ruled in *Brown v. Board of Education*[55] that laws requiring segregation in education were unconstitutional.[56] Although the Court had issued earlier decisions undercutting segregation practices in more limited situations,[57] the wholesale rejection of segregation in the public school system was a monumental occurrence with a significant symbolic and practical effect.[58] For King, the unanimous decision suggested that the long-deferred hope of legal equality might soon be realized.[59] Indeed, the law and justice promised in the Declaration of Independence and the United States Constitution was soon to come as King saw it, though it would require much prodding and agitation.[60]

Rather than a clear, uncontested meaning as might be inferred by the Aristotelian formulation, in practice the concept of

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laws allowed the hiring out of convicted offenders, and that offenders unable to pay their fines would be sentenced to a term of labor).

53. *See* KLARMAN, *supra* note 46, at 90, 146–47, 204 (citing examples of residential segregation and segregation in education).

54. *See* GREEN, *supra* note 49, at xxi–xxii (noting the tension in the American legal system between the tradition of equality and rights, and the "existence of slavery, discrimination and institutional racism").

55. 347 U.S. 483 (1954).

56. *Id.* at 495 (holding that the segregation of schools denied Black children in public schools equal protection under the law guaranteed to them by the Fourteenth Amendment of the Constitution).

57. *See* GREEN, *supra* note 49, at 235, 239 (discussing the Supreme Court's decision preventing a law school from admitting students only on the basis of race by rejecting the "separate but equal" claim).

58. *See id.* at 247 (noting that *Brown* was a "stunning reversal of precedent" that finally recognized segregation as unconstitutional).

59. *See id.* at 301 (quoting King's statement that the Supreme Court's decision "came as a great beacon of light of hope to millions of colored people throughout the world who had had a dim vision of the promised land of freedom and justice"); JOSEPH WILSON, TEARING DOWN THE COLOR BAR: A DOCUMENTARY HISTORY AND ANALYSIS OF THE BROTHERHOOD OF SLEEPING CAR PORTERS 300–09 (1989).

60. *See* GREEN, *supra* note 49, at 301 (quoting King's remark that *Brown* "was a reaffirmation of the good old American doctrine of freedom and equality for all men"); *id.* at 308–09 (noting that segregation is still rampant and that continued work through the courts and legislatures is needed in order to make desegregation a societal reality).

equality before the law struggled to gain acceptance as something widely available across preexisting social barriers such as race.[61]

II. Philosophical Commitments of Dr. King to Law and Justice

A. Personalism, Law, and Justice

King made it clear that the basic philosophical position guiding his actions was rooted in a personal idealism.[62] He wrote, "Personalism's insistence that only personality—finite and infinite—is ultimately real strengthened me in two convictions: it gave me metaphysical and philosophical grounding for the idea of a personal God, and it gave me a metaphysical basis for the dignity and worth of all human personality."[63] King applied these concepts in forming his views on what justice required.[64] He regarded racial discrimination and segregation as evils in society that were manifestly unjust.[65] On the subject he said, "Segregation stands diametrically opposed to the principle of the sacredness of human personality. It debases personality."[66] This debasement, in King's view, took on multiple dimensions, harming both Blacks and Whites in the process.[67] King felt that discrimination and segregation treated Blacks as means to an end, and not ends in and of themselves, thereby violating Immanuel Kant's Categorical Imperative that "all men must be treated as ends and never as mere means."[68] In King's view, the White Southerners' view of Blacks as property or "animated tools,"

61. *See* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 31–32 (1958) (describing the unequal system of justice in Southern courts, where a Black male faced the death penalty for allegedly raping a White woman, while White men seldom faced arrest for allegedly raping a Black woman).

62. *Id.* at 100.

63. *Id.*

64. *See* Martin Luther King, Jr., *The Ethical Demands for Integration* (Dec. 27, 1962), *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 117, 119, 122 ("There is no divine right of one race which differs from the divine right of another. Every human being has etched in his personality the indelible stamp of the Creator. Human worth lies in relatedness to God.").

65. *See id.* at 118–19.

66. *Id.* at 119.

67. *Id.*

68. King, *The Ethical Demands for Integration*, *supra* note 64, at 119 ("The tragedy of segregation is that it treats men as means rather than ends, and thereby reduces them to things rather than persons.").

cemented through Jim Crow laws, depersonalized Blacks and desecrated the sacredness of their humanity.[69]

Segregation and the racial discrimination it legitimized also afflicted Blacks with "social leprosy" that inflicted psychological as well as physical scars, King contended.[70] He explained that the scars flowed from "suppressed fears and resentments, and the expressed anxieties and sensitivities [made] each day of life a turmoil."[71] Even Whites suffered from the reign of Jim Crow, in King's estimation.[72] King felt that the presumed inferiority and inequality of Blacks maintained through Jim Crow segregation abused the image of God in them and proportionately decreased the image of God in those Whites who inflicted the abuse.[73]

Because segregation was based in legal code as much as custom and practice, King saw the damage to the personhood of Whites and Blacks caused by Jim Crow laws as a direct violation of law and justice.[74] The affront to personality caused by Jim Crow laws served as significant evidence to King that the laws were unjust and dictated civil disobedience as an ethical response.[75] "Any law that uplifts human personality is just. Any law that degrades human personality is unjust," he wrote.[76] "All segregation statutes are unjust because segregation distorts the soul and damages the personality."[77] As such, the first concern of law and justice for King is the law's effect on human personality.

B. Natural Law and Justice

When King raised issues of moral justice, he drew upon an ideal rooted in the classical western natural law tradition.[78] This tradition, grown from the writings of Greek philosophers and the Christian scholars that influenced many of the sacred texts of Judaism and Christianity, viewed justice as part of the natural

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69. *See id.*

70. *See id.* at 121.

71. *See id.*

72. *Id.* at 122 (describing how the self cannot reach its full potential without interacting with others and showing concern for them).

73. *See* King, *The Ethical Demands for Integration*, *supra* note 64, at 119.

74. *See id.* (noting that because the Constitution guarantees equality of all people, Blacks have a right to the benefits espoused in the Constitution).

75. *See id.* at 124 (advocating nonviolent resistance as a means by which the Black community can gain "total emancipation").

76. King, *Letter from Birmingham City Jail*, *supra* note 3, at 293.

77. *Id.*

78. *See* Martin Luther King, Jr., *Love, Law and Civil Disobedience* (Nov. 16, 1961), *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 43, 50.

order of the universe created by God and comprehended by human beings through their ability to reason.[79]

In this tradition, the laws of society are secondary to a higher law that establishes the right and the good.[80] From this higher law, human beings derive the norms of behavior toward each other that govern their lives together.[81] What King called the human law, within the tradition, represented the efforts of different societies to enshrine the higher law in their particular legal systems.[82] This "positive law" was subject to the higher or natural law in moral terms.[83] Accordingly, a society's legal pronouncements could be viewed as good or bad on moral—as well as legal and pragmatic—grounds.[84]

On legal grounds, a law could be good or bad based on its conformity with procedural requirements established by preexisting legal requirements governing its promulgation or pronouncement.[85] A law properly promulgated by a legislative body or pronounced by a judge in light of preexisting legal requirements would be good law.[86] A law issued outside of established procedural obligations or binding legal requirements would be a bad law.[87]

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79. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at xxxii–xxxiv.

80. *Id.*

81. *Id.* at xxxiii (noting that through natural law human beings know "to do good and avoid evil").

82. *Id.* at 129 (discussing the extent to which human law is derived from natural law).

83. *See id.* at 143–44 (describing human laws in terms of just and unjust laws, stating that humans are bound to obey just laws because they derive from the eternal law).

84. *Id.*

85. *See* Aquinas, *Summa Theological of St. Thomas Aquinas, Question 90: The Essence of Law, Article 4, reprinted in* NEW ADVENT (2008) [hereinafter Aquinas, *Question 90*]; LON L. FULLER, THE MORALITY OF LAW 39, 39 (Yale Univ. Press rev. ed. 1969) (discussing a list of factors that make a law bad: deciding rules on *ad hoc* basis, failure to make the law available or publicize the law, retroactive laws, failure to make laws understandable, contradictory laws, frequent changes in the law that make it impossible for a subject to follow, and inconsistencies between how the law is promulgated and how it is administrated).

86. *See* Aquinas, *Question 90*, *supra* note 85; FULLER, *supra* note 85, at 39–44 (discussing what factors contribute to a bad legal system and which ones contribute to a good legal system).

87. *See* Aquinas, *Question 90*, *supra* note 85; FULLER, *supra* note 85, at 39.

> [T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.

Id.

In a prudential or a pragmatic sense, a law could be good or bad based on its expected or actual effects.[88] A law that positively affects a society through its application or from its mere promulgation would be a good law, while a law that negatively affects the society would be a bad law.[89] Of course, consequences cannot always be seen in advance so, as a pragmatic matter, laws that are good in practice actually accomplish desirable ends and should be distinguished from those that merely portend certain results.[90] A law that is initially universally endorsed may be later universally rejected because of an unanticipated consequence, while a law that enjoys little support in its development may be widely praised in the future because of some foreseeable but unanticipated benefit.[91]

In these instances, reason may not dictate any particular position regarding a law because of its lack of apparent moral content; however, the effect of the law may have moral significance that places it within or beyond the bounds of natural law.[92] Take, for example, a law governing the appearance of the uniforms of guards. If the uniform included a feather from the favored bird of the nation that inadvertently caused a debilitating and ultimately deadly rash on all of the guards, the continued application of the law requiring the use of the feather would take on moral significance, and be judged in turn in accordance with the natural law. Accordingly, in both a pragmatic and a moral sense, this would be a bad law because it prevents guards from serving and unintentionally deprives them of their lives without good reason.[93]

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88. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at xxxiii, 97–99 (discussing the good and bad effects laws can have on society). *But see* FULLER, *supra* note 85, at 153–57 (arguing that the internal morality of the law is an essential condition of law itself, and that "law is a precondition of good law").

89. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at xxxiii (discussing that human laws that require conformance to "standards of virtuous conduct" can have a positive impact on society by forming "genuinely virtuous habits" in humans whereas unjust laws "[oppress] those subject to them," having a negative impact).

90. *See id.*

91. *See id.* at 97 ("[T]he proper effect of the law is to lead its subjects to their proper virtue; and since virtue is 'that which makes its possessor good,' it follows that the proper effect of law is to make those to whom it is given good, either absolutely or relatively."). Here I speak of laws that lack apparent moral significance in their formulation but have outcomes that take on moral importance.

92. *See id.* at 97–99 (noting that a proper law has a good effect either relatively or absolutely on those whom it governs).

93. *See id.* at xxxiii–xxxiv (noting that a prerequisite to having a just human law is that it should be an inference made by reasoning from natural law); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 383 (1929) (noting that "life, liberty, and estate" are natural law rights that are embedded into the American constitutional framework).

Natural law then establishes a moral norm that can be used to judge the moral character of a nation's laws.[94] A society's laws may conform to or violate the natural law in their formulation, their implementation, or their outcome.[95] A law that conforms to the higher moral or natural law would then be a good law, while a law that conflicts with the moral law would be a bad law.[96] Under this approach, knowledge of morality or natural law is accessible to human beings through their ability to reason.[97] However, this classic or traditional understanding of natural law places it outside the bounds of human control or subjectivity.[98] Accordingly, the natural law is not bound by culture, nationality, or time, though knowledge and awareness of it may vary.[99]

Saint Thomas Aquinas offered a systematic treatment of natural law that was referenced by King in the *Letter from the Birmingham City Jail*.[100] King wrote, "[t]o put it in terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law."[101] The system developed by Aquinas places all laws within a structured hierarchy that begins with God in the creation of the world through divine wisdom.[102] This divine wisdom manifests the eternal law that permeates perfectly throughout the natural law and imperfectly in human laws.[103] In the natural law, the eternal law can be better known through reason.[104] Reason, commonly distributed to humanity, allows the natural law in its general precepts to be known to all, while its conclusions in particular circumstances may be unclear because of bad habits or dispositions.[105] When human laws violate the dictates of the natural law, they are unjust laws that do not accord

94. *See* Aquinas, *Summa Theological of St. Thomas Aquinas, Question 95: Human Law, Article 2, reprinted in* NEW ADVENT (2008) [hereinafter Aquinas, *Question 95*].

95. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at 143–44 (describing just and unjust laws).

96. *See id.* at 139–43. This should be distinguished from the legal prohibition of all vices and prescription of all virtues, both of which Aquinas rejects. *See id.*

97. *Id.* at 121.

98. *See* Aquinas, *Question 95*, *supra* note 94 (listing a number of factors as to why human law cannot be derived from natural law).

99. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at 123–25 (noting that natural law is "equally valid everywhere").

100. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 293.

101. *Id.*

102. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at 105–07 ("[A]ll laws proceed from eternal law.").

103. *See id.*

104. *See id.* at 118–21.

105. *See id.* at 120–23.

with reason or the eternal law.[106] Despite the close connections within the system, Aquinas allows room for variation in positive human law dependent upon the society and circumstances.[107] These variations do not necessarily violate natural or eternal law as long as they concern matters for which natural law and reason dictate no particular action.[108]

For King, the law of segregation was a corrupt human law that was unjust in its implementation, its consequences, and its formulation.[109] King based his view on his understanding of moral law, which held all humans as equal beings worthy of equal regard and consideration that afforded them certain natural rights.[110]

In the *Letter from Birmingham City Jail*, King provided the most detailed elaboration of his views on law and justice.[111] Written in response to a letter printed in the Birmingham newspaper by eight prominent local clergy criticizing civil rights protests in the city, the letter provided King the opportunity to defend the Civil Rights Movement from the attacks of critics both locally and nationally.[112] To accomplish this, King placed the movement's goals and tactics in the broader context of natural law and justice.[113]

I begin with a similar, though more abbreviated, explanation of King's views on law and justice from his address to the Annual Meeting of the Fellowship of the Concerned in 1961.[114] In this address, he defended the sit-ins and freedom rides of students fighting for civil rights to an interracial group that included White liberal allies who preferred a more gradual approach to the civil disobedience of the students.[115] To counter the claims that it was inconsistent for the students and other civil rights activists to call for compliance with the *Brown v. Board of Education* decision while violating the segregation laws, King enunciated what he saw

106. *See id.* at 143–44.

107. *See* AQUINAS: POLITICAL WRITINGS, *supra* note 20, at 135–36 (describing various forms human civil law may take depending on the form of government that enacts the law).

108. *Id.* at 121–22, 135–36.

109. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 293–94.

110. *Id.* at 293 (asserting that segregation is morally wrong and sinful because it relegates those subject to it as not persons but things).

111. *Id.* at 289–302.

112. *Id.* at 289.

113. *Id.* at 293–95.

114. See King, *Love, Law and Civil Disobedience*, *supra* note 78, at 43–53 for a transcription of the address.

115. *See id.* at 44–47 (defending the civil disobedience engaged in by students and discussing its philosophical underpinnings).

as a fundamental distinction between the two.[116] He explained:

> [T]he students recognize that there are two types of laws. There are just laws and there are unjust laws. And they would be the first to say obey the just laws, they would be the first to say that men and women have a moral obligation to obey just and right laws. And they would go on to say that we must see that there are unjust laws . . . . [W]hat is the difference between a just and unjust law? Well, a just law is a law that squares with a moral law. It is a law that squares with that which is right, so any law that uplifts human personality is a just law. Whereas that law which is out of harmony with the moral is a law which does not square with the moral law of the universe.[117]

In King's view, the moral law is preeminent and accords with a divine law established by God.[118] Likewise, King saw God establishing certain rights for individuals in their relationships with others.[119] These he called "God given rights,"[120] in agreement with the statement in the Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[121] King connected natural law with these and other pronouncements by the Founding Fathers and President Abraham Lincoln.[122] King saw a direct connection between the rights and freedoms that people enjoy and the dictates of natural law.[123]

In King's pronouncements, the natural law establishes rigid categories that demand clear responses.[124] An unjust law like segregation demands rejection and noncooperation as part of an unjust system.[125] King stated that just laws should be obeyed and unjust laws should not.[126] This, King pointed out, flows from a duty not to cooperate with an evil system.[127]

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116. *Id.* at 48–49.

117. *Id.*

118. *See id.*

119. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 293 (discussing the relationship between the oppressed and the oppressor).

120. *Id.* at 292.

121. THE DECLARATION OF INDEPENDENCE, *supra* note 33, at para. 2.

122. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 297.

123. *See* King, *Love, Law and Civil Disobedience*, *supra* note 78, at 48–49 ("[L]aw which is out of harmony with the moral is a law which does not square with the moral law of the universe.").

124. *See id.* at 48.

125. *See, e.g.*, *id.* at 49 ("For many individuals who would call themselves segregationists . . . they seek to evade the law, and their process can lead to anarchy.").

126. *Id.* This contrasts with the more nuanced approach developed by Aquinas.

To explain how to decide the justness of a law, King appealed to the natural law as a standard, expounding that a law that conforms to morality is "right."[128] To assess a law's morality, King initially looked to its effect on human personality.[129] Laws that uphold personhood are moral and therefore just and right, while those that "degrade[] the human personality" are immoral and unjust.[130] While King expanded the category of unjust laws later in the address based on the process of their development, he did not explain how laws uphold or degrade personhood.[131]

To clarify his meaning in more secular and practical terms, King said, "an unjust law is a code which the majority inflicts upon the minority, which that minority had no part in enacting or creating, because that minority had no right to vote . . . ."[132] This undemocratic process of legislating against minority interests, King maintained, renders the resulting law unjust.[133] This relates back to the discussion of a law's legitimacy based on its promulgation in accordance with preexisting legal procedures and requirements.[134] Although King did not maintain that states that denied Blacks the right to vote were breaking state or federal laws, he was arguing that they violated the principles of democracy underlying the American legal system.[135]

These violations of what King understood as the spirit of the law evidenced in the Declaration of Independence, the Constitution, and the Emancipation Proclamation represented miscarriages of justice discernible in terms that King believed natural law skeptics and atheists alike could equally appreciate.[136] "An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand, a just law is a code that a majority compels a minority to follow that it is willing to follow itself," King explained.[137] His point was simple: segregation laws contradicted basic notions of

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See AQUINAS: POLITICAL WRITINGS, *supra* note 20, at 143–44.

127. *See* King, *Love, Law and Civil Disobedience*, *supra* note 78, at 47.

128. *Id.* at 48.

129. *Id.* at 49.

130. *Id.*

131. *Id.* at 43–53.

132. *Id.* at 49.

133. *Id.*

134. *See supra* Part I.B.

135. King, *Love, Law and Civil Disobedience*, *supra* note 78, at 49.

136. King, *Letter from Birmingham City Jail*, *supra* note 3, at 292–302.

137. *Id.* at 294.

fairness.[138] They were passed in states that denied Black residents the right to vote for the legislators who drafted the laws or the governors who signed them.[139] Furthermore, they were applied hypocritically to place limitations on the Black minority that the White majority would have been unwilling to follow if universally applied.[140]

C. American Democratic Ideology, Law, and Justice

A critical component of King's view of law and justice grew from the United States' democratic ideology.[141] King described law and justice as the fulfillment and embodiment of basic principles articulated by the Founders of the nation in the Declaration of Independence and the Constitution, and later extended by Lincoln in the Emancipation Proclamation:[142]

> When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, [B]lack men as well as [W]hite men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.
>
> It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.[143]

This passage, from King's keynote address for the March on Washington, highlights his consistent description of a chief goal of the Civil Rights Movement as the fulfillment of the American

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138. *See id.* at 293–95.

139. King, *Love, Law and Civil Disobedience*, *supra* note 78, at 49.

140. *Id.*

141. *See* Martin Luther King, Jr., *A Testament of Hope*, PLAYBOY, Jan. 16, 1969, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 313, 314–15 (arguing that Americans should acknowledge the principles of "life, liberty, and the pursuit of happiness" as applying to all individuals).

142. *See* King, *The Ethical Demands of Integration*, *supra* note 64, at 119. These principles also demonstrated King's commitment to the sacredness of human personality. In an address to a church conference in 1963, King explained, "[t]his idea of the dignity and worth of human personality is expressed eloquently and unequivocally in the Declaration of Independence . . . . Never has a sociopolitical document proclaimed more profoundly and eloquently the sacredness of human personality." *Id.*

143. King, *I Have a Dream*, *supra* note 19, at 217.

creed provided in the Declaration of Independence that "all men are created equal."[144] King understood that, despite the promise of the creed, the reality for Blacks was legal and social inequality. Beginning the same speech with a reference to the "beacon light of hope" that the Emancipation Proclamation brought to "millions of Negro slaves who had been seared in the flames of withering injustice," King articulated the inconsistency in the promises of equality and freedom and the lived experiences of Black people.[145] "But one hundred years [after the Emancipation Proclamation] the Negro still is not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination."[146]

This contradiction or tension fueled King's understanding of and approach to the issue of law and justice.[147] Approaching the matter as an activist and unwilling victim, rather than as a detached scholar weighing abstract ideas of political and legal philosophy, King saw racial discrimination and segregation as evils that directly contravened the great principles of the nation.[148] Quoting a lecture by Frederick Douglass on the Constitution, he noted that its language speaks unreservedly of "[w]e the people," without qualification as to race or class or other status.[149] King, like Douglass, saw a claim in the Constitution towards an undifferentiated humanity that necessarily included Blacks as members of humanity who should be included in "the benefits for which the Constitution of America was ordained and established."[150] The rightful extension of the benefits of the Constitution and the rights described in the Declaration of Independence represented the embodiment of law and justice to King: the end to a long night of injustice.[151] The Supreme Court had instilled hope in King and others in 1954 with the landmark decision in *Brown v. Board of Education*.[152] Speaking of *Brown*, King remarked, "It came as a reaffirmation of the good old

144. THE DECLARATION OF INDEPENDENCE, *supra* note 33, at para. 2.

145. King, *I Have a Dream*, *supra* note 19, at 217.

146. *Id.*

147. *See id.* at 217–18.

148. King, *The Ethical Demands for Integration*, *supra* note 64, at 119 (referring to the dignity and worth expressed by the principles of the Declaration of Independence).

149. *Id.*

150. *Id.*

151. Martin Luther King, Jr., *Give Us the Ballot—We Will Transform the South* (May 17, 1957), *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 197, 197 (referring to the recent decision to end segregation in public schools).

152. 347 U.S. 483 (1954).

American doctrine of freedom and equality for all people."[153] In this decision that undermined the scourge of legally sanctioned segregation entrenched in *Plessy v. Ferguson*,[154] King saw a foreshadowing of the day when law and justice promised by the Founding Fathers would become a reality for their Black progeny.[155]

In the *Letter from Birmingham City Jail*, King connected his defense of civil disobedience in Birmingham with the prevalence of unjust laws that compel disobedience.[156] To help his readers know just from unjust laws, King expanded on his discussion of Personalism and natural law with concrete examples rooted in the principles of the nation's democracy:

> An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama all types of conniving methods are used to prevent Negroes from becoming registered voters . . . despite the fact that the Negro constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?[157]

Alabama, the South, and the entire nation's failure to ensure the right to vote for millions of Blacks served as one of the principle injustices for which King sought a legal remedy.[158] He described this particular Jim Crow practice as "a tragic betrayal of the highest mandates of our democratic tradition" and as "democracy turned upside down."[159]

Law and justice for King was the end of Jim Crow segregation.[160] On three separate but consistent grounds, King saw the end of the nation's legal contradiction—promising freedom and equality for all but providing bondage and racial inequality for Blacks—as a fundamental requirement of law and justice.[161] To

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153. King, *Give Us the Ballot—We Will Transform the South*, *supra* note 151, at 197.

154. 163 U.S. 537 (1896) (upholding a Louisiana law requiring racial segregation on trains).

155. *See* King, *Give Us the Ballot—We Will Transform the South*, *supra* note 151, at 197.

156. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 289.

157. *Id.* at 294.

158. King, *Give Us the Ballot—We Will Transform the South*, *supra* note 151, at 197 (arguing that the prevention of voter registration was a betrayal of democratic principles).

159. *Id.*

160. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 293.

161. *See* King, *I Have a Dream*, *supra* note 19, at 217–18.

King, segregation laws were an affront to human personality and dignity, an immoral contravention of the natural law, and inconsistent with the democratic principles of the United States.[162] Only once they ended could law and justice begin.

In the remainder of this Article, I consider how King's views compare to two contemporary legal discourses: critical legal studies and critical race theory. I will buttress the optimism of King that grounded his views above with later statements from him following the passage of the Civil Rights Act of 1964, his visit to Watts, and his lackluster campaign in Chicago. These later statements focus more on the substantial reform required to meet the needs of Black Northerners and Southerners trapped in ghettos and rural poverty.[163] It was during this period that King came to more fully appreciate that legal rights alone could not secure the material wellbeing of Blacks that racial justice demanded.[164]

III. Dr. King and Contemporary Legal Discourse

A. Critical Legal Studies, Law, and Justice

Contemporary scholars reject many of the foundational beliefs undergirding King's philosophy.[165] The most divergent view in today's scholarship comes from the adherents of Critical Legal Studies (CLS).[166] The CLS movement grew out of scholarly critiques of legal and political thought in the late 1970s that challenged philosophical claims that the existing legal system represented an objective, determinate, and politically neutral system.[167] Many scholars espousing this view contend that the American legal system advances a liberal capitalist ideology using a hierarchical vision of the world built on patterns of domination and subordination that appear fixed, immutable, and proper.[168] A second theme of the CLS scholarship is the indeterminate nature

162. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 293 ("So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful.").

163. *See* Martin Luther King, Jr., *Showdown for Nonviolence*, LOOK, Apr. 16, 1968, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 64, 64–72.

164. *See id.* at 67 ("We need an economic bill of rights. This would guarantee a job to all people who want to work and are able to work.").

165. *See* LEVIT ET AL., *supra* note 2, at 52–53 (noting that civil disobedience may not be simply just or unjust behavior as it is still an illegal act committed for what the actor deems a moral reason).

166. *See id.* at 402.

167. *Id.*

168. *Id.* at 402–03.

of legal rules and reasoning.[169] Scholars advancing this view critique claims that legal rules necessitate particular judgments in legal cases; instead, they maintain that law fails to provide judges with objective criteria necessitating particular rulings.[170] CLS scholars argue that the prevalence of competing claims and considerations in cases dictates that judges bring subjective value judgments into play when reaching their conclusions.[171] The chief development of this CLS theme is a critique of rights discourse as both a façade that hides the actual needs and relationships paramount to desired outcomes, and an ephemeral signifier devoid of the content necessary to ensure or determine legal results.[172] This question of the importance or relevance of rights will serve as the central theme of my analysis of King's views relative to these more recent jurisprudential movements. Namely, how does King's conception of law and justice—the realization of the natural rights provided by God that uphold human personality in accordance with natural law, as promised by the Declaration of Independence and the Constitution—withstand the challenge made by CLS scholars?

In an article entitled *An Essay on Rights*, Mark Tushnet provides a seminal CLS critique of rights discourse in which he describes the four elements of his critical assessment.[173] They are instability, indeterminacy, abstraction, and impediment.[174] Rights are unstable: as social circumstances change so does the meaning and availability of rights.[175] Rights produce indeterminate results: the existence or nonexistence of one or more rights fails to "produce determinate consequences."[176] The rights concept is an abstraction from reality: the notion of rights substitutes an empty abstraction for actual experiences that should be valued.[177] Rights impede social change: rights discussions function as formidable obstacles to the changes needed to restructure society in accordance with a progressive agenda.[178]

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169. *Id.* at 402.

170. LEVIT ET AL., *supra* note 2, at 402 ("On the legal reasoning level, the abstract rhetoric of rights and rules masks subjective value adjudication.").

171. *See id.* ("[D]ecisionmaking inevitably includes subjective value judgments.").

172. *See id.* at 404 ("Rights are unstable and ultimately unreliable . . . .").

173. Mark Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363, 1363–64 (1984).

174. *Id.*

175. *Id.* at 1363.

176. *Id.* at 1364.

177. *Id.*

178. *Id.*

After a brief elaboration of the first two elements of Tushnet's assessment, I evaluate the strength of their merits relative to King's view of law and justice. I begin with his initial claim that rights suffer from instability.[179] As abstract principles, rights have no coherent meaning outside the context of particular situations and societal understandings.[180] Tushnet explains, "[t]he conditions of the society define exactly what kind of rights-talk makes sense, and the sort of rights-talk that makes sense in turn defines what the society is."[181] In other words, rights depend on the historical contingency of particular societies and only have meaning in light of those contingencies.[182] In turn, the contingencies themselves determine the nature of the society and the social meanings that govern relationships.[183] As conditions change within societies and social meanings shift, so will the meaning of rights, thereby revealing their instability.[184] Because of this instability, the successful recognition of rights on one day may completely lose its value the next day, or at some point in the future under changed circumstances.[185]

Applying this assessment to King's view of law and justice reveals the historic contingency of King's argument. King and his predecessor Frederick Douglass argued that Blacks in the United States fell within the protections of the Constitution because they were "people," but this only makes sense if there is a putative understanding within society that Blacks are in fact "people."[186]

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179. *See id.* at 1370.

180. *Id.*

181. *Id.*

182. *See id.* at 1370–71.

183. *Id.*

184. *Id.*

185. Here we might consider how the meaning of many constitutional rights changed in the wake of the terrorist attacks on the World Trade Center Towers and the Pentagon on September 11, 2001. New legal interpretations employed by the federal government in light of the perceived risk of additional attacks affected a host of constitutional rights including a right to counsel, a right to a speedy trail, and a right to confront accusers, among others. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him . . . and to have the assistance of [c]ounsel for his defense."). For examples of post-September 11 federal interpretations affecting constitutional rights, see *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Guantánamo detainees are entitled to a prompt habeas corpus hearing); Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U.L. REV. 1683, 1684 (2009) (noting the significance of the Supreme Court's upholding constitutional rights of noncitizen wartime prisoners after "six years of government insistence that the prisoners at Guantánamo had no rights whatsoever, and could be held indefinitely, even for life, without charge or meaningful opportunity to contest their treatment or detention").

186. King, *The Ethical Demands for Integration*, *supra* note 64, at 119. For a

The fact that some Whites and most Blacks held this view when the Constitution was signed could not establish the societal meaning of the term or legal rights derived therein.[187] Instead, this understanding developed across the history of the nation out of many contingent occurrences.[188] Likewise, the Declaration of Independence's claim that "all Men" were endowed by their Creator with unalienable rights should be considered in light of the predominant view of the time that Black males could not become "men."[189] Of course, this is the argument that Justice Taney made in *Dred Scott* that infuriated some and placated others.[190] Its relevance to my argument is that the Civil War seems to have been fought in part to determine which social meaning of "people" and "man" would prevail. The outcome of the war and the ensuing occupation of the South partially settled the question for Blacks in the North and temporarily settled the question for Blacks in the South.[191] While Northern troops were present, the right to vote guaranteed to Black men by the Fifteenth Amendment meant that they could freely participate in elections and even hold office.[192] Following the withdrawal of the troops from the South, however, the right to vote for Southern Black men had a completely different set of meanings that led to seven decades of disenfranchisement.[193]

In addition to a challenge to the stability of rights across time, Tushnet also proffers a challenge to what he calls the technical indeterminacy of rights.[194] Technical indeterminacy addresses the fact that in individual cases, judges use a balancing process to determine a right's existence, extent, limitation, significance, and benefit.[195] Because of this myriad of considerations, the existence of a right does not compel any particular

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contrary view, consider Justice Taney's opinion in *Dred Scott v. Sanford*, 60 U.S. 393, 399–454 (1861).

187. *See* Tushnet, *supra* note 173, at 1370–71.

188. For a consideration on the relevance of the Declaration of Independence to Blacks, see HIGGINBOTHAM, *supra* note 36, at 371–89.

189. *Compare* THE DECLARATION OF INDEPENDENCE, *supra* note 33, at para. 2, *with Dred Scott*, 60 U.S. at 410.

190. *Dred Scott*, 60 U.S. at 410.

191. For a discussion of Blacks' struggle to obtain personhood before and following the Civil War, see VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA 258–317 (1992).

192. *See id.* at 287–97.

193. *Id.* at 306–17.

194. Tushnet, *supra* note 173, at 1371–72.

195. *Id.*

outcome in a given case.[196] As judges balance rights against each other, weigh the affected interests, and construct the background situation, a host of subjective valuations obscure any necessary outcomes.[197] Tushnet explains that the risk of focusing on rights-based arguments is basic: "[b]ecause rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles."[198]

As we consider the four decades since the passage of the civil rights statutes of the 1960s, we can better appreciate the concern about indeterminacy and its consequences. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race.[199] However, as early as 1970 the Supreme Court decided a seminal employment discrimination case that tested the meaning of discrimination under Title VII. In *Griggs v. Duke Power Co.*,[200] the Court considered whether an employer could require that employees pass an aptitude test as a condition to employment or promotion, when there was evidence that the test disproportionately excluded Black workers from access to desirable inside jobs.[201] The court of appeals held that the employer's subjective intent was determinative, and held against the Black employees because of the absence of purposeful discrimination.[202] The Supreme Court disagreed, however, finding that the use of tests, unrelated to job qualifications, that disparately impacted Blacks violated the protection afforded to Blacks under the statute.[203]

Within six years of the Court's decision in *Griggs*, the Supreme Court heard a similar case, *Washington v. Davis*,[204] regarding examinations at the Washington, D.C. police academy.[205] In that case, the Supreme Court overturned the appellate court's decision ruling that the use of a written verbal skills exam was unconstitutional because of the disparate racial impact it created by excluding otherwise qualified Blacks from joining the police force.[206] The Supreme Court held that the protection provided by Title VII did not apply to the Washington, D.C. police department

196. *See id.* at 1372–73.
197. *Id.*
198. *Id.* at 1371.
199. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).
200. 401 U.S. 424 (1971).
201. *Id.* at 425–26.
202. *Id.* at 429.
203. *Id.* at 436.
204. 426 U.S. 229 (1976).
205. *Id.* at 232.
206. *Id.* at 237.

because no such right against disparate impacts exists under the Equal Protection Clause.[207] Unlike under a Title VII analysis, the Court held that under an equal protection analysis the test was a valid and acceptable practice that could be used to improve the qualifications of the employees even if it could not be shown to improve job performance.[208]

These two watershed cases in civil rights law highlight the indeterminacy of legal rules and rights. Leading up to these decisions, courts had used the same analysis of racial discrimination claims under both Title VII and the Equal Protection Clause.[209] *Griggs* held that the test was unacceptable, despite the holding of the court of appeals,[210] while *Davis* found the test unlawful, even though the court of appeals had found it acceptable.[211] Here we have two similar periods, two similar tests, two similar issues, but two different results. In these two cases—and the numerous others like them from 1971 to 1976, and from 1976 to today—a discussion of the "right" to be free from racial discrimination adds little to an evaluation of a Black person's ability to gain employment or access to jobs or other benefits when he or she does not perform as well as Whites on written examinations.[212] Although the right to be free from racially based employment discrimination in most jobs was established in 1964,[213] the ability to be free from such racial discrimination is a completely different matter.[214] To argue for the creation of a right to be free from racial discrimination in employment in American society has no meaning today—not because people are all free from racial discrimination, but because the right to be free exists.[215]

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207. *Id.* at 239.

208. *Id.* at 249–52.

209. *Id.* at 237.

210. *Griggs*, 401 U.S. at 436.

211. *Davis*, 426 U.S. at 237.

212. For a discussion of the limitations of legal rights against discrimination in achieving equality, see RICHARD F. AMERICA, THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES 3–12 (2002) (addressing the implications and benefits of reparations, and how to assess their value); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 41–83 (2003) (examining the separate lives of Whites and Blacks, despite continued efforts to increase understanding and expand opportunities).

213. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e).

214. JOE R. FEAGIN, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 138 (1995) ("[L]egal statements of [employment rights] are not necessarily statements of reality."); HACKER, *supra* note 212.

215. *See* 42 U.S.C. § 2000e; ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE, ONE NATION, INDIVISIBLE 423–61 (1997).

Persons concerned with enjoying this actual freedom, therefore, might look to other means or methods to achieve it that do not infringe on their rights.[216]

King's focus on law and justice may have belied an inordinate emphasis on, and confidence in, rights' ability to establish legal protections that would insulate Blacks from future discrimination.[217] Despite the indeterminacy and instability of Blacks' newly acquired rights, the importance of the attainment of formal equality for Blacks should not be undervalued.[218] The destruction of White supremacy in the South as an accepted social norm substantially changed the lived experiences of Black Southerners,[219] who did then and still do represent the vast majority of the United States' Black population.[220] In the South, the call for rights and the extension of formal equality to Blacks was closely intertwined with the demand for equal recognition and equal regard in the public sphere.[221] King expressed this in his concerns about the immorality of segregation as a double standard that the White majority imposed upon the Black minority and an assault upon the dignity of Blacks that correspondingly diminished the personhood of Whites.[222] As such, the CLS critique fails to account for the importance of defeating the public presumption of White supremacy and superiority in the psyche of Black and White Southerners.[223]

However, the focus on rights and formal equality did limit the reach of the victory to the American South.[224] King acknowledged that himself in 1965 following the riots in Watts,

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216. *See* ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY (1996); Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163 (2009).

217. *See* King, *A Testament of Hope*, *supra* note 141, at 314–22.

218. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378–79 (1988).

219. *See id.* at 1378 ("Removal of these public manifestations of subordination was a significant gain for all Blacks . . . .").

220. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 7 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

221. *See* Martin Luther King, Jr., *Civil Right No. 1: The Right To Vote*, N.Y. TIMES, Mar. 14, 1965, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 182, 182–88.

222. King, *Letter from Birmingham City Jail*, *supra* note 3, at 291–94.

223. For an in-depth discussion for the limitation of CLS on issues of race, see Crenshaw, *supra* note 218, at 1349–56.

224. *See* Martin Luther King, Jr., *Next Stop: The North*, SATURDAY REV., Nov. 13, 1965, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 189, 189.

Los Angeles.[225] He asserted, "It is in the South that Negroes in this past decade experienced the birth of human dignity . . . . In the North, on the other hand, the Negro's repellent slum life was altered not for the better but for the worse."[226] After spending time in Los Angeles and Chicago, King came to appreciate that his focus on rights did not account for the miserable conditions of many Blacks in the North and in the West who already enjoyed the formal rights for which the movement fought.[227] In the same address, King identified the failure of civil rights leaders to adequately account for their strategy's Northern consequence as a "miscalculation."[228] This miscalculation is what the CLS perspective helps elucidate.[229]

B. Critical Race Theory, Law, and Justice

Critical race theorists bring a critical perspective to current and past antidiscrimination law. Though influenced by CLS, Critical Race Theory (CRT) looks primarily to the limitations of antidiscrimination law and its ability to address the continuing problem of societal racism.[230] Therefore, unlike CLS, CRT does not reject law as a viable means to produce societal reform, but instead serves as more of a lamentation regarding the courts' failure to provide racial justice in post-civil rights era cases despite the symbolic provision of formal equality.[231] CRT scholarship provides a discerning analysis of the federal courts' insulation and protection of social practices that produce and reinforce substantive racial and gender inequality from legal challenge.[232]

As a correlative insight, CRT scholars have shown how the federal courts' ongoing rejection of remedial efforts to rectify discriminatory conduct against racial and ethnic minorities protects societal privileges and advantages afforded Whites as a

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225. *Id.*

226. *Id.*

227. *Id.* at 189–90.

228. *Id.* at 190.

229. Although King lacked the benefit of the CLS perspective at the time, Malcolm X consistently pointed out the limitations of the approach. See JAMES CONE, MARTIN AND MALCOLM IN AMERICA (Orbis 1992) for an examination of the contrasting views and perspectives of Malcolm X and King on race in the United States.

230. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, *in* CRITICAL RACE THEORY 5, 13–32 (Kimberlé Crenshaw et al. eds., 1996) (discussing the relationship between CRT and CLS).

231. *Id.*

232. *Id.*

result of historic racial discrimination.[233] Additionally, CRT emphasizes critical feminist discourses examining the intersection of race and gender and the prevalence of societal racism against Blacks, Latinos, and other racial minorities despite the promise of formal legal equality.[234] In this section, I focus my analysis on CRT's concern with the rejection of race-based remedies by post-civil rights era courts, and its relevance to King's vision of law and justice. Although many CRT scholars would recognize the value and importance of the rights-centered formal equality rhetoric of King and the Civil Rights Movement at the time it was used, they would likely mirror King's disappointment with the progress made beyond the extension of rights.[235]

Kimberlé Crenshaw authored one of the seminal works in CRT, engaging both the CLS critique of rights and the neoconservative critique of race-based remedies.[236] In the article, she raises a very important issue that has great relevance for our consideration of King's view of law and justice.[237] Drawing on a common theme in CRT that racial justice requires race-based remedies,[238] Crenshaw asserts that formal equality gained through civil rights law undermines arguments that racism bears any meaningful relationship to the material wellbeing of Blacks.[239] In effect, by focusing demands on the elimination of the disjuncture in the nation's promised and afforded rights for its citizens, the movement's success in gaining the passage of civil rights laws requiring formal equality severed the relationship between historic racism and conditions of material inequality in the minds of most Whites.[240] She explains the distinction between symbolic and material subordination as follows:

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233. *Id.*

234. Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY, *supra* note 230, at 357, 357–77.

235. *See* King, *Letter from Birmingham City Jail*, *supra* note 3, at 295–300.

236. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY, *supra* note 230, at 103.

237. Commenting on the strategy used by civil rights leaders, Crenshaw notes:

> Movement leaders used these tactics to force open a conflict between [W]hites, which eventually benefited [B]lack people. Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped to create the political controversy without which the state's coercive function would not have been enlisted to aid [B]lacks.

Id. at 117.

238. *Id.* at 103–19.

239. *Id.* at 114–16.

240. *Id.* at 115.

> Symbolic subordination refers to the formal denial of social and political equality to all [B]lacks, regardless of their accomplishments . . . . Material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated [B]lacks to [W]hites and subordinated the life chances of [B]lacks to those of [W]hites on almost every level.[241]

These two, Crenshaw recognizes, were typically connected in the minds of most people.[242] However, the end of legal segregation resulted in society's acceptance of formal equality and the inclusion of Blacks as equal members in the nation's political vision.[243] Crenshaw points out that, consequently, Blacks' experiences of material subordination are viewed as the result of cultural inferiority rather than historic or continued discrimination.[244] She goes on to elaborate that the same legal reforms that removed symbolic subordination now support an ideological framework that makes contemporary experiences of Blacks facing material subordination seem "fair and reasonable."[245]

King became painfully aware of this paradox in the last years of his life. He asked:

> Why is the issue of equality still so far from solution in America, a nation that professes itself to be democratic, inventive, hospitable to new ideas, rich, productive and awesomely powerful? . . . America is deeply racist and its democracy is flawed both economically and socially . . . . Justice for [B]lack people will not flow into society merely from court decisions nor from fountains of political oratory. Nor will a few token changes quell all the tempestuous yearnings of millions of disadvantaged [B]lack people . . . . When millions of people have been cheated for centuries, restitution is a costly process.[246]

He continued:

> Many [W]hites hasten to congratulate themselves on what little progress we Negroes have made. I'm sure that most [W]hites felt that with the passage of the 1964 Civil Rights Act, all race problems were automatically solved. Because most [W]hite people are so far removed from the life of the average Negro, there has been little to challenge this assumption. Yet Negroes continue to live with racism every day. It doesn't matter where we are individually in the scheme of things, how near we may be either to the top or to

241. *Id.* at 114.
242. *Id.* at 114–16.
243. *Id.*
244. *Id.* at 116.
245. *Id.* at 116–18.
246. King, *Letter from Birmingham City Jail*, *supra* note 3, at 314.

> the bottom of society; the cold facts of racism slap each one of us in the face.[247]

In these passages, King addressed a significant problem that followed the passage of the Civil Rights Acts of 1964 and 1965 that also concerns CRT scholars—formal equality provided by the legislation could not achieve law and justice for Blacks.[248] King's remarks suggest recognition that the end of lawful segregation and the formal extension of legal rights to Blacks that had been afforded to Whites failed to meet the full demands of law and justice by ending widespread racial discrimination against Blacks or by satisfying legal notions of restitution for past wrongs.[249] These realizations underscore the ways that King's vision of law and justice based in procedural justice was incomplete—lacking an adequate vision of restorative justice.

Overall, King's view of law and justice was well suited to the time and the needs of the majority of Blacks who, like him, lived under the powerful grip of Jim Crow segregation.[250] Crenshaw persuasively argues in her article that, in fact, the federal government only supported King and the Civil Rights Movement because of the way the argument was framed.[251] She explains, "Because [B]lacks were challenging their exclusion from political society, the only claims that were likely to achieve recognition were those which reflected American society's institutional logic—legal rights ideology."[252] Crenshaw acknowledges that although the rights-based arguments did place limitations on the possible accomplishments of the movement, its leadership—like most oppressed people—found themselves "between a rock and a hard place," as broader claims beyond the rights ideology would have fallen on deaf ears.[253]

C. Restorative Justice and Reparations

While Crenshaw's defense of the movement's approach carries great merit, I believe that King's failure to include

247. *Id.* at 321–22.

248. *See id.*

249. *Id.* at 314, 322.

250. *See, e.g.*, Martin Luther King, Jr., *The Current Crisis in Race Relations*, NEW S., Mar. 1958, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 85, 85–90 (describing the heavy pushback from Southern states following the *Brown* decision).

251. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *supra* note 236, at 111–12.

252. *Id.* at 111.

253. *Id.* at 112.

restorative justice as an essential element of law and justice in the early days of the movement was avoidable. By 1963, King had recognized the issue.[254] In his book, *Why We Can't Wait*, he wrote:

> 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 for American Negroes. The payment should be in the form of a massive program by the government of special, compensatory measures which could be regarded as a settlement in accordance with the accepted practice of common law.[255]

Even here, it is not clear the extent to which King is fully invested in the claim.[256] Although he raises the issue, he also makes the broader problem of poverty for poor Whites a component, and fails to sufficiently develop the redress claim as an independent and essential element of law and justice.[257] Ultimately, the claim for redress becomes overshadowed in King's subsequent writings and speeches by his focus on the federal government's obligation to end poverty.[258] Before that time, King consistently and tirelessly focused his arguments around ending segregation.[259] Although King was convinced of the need to address poverty before that time, the chief concern of the Civil Rights Movement, as voiced by King, was the end of segregation as a dictate of law and justice.[260]

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254. *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 137–52 (1964) [hereinafter KING, WHY WE CAN'T WAIT].

255. *Id.* at 137.

256. *See id.* King's decision not to press this point may have been strategic based on a belief that Whites would not support it and that Blacks did not demand it.

257. See MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU 317 (2000) for a contrary view. Dyson argues that King's inclusion of poor Whites as beneficiaries reflected his dual commitment to remedying slavery and past discrimination against Blacks, as well bringing about economic justice for Whites. *Id.*

258. King's later speeches and writings consistently address the issue of poverty as a central concern with only occasional references to slavery as a justification. *See, e.g.*, King, *I Have a Dream*, *supra* note 19, at 217; King, Nobel Prize Acceptance Speech, *supra* note 19, at 224 ("I am mindful that debilitating and grinding poverty afflicts my people and chains them to the lowest rung of the economic ladder."). This did not become a focal point, however, until the Voting Rights Act of 1965 was passed. *See, e.g.*, King, *A Testament of Hope*, *supra* note 141, at 313–28 ("Confronted now with the interrelated problems of war, inflation, urban decay, [W]hite backlash and a climate of violence [the nation] is now *forced* to address itself to race relations and poverty, and it is tragically unprepared.").

259. *See* Martin Luther King, Jr., *The Burning Truth in the South*, PROGRESSIVE, May 1960, *reprinted in* ESSENTIAL WRITINGS, *supra* note 1, at 94, 94–98; King, *The Ethical Demands for Integration*, *supra* note 64, at 117–25; Bernice McNair Barnett, *Invisible Southern Black Women Leaders in the Civil Rights Movement: The Triple Constraints of Gender, Race, and Class*, 7 GENDER & SOC'Y, 162, 162–82 (1993).

260. King, *The Burning Truth in the South*, *supra* note 259, at 94–98.

We can only speculate on what might have resulted if King had strongly linked the demand for Black rights with restitution for their past abridgment as a central theme of the Civil Rights Movement. Such an approach, arguably, would have allowed for a more sweeping movement that more effectively captured the needs of Blacks across the country, while still keeping the end of segregation in the forefront. This would have provided a more fundamental alliance between Black Northerners and Black Southerners that could have nurtured a Northern component of the movement advocating both civil rights and restitution. It might also have avoided the bifurcation of civil rights and remedial measures for past discrimination that the Court now deems unconstitutional as violations of the civil rights of Whites.[261]

Conclusion

Clearly, King's exceptional vision was less than 20/20. After all, in the same way that Personalism, the nation's founding documents, and natural law brought him to see segregation as a violation of law and justice, King should have seen the same dictate for Black women and all women.[262] Today, scholars and others have come to see that law and justice dictate equality before the law regardless of race, gender, national origin, religion, disability, sexual identity, or class.[263] This expansion of King's vision also includes restorative justice and redress for years of segregation and exclusion suffered before and during the Civil Rights Movement.[264] Although the courts and Congress have yet to recognize and establish legal equality and rights in all of these areas, the validity and importance of these rights are even more apparent in the United States and around the world today than during King's life.[265] Nonetheless, as many critical theorists might

261. Of course, there are other issues that also could, and arguably should, have been included in King's view of law and justice, including the equal treatment of Black women both inside and outside of the movement. See CONE, *supra* note 229, at 272–87 for a detailed consideration of King's views on gender.

262. Unfortunately, space does not allow me to examine this issue. *See id.*

263. *See* Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–88 (2006) (prohibiting discrimination based on sex); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (prohibiting discrimination based on race, religion, sex, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) (prohibiting discrimination based on disability); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006) (describing prohibitions of discrimination based on class).

264. *See* KING, WHY WE CAN'T WAIT, *supra* note 254, at 134–36.

265. *See, e.g.*, laws cited *supra* note 263.

note, legal rights and remedies will often fall short of the substantive goals they represent, even when fully recognized. Accordingly, if living today, perhaps King would see the challenge more expansively to require rights and remedies that both preserve and protect human personality for all as a fundamental tenet of American democracy worth fighting for. Yet we should not saddle King's vision with the battles that history dictates we wage; instead, we would do well to marry our own visions of law and justice with a commitment to activism that society finds as compelling as King's.