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King and the Crits: Exploring the Length and Limits of Dr. Martin Luther King Junior's Vision of Legal Justice

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KING AND THE CRITS: EXPLORING THE LENGTH AND LIMITS OF DR.
MARTIN LUTHER KING JUNIOR’S VISION OF LEGAL JUSTICE

Carlton Waterhouse*

“The arc of the moral universe is long but it bends toward justice.”¹

-Martin Luther King, Jr.

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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

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¹ Martin Luther King, Jr., Address to the Southern Christian Leadership Conference: Where Do We Go From Here (Aug. 16, 1967).

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, 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? Is it the historically contingent legislation of democratic regimes? Is it divine directive revealed to prophets and the faithful and binding upon all? Or is it a fundamental ordering of the universe made clear to all through unimpeded reason? Through sermons, addresses, books, and other writings, King developed and presented his views regarding legal justice.⁴ Although lacking the developed legal analysis of jurisprudential scholars, King made a meaningful contribution to jurisprudential discourse of his time by opening the discourse to the broader society and centering it on a critical issue of his day.⁵

Despite his lack of legal training, King benefited from an excellent education and the unique ability to connect with the black masses of the south, suffering the hardships of segregation, and northern whites committed to the ideals of liberalism.⁶ Given the time and interest, King very well could have made a more meaningful contribution to our understanding of legal justice. While alive, King was not afforded the same luxuries of

² See, NANCY LEVIT, RICHARD DELGADO & ROBERT L. HAYMAN, JR., JURISPRUDENCE: CLASSICAL AND CONTEMPORARY (2d ed. 2002).

³ See, Letter from Birmingham City Jail (Apr. 16, 1963), *in* MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., at 289-303 (James M. Washington ed., New York: HarperCollins 1991).

⁴ See MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. (James M. Washington ed., New York: HarperCollins: 1991) for the best collection of the speeches and writings reflecting Dr. King's outlook on the subject.

⁵ See generally, DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING JR., and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (Harper Perennial 1999)

⁶ *Id.* at 44.

abstract contemplation taken for granted by many ancient and contemporary philosophers and his ruminations were ultimately cut short by a sniper's bullet.⁷ King's writings and addresses, nonetheless, reveal a man genuinely concerned with the theological and philosophical questions of his day.⁸ Critical scholarship endeavors to recognize and identify the insights and inconsistencies, limitations and lucidity in the words and ideas of men and women like Dr. King whose lives like rudders changed the course of history.⁹ Through the engagement we should come to better understand them and ourselves.¹⁰

In this article, I strive to identify, understand, and critically evaluate King's views on legal justice. Part I of the article begins with a brief consideration of what is meant by the term "legal justice." After gaining some background understanding of the term, the article explores Personalism, America's democratic principles (as found in the Declaration of Independence and the United Constitution), and Natural Law as the three philosophical commitments that formed King's vision of legal justice. Part II of the article considers King's vision in light of the insights of two schools of critical jurisprudence: Critical Legal Studies and Critical Race Theory. A short review of some of the primary concerns of these legal schools precedes the scrutiny of King's vision in light of these two legal philosophies. The analysis concludes with a reflection on the poignancy of the challenges to King's vision of legal justice in light of historical developments of the last forty years.

LEGAL JUSTICE

⁷ *Id.* at 623-634.

⁸ *See generally*, Garrow, *supra* note 5.

⁹ 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* 271-275 (1986) (addressing challenges raised by critical legal scholarship to the integrity of the American legal system).

¹⁰ *Id.*

Legal Justice ought to be distinguished from the many other types of justice commonly spoken about.¹¹ Distinct from restorative justice, distributive justice, retributive justice, compensatory justice, and procedural justice, legal justice will incorporate and/or facilitate one or more of the above aspects of justice.¹² However, unlike the above concepts, legal justice finds its roots bound to the juridical system of a nation or a society. Avoiding precise definition, I suggest that the term speaks to an ideal by which legal processes and outcomes can be evaluated.¹³ In effect then, legal justice refers to the justice of the laws and the legal system itself. These laws can range from legislative efforts to proscribe the boundaries of state recognized marital relationships to a person's ability to be compensated by another for some wrongful injury that they suffer.¹⁴ The requirements for participating in the court system and the ability to receive public assistance when needed each relate to some form of justice and can be matters of legal justice when they affect any person or group of persons.

1. Justice and Legal Equality

One basic aspect of legal justice, "equality before the law" 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

¹¹ Aristotle, *Nicomachean Ethic* Book 5, paragraph 2, <http://classics.mit.edu/Aristotle/nicomachaen.5.v.html> .

¹² Julian Lamont & Christi Favor, *Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <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.)

¹³ The substance of the ideal that should be used to define legal justice is the primary subject of contemporary jurisprudence. Levit, Delgado & Hayman, *supra note 2*.

¹⁴ Aristotle, *supra note 11*, paragraph 7.

is being wronged, and if one inflicted injury and the other has received it.¹⁵

In the passage, Aristotle makes reference to what he calls rectificatory justice.¹⁶ This term relates to individuals' treatment by a judge in a legal dispute. 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.¹⁷ As an example, Aristotle asserts that the facts at issue are tantamount and not the character or the reputation of the individuals.¹⁸ A good man who has defrauded a bad man is equally liable as a matter of justice as both are equally liable for any crime that they commit.¹⁹ In Aristotle's view, the actions of individuals should govern the outcome of legal disputes rather than their personal characteristics.²⁰

This notion of equality before the law has threads through Western philosophy and jurisprudence and blossoms in the Declaration of Independence and the United States Constitution.²¹ The Declaration of Independence points to the concept in considering the rights of all men.²² "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."²³ With regard to white men, from the time of the founding of the nation the principle was established.²⁴ As a matter of law,

¹⁵ Aristotle, *supra* note 11, paragraph 4 (B).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ For a discussion of equality in the western tradition, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press 1978).

²¹ United States Declaration of Independence, July 4, 1776.

²² *Id.*

²³ *Id.*

²⁴ Consider Justice Taney's opinion in *Dred Scott v. Sanford*, 60 U.S. 393 (1861) finding that black had no rights accorded in the Declaration of Independence from the beginning.

cases and controversies, as well as the rights of citizens were to be adjudicated and adjudged without respect of persons.²⁵ However, the extension of equality before the law to blacks was not widely recognized at the time of the Declaration's signing.²⁶ 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.²⁷ Despite these strides, most states failed to extend full equality to blacks before the law.²⁸ When the question of the legal equality of blacks came before the Supreme Court in *Dred Scott v. Sanford*, the highest court of the land addressed whether blacks were entitled to rights equal to those of whites.²⁹ 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.³⁰

In the decision, the majority rules that a formerly enslaved black man who gained his freedom through residence in a state that prohibited slavery could not bring suit in federal

²⁵ U.S.CONST. amend. V.

²⁶ See, A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR (NY: Oxford University Press 1978).

²⁷ *Id.* at 381-389.

²⁸ A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 371-75 (Oxford University Press 1978).

²⁹ See, *Dred Scott* 60 U.S. 393.

³⁰ *Id.* at 405-406 (emphasis added).

court as a citizen of the United States when he was re-enslaved by his former master after returning to the antebellum south.³¹ The Court makes the decision based largely on their 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.³²

Roughly eight decades after the Declaration of Independence was signed, the Fourteenth Amendment of the United States Constitution spoke directly to the issue.³³ 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 to any person within its jurisdiction the equal protection of the laws, 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.³⁴ However, following a brief period of reconstruction, in the south, equal protection before the law was a dead letter principle as legislatures and judges abridged the rights of blacks with impunity.³⁵ 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.³⁶

2. Justice and Racial Inequality

³¹ *Id.*

³² Speaking of the prevailing opinion at the time the Declaration of Independence was signed, 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 white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.

Id. at 407..

³³ U.S. CONST. amend. XIV.

³⁴ *Id.*

³⁵ See, MICHAL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (New York: Oxford University Press 2004).

³⁶ *Id.*

As a historical matter, equality before the law evaded blacks across the generations.³⁷ From the time of the American colonies to the birth of Dr. King, the legal justice available to most Americans was different than the legal justice available to blacks.³⁸ 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 women in court.³⁹ At the onset of the new deal, blacks were legally denied the benefits of federal programs made available to whites.⁴⁰ In the post-reconstruction south, blacks were legally bound out to whites after being arrested on spurious charges.⁴¹ Through most of Dr. King's life, Jim Crow laws denied blacks equal access to jobs, housing, education, and medical care.⁴²

As a result, the American legal system embodied a substantial contradiction leading up to the Civil Rights Movement: grand ideals of legal justice that promised equality before the law and the reality of the biased creation and implementation of laws towards blacks and other nonwhites.⁴³ In 1954, the dawn following the long night of America's legal contradiction began to break when the Supreme Court ruled in *Brown v. the Board of Education* that laws requiring segregation in education were unconstitutional.⁴⁴ Although the Court had made earlier decisions that undercut

³⁷ See, Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events*, 26 B.C. THIRD WORLD L.J. (2006).

³⁸ See, [ROBERT P. GREEN JR.](#), EQUAL PROTECTION AND THE AFRICAN AMERICAN CONSTITUTION EXPERIENCE: A DOCUMENTARY HISTORY (Greenwood 2000).

³⁹ See, HIGGINBOTHAM, *supra* note 28.

⁴⁰ See, PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION (Mississippi: University Press of Mississippi 2001).

⁴¹ William Cohen, *Negro Involuntary Servitude in the South, 1865-1940*, THE JOURNAL OF SOUTHERN HISTORY Vol. XLII, No.1, Feb. 1976, 47.

⁴² See, *supra* note 35.

⁴³ Green, *supra* note 38.

⁴⁴ *Brown v. the Board of Education*, 347 U.S. 483 (1954).

segregation practices in more limited situations,⁴⁵ the wholesale rejection of segregation in the public school system was a monumental occurrence with a significant symbolic and practical effect. For King, the unanimous decision suggested that the long deferred hope of legal equality might soon be realized.⁴⁶ The legal 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.⁴⁷

Rather than a clear uncontested meaning as it might be inferred by the Aristotelian formulation, in practice the concept of equality before the law struggled to gain acceptance as something widely available across preexisting social barriers such as race.⁴⁸

PHILOSOPHICAL COMMITMENTS OF DR. KING AND LEGAL JUSTICE

1. Personalism and Legal Justice

King made clear that the basic philosophical position guiding his actions was rooted in a personal idealism.⁴⁹ 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 worth of all human personality.”⁵⁰ King applied these concepts in forming his views on what justice required.⁵¹ He regarded racial

⁴⁵ Green, *supra* note 38.

⁴⁶ King, *supra* note 4.

⁴⁷ *Id.*

⁴⁸ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 31 (San Francisco: HarperCollins 1958)

⁴⁹ *Id.* at 100.

⁵⁰ *Id.*

⁵¹ The Ethical Demands for Integration (Dec. 27, 1962) in MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, at 119 (James M. Washington ed., New York: HarperCollins 1991).

discrimination and segregation as evils in the society that were manifestly unjust.⁵² On the subject he said, “Segregation stands diametrically opposed to the principle of the sacredness of human personality. It debases personality.”⁵³ This debasement, in King’s view, took on multiple dimensions harming both blacks and whites in the process.⁵⁴ For blacks, King felt that discrimination and segregation treated them as means to an end and not ends in and of themselves violating Immanuel Kant’s Categorical Imperative that “all men must be treated as ends and never as mere means.”⁵⁵ The southerners’ view of black’s as property or “animated tools” cemented through Jim Crow laws depersonalized blacks, in King’s view, and desecrated the sacredness of their humanity.⁵⁶

Segregation and the racial discrimination it legitimized also afflicted blacks with “social leprosy” that inflicted psychological as well as physical scars, King contended.⁵⁷ Elaborating, he explained that the scars flowed from “suppressed fears and resentments, and the expressed anxieties and sensitivities that make each day of life a turmoil.”⁵⁸ Even whites suffered from the reign of Jim Crow, in King’s estimation.⁵⁹ King felt 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.⁶⁰

Because segregation was based in legal code as much as custom and practice, King saw the Jim Crow laws damage to the personhood of whites and blacks as direct

⁵² *Id.*

⁵³ *Id.* 119.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 119-21.

⁵⁸ *Id.* at 121.

⁵⁹ *Id.*

⁶⁰ *Id.* at 119.

violations of legal justice.⁶¹ 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.⁶² “Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.”⁶³ As such, the first concern of legal justice for King is the laws effect on human personality.

2. Natural Law and Legal Justice

When Dr. King raised issues of moral justice he drew upon an ideal rooted in the classical western natural law tradition.⁶⁴ This tradition, grown from the writings of Greek philosophers and the Christian scholars that influenced as much as the sacred texts of Judaism and Christianity, viewed justice as part of the natural order of the universe created by God and comprehended by human beings through their ability to reason.⁶⁵

In this tradition, the laws of society are secondary to a higher law that establishes the right and the good.⁶⁶ From this higher law, human beings derive the norms of behavior toward each other that govern their lives together.⁶⁷ What Dr. King called the human law, within the tradition, represented the efforts of different societies to enshrine the higher law in their particular legal systems.⁶⁸ This “positive law” was subject to the

⁶¹ *Id.*

⁶² *Id.*

⁶³ King, *supra* note 4, at 293.

⁶⁴ See, Love, Law, and Civil Disobedience (Nov. 16, 1961) in MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., at 50 (James M. Washington ed., New York: HarperCollins 1991).

⁶⁵ R.W. DYSON, AQUINAS: POLITICAL WRITINGS xxxii-xxxiv (Cambridge: Cambridge University Press 2002).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 129.

higher or natural law in moral terms.⁶⁹ Accordingly, a society's legal pronouncements could be viewed as good or bad on moral as well as legal and pragmatic grounds.

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.⁷⁰ A law properly promulgated by a legislative body or pronounced by a judge in light of preexisting legal requirements would be good law.⁷¹ A law issued outside of established procedural obligations or binding legal requirements would be a bad law.⁷²

In a prudential or a pragmatic sense, a law could be good or bad based on its expected or actual effects.⁷³ 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. 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. A law that is universally endorsed initially may be universally rejected, later, 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.⁷⁴ 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

⁶⁹ *Id.* at 143-144.

⁷⁰ Aquinas, *Summa Theological*, Question 90: The Essence of Law, Article 4, <http://www.newadvent.org/summa/2090.htm>; *See generally*, LON L. FULLER, *THE MORALITY OF LAW*, 33-94 (Yale University Press 1977).

⁷¹ Aquinas, *supra* note 70; Fuller, *supra* note 70 at 33-94.

⁷² Aquinas, *supra* note 70; Fuller, *supra* note 70 at 33-94.

⁷³ *See* Fuller, *supra* note 70, at 153-57 for a contrary view.

⁷⁴ Here I speak of laws that lack apparent moral significance in their formulation but have outcomes that take on moral importance.

have moral significance that places it within or beyond the bounds of natural law. Take for example a law establishing 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 in 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 would prevent guards from serving and because it would unintentionally deprive them of their lives without good reason.

Natural law then establishes a moral norm that can be used to judge the moral character of a nation's laws.⁷⁵ A society's laws may conform or violate the natural law in their formulation, their implementation, or their outcome.⁷⁶ 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.⁷⁷ Under this approach, knowledge of morality or natural law is accessible to human beings through their ability to reason.⁷⁸ However, this classic or traditional understanding of natural law places it outside the bounds of human control or subjectivity.⁷⁹ Accordingly, the natural law is not bound by culture, nationality, or time though knowledge and awareness of it may vary.⁸⁰

Saint Thomas Aquinas offered a systematic treatment of natural law referenced by King in the Letter from the Birmingham City Jail.⁸¹ King wrote, "To put it in terms of

⁷⁵ Aquinas. Summa Theological, Question 95: Human law, Article 2, <http://www.newadvent.org/summa/2095.htm>;

⁷⁶ Dyson, *supra* note 65, at 143.

⁷⁷ This should be distinguished from the legal prohibition of all vices and prescription of all virtues both of which Aquinas rejects. *Id.* at 139-143.

⁷⁸ *Id.* at 121.

⁷⁹ Aquinas, *supra*, note 75.

⁸⁰ Dyson, *supra* note 65, at 123-125.

⁸¹ King, *supra* note 4, at .293.

Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law.”⁸² 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.⁸³ This divine wisdom manifests the eternal law that permeates perfectly through the natural law and imperfectly in human laws.⁸⁴ In the natural law, the eternal law can be better known through reason.⁸⁵ 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.⁸⁶ When human laws violate the dictates of the natural law then they are unjust laws that do not accord with reason or the eternal law.⁸⁷ Despite the close connections within the system, Aquinas allows room for variation in positive human law dependent upon the society and circumstances.⁸⁸ These variations do not necessarily violate natural or eternal law as long as they regard matters for which natural law and reason dictate no particular action.⁸⁹

For Dr. King, the law of segregation was a corrupt human law that was unjust in its implementation, its consequences, and its formulation.⁹⁰ Dr. King based his view on his understanding of moral law that held all humans as equal beings worthy of equal regard and consideration that afforded them certain natural rights.⁹¹

⁸²*Id.*

⁸³ *Id.* at 105-07.

⁸⁴ *Id.*

⁸⁵ *Id.* at 118-21.

⁸⁶ *Id.* at 120-23.

⁸⁷ *Id.* at 143-44.

⁸⁸ *Id.* at 135-36.

⁸⁹ *Id.* at 121-22.

⁹⁰ *Id.* at 118-21.

⁹¹ *Id.* at 119.

In the Letter from the Birmingham Jail, King provided the most detailed elaboration of his views on legal justice.⁹² Written in response to a letter printed in the Birmingham newspaper by eight prominent local clergy that criticized civil rights protests in Birmingham, the letter provided King the opportunity to defend the civil rights movement from the attacks of critics both locally and nationally.⁹³ To accomplish this, King placed the movement's goals and tactics in the broader context of legal justice and natural law.⁹⁴ I begin with a similar though more abbreviated explanation of his views on law and justice from his address to the Annual Meeting of the Fellowship of the Concerned in 1961.⁹⁵ In this address, King defended the sit-ins and freedom rides of students fighting for civil rights to this interracial group that included white liberal allies who preferred a more gradual approach to the civil disobedience of the students.⁹⁶ 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 explained what he saw as a fundamental distinction between the two. He explained:

[T]he students recognize that there are two types of laws. There are just laws and 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 . . . what 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 that does not square with the moral law of the universe.⁹⁷

⁹² *Id.* at 293-295.

⁹³ *Id.* at 289.

⁹⁴ *Id.* at 293-295.

⁹⁵ *Id.* at .43.

⁹⁶ *Id.* at 47.

⁹⁷ *Id.* at 48-49.

In King's view, the moral law is preeminent and accords with a divine law established by God.⁹⁸ Likewise, King saw God establishing certain rights for individuals in their relationship with others.⁹⁹ These he called God given rights; 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."¹⁰⁰ King connected natural law with these and other pronouncements by the founding fathers and Lincoln¹⁰¹. King saw a direct connection between the rights and freedoms that people enjoy and the dictates of natural law.¹⁰²

In King's pronouncements, the natural law establishes rigid categories that demand clear responses.¹⁰³ An unjust law like segregation demands rejection and non cooperation as part of an unjust system.¹⁰⁴ Straightforwardly, King states that just laws should be obeyed and unjust laws should not.¹⁰⁵ This, King points out, flows from a duty not to cooperate with evil.¹⁰⁶

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."¹⁰⁷ To assess a

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 85-90.

¹⁰² *Id.* at 48-9.

¹⁰³ *Id.* at 48.

¹⁰⁴ *Id.* at 47.

¹⁰⁵ This contrasts with the more nuanced approach developed by Aquinas. Dyson, *supra* note 65, at 143-144.

¹⁰⁶ King, *supra* note 4, at 47.

¹⁰⁷ *Id.*

law's morality, King initially appealed to its effect on human personality.¹⁰⁸ Laws that uphold personhood are moral and therefore just and right while those that “degrade personhood” are immoral and unjust.¹⁰⁹ 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.¹¹⁰

To clarify his meaning in more secular and practical terms, King said, “an unjust law is a code that the majority inflicts upon the minority, which that minority had no part in enacting or creating, because that minority had no right to vote”¹¹¹ This undemocratic process of legislating against minority interests, King maintained, renders the resulting law unjust.¹¹² This relates back to the discussion of laws legitimacy above based on its promulgation in accordance with preexisting legal procedures and requirements. 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.¹¹³

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 discernable in terms that King believed natural law skeptics and atheists alike could equally appreciate.¹¹⁴ “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 that a majority compels a minority to follow

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 48

¹¹⁰ *Id.* 43-53.

¹¹¹ *Id.* at.49

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 292-302.

that it is willing to follow itself,” King explained.¹¹⁵ His point was simple, segregation laws contradicted basic notions of fairness.¹¹⁶ They were passed in states that denied the black residents that they governed the right to vote on the legislators who would drafted them or the governors who signed them.¹¹⁷ Furthermore, they were applied hypocritically to place limitations on the black minority that the white majority was unwilling to follow.¹¹⁸

3. American Democracy and Legal Justice

A critical component of King’s view of legal justice grew from America’s democratic ideology.¹¹⁹ Harkening back to the Emancipation Proclamation, the Declaration of Independence, and the democratic notions underlying the U.S. Constitution, King described legal justice as the fulfillment and embodiment of basic principles articulated by the founders of the nation and extended by Lincoln in the Emancipation Proclamation:¹²⁰

When the architects of our country write 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, black men as well as white 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

¹¹⁵ *Id.* at 294.

¹¹⁶ *Id.* at 293-95.

¹¹⁷ *Id.* at 48-9.

¹¹⁸ *Id.* at 49.

¹¹⁹ *Id.* at 314-15 and 300-01.

¹²⁰ These principles also shared King’s commitment to the sacredness of human personality. In an address to a church conference in 1963 King explained, “This 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.* at 119.

check that will give us upon demand the riches of freedom and the security of justice.¹²¹

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 creed provided in Declaration of Independence that "all men are created equal." 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.¹²² "But one hundred years later, [from the issuance of the Emancipation Proclamation] the Negro still is not free; one hundred years later the life of the Negro is still crippled by the manacles of segregation and the chains of discrimination," he contended.¹²³

This contradiction or tension fueled King's understanding of and approach to the issue of legal justice.¹²⁴ Approaching the matter as an activists 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.¹²⁵ Quoting a lecture by Frederick Douglas on the Constitution, he noted that its language speaks unreservedly of "We the people."¹²⁶ Without qualification as to race or class or other status, King like Douglas saw a claim in

¹²¹*Id.* at 217.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ I have a Dream (Aug. 28, 1963) in MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. at 217-18 (James M. Washington ed., New York: HarperCollins 1991).

¹²⁵ King, *supra* note 4, at 119.

¹²⁶ *Id.*

the Constitution towards an undifferentiated humanity that necessarily includes blacks as members of humanity who should be included in “the benefits for which the Constitution of America was ordained and established.”¹²⁷ The rightful extension of the benefits of the Constitution and the rights described in the Declaration of Independence represented legal justice to King: the rightful end to a long night of injustice.¹²⁸ The Supreme Court had instilled hope in King and others in 1954 with the landmark decision in *Brown v. Board of Education*.¹²⁹ Speaking of *Brown*, King remarked “It came as a reaffirmation of the good old American doctrine of freedom and equality for all people.”¹³⁰ King saw, in this decision undermining the scourge of legally sanctioned segregation that had been entrenched in *Plessy v. Ferguson*, a foreshadowing of the day when the legal justice promised by the founding fathers would become a reality for their black progeny.¹³¹

In the Letter from the Birmingham Jail, King connected his defense of civil disobedience in Birmingham with the prevalence of unjust laws that compel disobedience.¹³² 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 American democracy:

[A]n unjust code 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 to vote despite the fact that the Negro

¹²⁷ *Id.*

¹²⁸ *Id.* at 197.

¹²⁹ *Brown v. the Board of Education*, 347 U.S. 483 (1954).

¹³⁰ King *supra* note 4, at 197.

¹³¹ *Id.*

¹³² *Id.* at .289.

constitutes a majority of the population. Can any law set up in such a state be considered democratically structured?¹³³

Alabama, the south and the entire nation's failure to ensure the right to vote for millions of African Americans served as one of the principle injustices for which King sought a legal remedy.¹³⁴ 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."¹³⁵

Legal justice for King then was the end of Jim Crow segregation.¹³⁶ On three separate but consistent grounds, King saw the end of America's legal contradiction that promised freedom and equality for all, but provided bondage and racial inequality for blacks as the onset of legal justice.¹³⁷ Segregations laws were an affront to human personality and dignity, an immoral contravention of the natural law, and inconsistent with America's democratic principles.¹³⁸ Only when they ended could legal 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 attempt to 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 and his visit to Watts and lackluster campaign in Chicago. These later statements focus more on the substantial reform required to meet the needs of black northerners and southerners

¹³³ *Id.* at 294.

¹³⁴ *Id.* at .197.

¹³⁵ *Id.*

¹³⁶ *Id.* at 47; *see also, Id.* at 293-94.

¹³⁷ *Id.* at 217-18.

¹³⁸ *See generally, Id.* at 293-92 and 287-302.

trapped in ghettos and rural poverty.¹³⁹ It was during this period that King came to appreciate more fully that legal rights alone could not secure the material well being of the masses of blacks that racial justice demanded.

DR. KING, LEGAL JUSTICE, AND CONTEMPORARY LEGAL DISCOURSE

1. Critical Legal Studies and Legal Justice

Contemporary scholars reject many of the foundational beliefs undergirding King's philosophy.¹⁴⁰ The most divergent view in today's scholarship comes from the adherents of Critical Legal Studies. The Critical Legal Studies (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, inevitable, and fair system.¹⁴¹ Many scholars espousing this view contended that the American legal system advances a liberal capitalist ideology that uses a hierarchical vision of the world built on patterns of domination and subordination that appear fixed immutable and proper.¹⁴² A second theme of the CLS scholarship was the indeterminate nature of legal rules and reasoning.¹⁴³ Scholars advancing this view critiqued claims that legal rules necessitated particular judgments in legal cases; instead they maintained that law failed to provide judges with objective criteria that necessitated particular rulings.¹⁴⁴ The prevalence of competing claims and considerations in cases dictates that judges bring subjective value judgments into play in reaching their conclusions, CLS scholars argued.¹⁴⁵ The chief development of this theme from CLS is a critique of rights discourse

¹³⁹ *Infra* note 212-213.

¹⁴⁰ *See*, Levit, Delgado & Hayman, *supra* note 2.

¹⁴¹ *Id.* at 402-403.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

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.¹⁴⁶ This question of the importance or relevance of rights will then 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 legal justice as 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 elaborates the four elements of his critical assessment. They are instability, indeterminacy, abstraction, and impediment.¹⁴⁷ Rights are unstable: as social circumstances change so does the meaning and availability of rights.¹⁴⁸ Rights produce indeterminate results: the existence or non-existence of one or more rights fails to necessitate any particular legal outcome.¹⁴⁹ The rights concept is an abstraction from reality: the notion of rights substitutes an empty abstraction for actual experiences that should be valued.¹⁵⁰ Rights impede social change: rights discussions function as a formidable obstacle to the changes needed to restructure society in accordance with a progressive agenda.¹⁵¹

After a brief elaboration of the first two elements of Tushnet’s assessment, I evaluate the strength of their merits relative to Dr. King’s view of legal justice. I begin

¹⁴⁶ *Id.*

¹⁴⁷ Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

with his initial claim that rights suffer from instability.¹⁵² As abstract principles, rights have no coherent meaning outside the context of particular situations and societal understandings.¹⁵³ Tushnet explains, “The 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.”¹⁵⁴ In other words, rights depend on the historical contingency of particular societies and only have meaning in light of those contingencies.¹⁵⁵ In turn, the contingencies themselves determine the nature of the society and the social meanings that govern relationships.¹⁵⁶ As conditions change within societies and social meanings shift so will the meaning of rights, thereby revealing their instability.¹⁵⁷ Because of their instability, the successful recognition of rights one day may completely lose its value the next day or some point in the future under changed circumstances.¹⁵⁸

Applying this assessment to King’s view of legal justice reveals the historic contingency of King’s argument. The argument proffered by King and Frederick Douglas that blacks in America fell within the protections of the Constitution because they were “people” only makes sense in light of a putative understanding within society that blacks were in fact “people.”¹⁵⁹ The fact that some whites and most blacks held the view when the document was signed could not establish the societal meaning of the term

¹⁵² *Id.* at 1370

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1370-71.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 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 trial, and a right to confront accusers, among others.

¹⁵⁹ For a contrary view, consider Justice Taney’s opinion in *Dred Scott v. Sandford*.

nor legal rights there from.¹⁶⁰ This developed across the history of the nation out of many contingent occurrences.¹⁶¹ 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."¹⁶² Of course, this is the argument that Justice Taney made in *Dred Scott* that infuriated some and placated others.¹⁶³ 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.¹⁶⁴ While northern troops were present, the right to vote guaranteed to black men in the Fifteenth Amendment of the Constitution meant that they could freely participate in elections and even hold office.¹⁶⁵ Following the withdrawal of the troops from the South, however, the right to vote for black men in the south had a completely different set of meanings that lead to seven decades of disenfranchisement.¹⁶⁶

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.¹⁶⁷ Technical indeterminacy addresses the fact that in individual cases judges use various reasons to

¹⁶⁰ Tushnet, *supra* note 147, at 1369-71.

¹⁶¹ For a consideration on relevance of Declaration of Independence and African American, see Higginbotham, *supra* note 26, at 371-89.

¹⁶² United States Declaration of Independence, July 4, 1976.

¹⁶³ *Dred*, 60 U.S. 393.

¹⁶⁴ For a discussion of blacks' struggle to obtain personhood before and following civil war, see VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 258-317 (Mariner Books 1993).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Tushnet, *supra* note 147, at 1371-1372.

determine rights existence, extent, limitations, significance, and benefit.¹⁶⁸ Because of this myriad of considerations the existence of a right does not compel any particular outcome in a given case. 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. The risk of focusing on rights based arguments Tushnet explains is basic, “Because rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles.”¹⁶⁹ As we consider the four decades since the passage of the civil rights statutes of the 1960s, we can best appreciate the concern about indeterminacy and its consequence. Title VII of the civil rights act of 1964 prohibits discrimination in employment based on race;¹⁷⁰ however, as early as 1970 the Supreme Court heard arguments on a seminal case of employment discrimination that tested the meaning of discrimination.¹⁷¹ Under consideration was an employer’s ability to use aptitude tests that disproportionately excluded black workers from access to desirable “inside jobs.”¹⁷² The Supreme Court reversed the decision of the appellate court that had ruled the absence of purposeful discrimination meant that no violation of the employees’ rights had taken place.¹⁷³ Instead, the Court found that the use of tests that disparately impacted blacks that were not related to job qualifications violated the protection afforded blacks under the statute.¹⁷⁴ Within six years of the Court’s decision in the case the Supreme Court heard a similar case regarding examinations at the Washington, D.C.

¹⁶⁸ *Id.* at 1371

¹⁶⁹ *Id.*

¹⁷⁰ Civil Rights Act of 1964, Title VII.

¹⁷¹ *Griggs v. Duke Power*, 401 U.S. 424 (1971).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

police academy in *Washington v. Davis*.¹⁷⁵ In that case, the Supreme Court overturned the appellate court's decision ruling the use of a written verbal skills exam as unconstitutional because of the disparate racial impact it had excluding otherwise qualified blacks from joining the police force.¹⁷⁶ The Supreme held that the protection provided in the *Duke Power* case did not apply to the Washington D.C. police department because no such right against disparate impacts existed under the Equal Protection Clause of the Constitution and that 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.¹⁷⁷ These two watershed cases in civil rights law highlight the indeterminacy of legal rules and rights. Leading up to the decision courts had used the same analysis of racial discrimination claims under Title VII and the Equal Protection Clause.¹⁷⁸ In the *Griggs* decision, the test was unacceptable though the learned judges on the Court of Appeals ruled that it was lawful and in the *Davis* decision the test was unlawful though the Court of Appeals had found it acceptable.¹⁷⁹ 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 1976 to today, a discussion of the "right" to be free from racial discrimination adds little to an evaluation of blacks' ability to gain employment or access to jobs or other benefits who do not perform as well as whites on written examinations.¹⁸⁰ Although the right to be free from

¹⁷⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁷⁶ *Washington*, 426 U.S. 248.

¹⁷⁷ *Id.* at 248-252.

¹⁷⁸ *Washington*, 426 U.S. 229.

¹⁷⁹ *Id.* and *Griggs*, 401 U.S. 424.

¹⁸⁰ For a discussion of limitation on legal rights against discrimination in achieving equality see generally RICHARD F. AMERICA THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES (Greenwood Press 2002) and ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (Scribner; Rep Sub Ed. 2003).

racially based employment discrimination in most jobs was established in 1964,¹⁸¹ the ability to be free from such racial discrimination is a completely different matter.¹⁸² 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.¹⁸³ Persons concerned with enjoying the actual freedom therefore might look to other means or methods to achieve it that do not involve rights.¹⁸⁴

King's focus on legal justice as blacks' possession of rights promised in the founding documents that removed the legal legitimacy of Jim Crow segregation may have belied an inordinate emphasis on and confidence in rights to change the lived experiences of blacks.¹⁸⁵ However, despite the indeterminacy and instability of blacks newly acquired rights the importance of blacks' attainment of formal equality should not be undervalued.¹⁸⁶ The destruction of white supremacy in the South as an accepted social norm substantially changed the lived experiences of black southerners, who did then and still do represent the vast majority of America's black population.¹⁸⁷ In the South, the call for rights and the extension of formal equality to blacks was closely intertwined with their demand for equal recognition and equal regard in the public sphere.¹⁸⁸ King

¹⁸¹ Civil Rights Act of 1964, Title VII.

¹⁸² Hacker, *supra* note 180; for a contrary view, see JOE R. FEAGIN, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (Beacon Press 1995).

¹⁸³ [ABIGAIL THERNSTROM](#), *AMERICA IN BLACK AND WHITE, ONE NATION, INDIVISIBLE* (Simon & Schuster; 1st Touchstone Ed edition 1999); Civil Rights Act of 1964, 1965 and 1968.

¹⁸⁴ Carlton Waterhouse, *Following 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); ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* (Harvard University Press 1999).

¹⁸⁵ King, *supra* note 4, at 313-36.

¹⁸⁶ Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1378-79 (1988).

¹⁸⁷ *Id.*

¹⁸⁸ King, *supra* note 4, at 182-88.

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.¹⁸⁹ 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.¹⁹⁰ However, the focus on rights and formal equality did limit the reach of the victory to the American south.¹⁹¹ King acknowledged that himself in 1965 following the riots in Watts Los Angeles.¹⁹² 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.”¹⁹³ 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 the movement fought for.¹⁹⁴ In the same address, King identified the failure of civil rights leaders to adequately account for their strategy’s northern consequence as a “miscalculation.”¹⁹⁵ This miscalculation is what the CLS perspective helps elucidate.¹⁹⁶

2. Critical Race Theory and Legal Justice

¹⁸⁹ *Supra* note 3, at 291-94.

¹⁹⁰ For an in-depth discussion for the limitation of CLS on issue of race, see Crenshaw, *supra* note 186 at 1349-56.

¹⁹¹ *Id.*

¹⁹² King, *supra* note 4, at 189.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Although King lacked the benefit of the CLS perspective at the time, Malcolm X had consistently pointed out the limitations of the approach. See JAMES CONE, MARTIN AND MALCOLM IN AMERICA (Maryknoll, New York: Orbis 1992) for an examination of the contrasting views and perspectives of Malcolm X and Dr. King on race in America.

Critical race theorists bring a critical perspective to current and past antidiscrimination law.¹⁹⁷ Their work bears the influence of CLS but looks primarily to the limitations of antidiscrimination law and its ability to address the continuing problem of societal racism.¹⁹⁸ Unlike CLS, Critical Race Theory (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.¹⁹⁹ The most prevalent focus of CRT is the federal courts rejection of race based remedies for past discrimination on the grounds that they represent a denial of formal equality for whites—in short much CRT scholarship seeks to refute the claim that race based remedies for past discrimination are unconstitutional as a violation of the rights of whites.²⁰⁰ The remainder of the scholarship emphasizes the prevalence of racism against blacks and other racial minorities despite formal equality and critical feminist discourses examining the intersection of race and gender.²⁰¹ In this section, I focus my analysis on CRT scholars’ concern with the post civil rights era courts’ rejection of race based remedies and its relevance to Dr. King’s vision of legal justice. Although many CRT scholars would recognize the value and importance of the rights centered formal equality rhetoric of Dr. 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.²⁰²

¹⁹⁷ See, KIMBERLE CRENSHAW, NEIL GOTANDA, GARRY PELLER, & KENDALL THOMAS, *CRITICAL RACE THEORY* (New York: New Press 1996).

¹⁹⁸ For a discussion of relation between CRT and CLS, see *Id.*, at 13-32.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² King, *supra* note 4, at 295-300.

Kimberly Crenshaw authored one of the seminal works in CRT engaging both the CLS critique of rights and the neoconservative critique of race based remedies.²⁰³ In the article she raises a very important issue that has great relevance for our consideration of Dr. King's view of legal justice.²⁰⁴ Drawing on a common theme in CRT that racial justice requires race based remedies; Crenshaw asserts that the provision of formal equality gained through civil rights law undermined arguments that racism bore any meaningful relationship to the material well being of blacks.²⁰⁵ 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.²⁰⁶ She explains the distinction between symbolic and material subordination explaining:

Symbolic subordination refers to the formal denial of social and political equality to all blacks, regardless of their accomplishments Material subordination, on the other hand refers to the ways that discrimination and exclusion economically subordinated blacks to whites and subordinated the life chances of blacks to those of whites on almost every level.²⁰⁷

These two, Crenshaw recognizes, were typically connected in the minds of most people.²⁰⁸ However, the end of legal segregation means the society's acceptance of formal equality and the inclusion of blacks as equal members in the nation's political

²⁰³ Crenshaw, *supra* note 186.

²⁰⁴ Commenting on the strategy used by civil rights leaders she notes, "Movement leaders used these tactics to force open a conflict between whites, which eventually benefited black people. Casting racial issues in the moral and the 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 blacks. *Id.* at 1381.

²⁰⁵ *Id.* at 1377-1379.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1377.

²⁰⁸ *Id.*

vision.²⁰⁹ Crenshaw points out, that as a consequence blacks' experiences of material subordination are viewed as the result of cultural inferiority rather than historic or continued discrimination.²¹⁰ She goes on to elaborate that the same legal reforms that removed symbolic subordination now supports an ideological framework that makes contemporary experiences of blacks facing material subordination seem "fair and reasonable."²¹¹

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

Commenting in two separate addresses:

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 black 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 black people When millions of people have been cheated for centuries, restitution is a costly process.²¹²

And

Many whites hasten to congratulate themselves on what little progress we Negroes have made. I'm sure that most whites felt that with the passage of the 1964 Civil Rights Act race problems were automatically solved. Because most white 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 the bottom of society; the cold facts of racism slaps each one of us in the face.²¹³

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1379.

²¹¹ *Id.* at . 1381-1382.

²¹² King, *supra* note 4, at .314.

²¹³ *Id.* at 322.

In these passages, King addressed a significant problem that followed the passage of the Civil Rights Acts of 1964 and 1965 that concern CRT scholars—formal equality provided by the legislation could not achieve legal justice for black.²¹⁴ 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 legal justice by ending widespread racial discrimination against blacks or by satisfying legal notions of restitution for past wrongs.²¹⁵ These realizations underscore the ways that King’s vision of legal justice based in procedural justice was incomplete—lacking an adequate vision of restorative justice.

Overall, King’s view of legal 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. Crenshaw argues persuasively, in her article, that in fact the federal government only supported King and the Civil Rights Movement because it framed its argument in the way that it did.²¹⁶ She explains, “Because Blacks were challenging their exclusion from political society, the only claims that were likely to achieve recognition were those that reflected American society’s institutional logic: legal rights ideology.”²¹⁷ Although the rights based arguments did place limitations on the possible accomplishments of the movement, Crenshaw acknowledges, the leadership like most oppressed people found themselves “between a rock and a hard place” as broader claims beyond the rights ideology, she maintains, would have fallen on deaf ears.²¹⁸

3. Restorative Justice and Reparations

²¹⁴ *Id.*

²¹⁵ *Id.* at 314, 322.

²¹⁶ Crenshaw, *supra* note 186, at 1368.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1369.

While Crenshaw's defense of the movement's approach carries great merit, I believe that King's failure to include restorative justice as an essential element of legal justice in the early days of the movement was simply a mistake. By 1963, King recognized the issue. 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.²¹⁹

Even here, however, it is not clear the extent to which King is fully invested in the claim.²²⁰ Although he raises the issue, he makes the broader problem of poverty for poor whites a component as well and fails to sufficiently develop the redress claim as an independent and essential element of legal justice.²²¹ Ultimately, the claim for redress becomes overshadowed in King's subsequent writings and speeches by King's focus on the federal government's obligation to end poverty.²²² Before that time, King consistently and tirelessly focused his arguments around ending segregation. Although King was convinced of the need to address poverty before that time, the chief concern of the Civil Rights Movement voiced by King was the end of segregation as a dictate of legal justice.

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

²¹⁹ MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 137 (New York: New American Library 1964)

²²⁰ *Id.*

²²¹ See MICHAEL ERIC DYSON, *I MAY NOT GET THERE WITH YOU* 317 (The Free Press, NY 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.

²²² 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. This does not become a focal point however, until the Voting Rights Act of 1965 was passed.

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 with black northerners and southerners that could have nurtured a northern component of the movement that advocated both civil rights and restitution. It also might have avoided the bifurcation of civil rights and remedial measures for past discrimination that the Court now deem unconstitutional as violations of the civil rights of whites. Of course, there are other issues that also could have and arguably should have been included in King's view of legal justice, most importantly the extension of formal equality to women.²²³

CONCLUSION

In the same way that personalism, the nation's founding documents, and natural law brought him to see segregation as a violation of legal justice it should have enabled him to see the same dictate for black women and all women.²²⁴ Clearly, Dr. King's exceptional vision was less than 20/20. Today, scholars and others have come to see that legal justice dictates equality before the law regardless of race, gender, national origin, religion, disability, sexual identity, or class. This expansion of Dr. King's vision also includes restorative justice and redress for years of segregation and exclusion suffered before and during the Civil Rights Era. Although the courts and the Congress have yet to recognize and establish legal equality and rights in all of these areas their validity and importance have become more apparent in America and around the world today than during Dr. King's life. Nonetheless, as many critical theorists might note, legal rights

²²³ See, JAMES CONE, MARTIN AND MALCOLM IN AMERICA for a detailed consideration of King's views on gender.

²²⁴ Unfortunately, space does not allow me to examine this issue. See *Id.*

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

ABSTRACT

The notion of legal justice has been recognized since the time of the ancient Greeks and the concept extends well beyond Western philosophy and jurisprudence. Distinct from other types of justice, legal justice addresses 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, Dr. King made a meaningful contribution to jurisprudence discourse of his time by opening the discussion to the broader society and centering it on a critical issue of his day – racial segregation. This article places Dr. King’s views of legal justice within a historic and contemporary context by exploring the theory of legal justice and how it shaped and inspired King’s leadership of the Civil Rights Movement. The article begins by addressing a consideration of what is meant by the term “legal justice.” It then explores the three philosophical commitments that formed King’s vision of legal justice: America’s democratic principles, Personalism, and Natural Law. Lastly, this article considers King’s vision in comparison to two schools of critical jurisprudence: Critical Legal Studies and Critical Race Theory. Dr. King saw clear contradictions of the legal system that violated the demands of legal justice. This article identifies and explores the valuable insights provided by Dr. King’s vision of legal justice while still pointing out the oversights and contradictions still present in this vision.