

THE TEACHINGS OF DR. MARTIN LUTHER KING, JR.
AND CONTRACT THEORY:
AN INTRIGUING COMPARISON

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I. INTRODUCTION

At first glance, the speeches and writings of Dr. Martin Luther King, Jr. appear inapposite to or, at some cognitive level, irrelevant to the traditional law of contract. A cursory inspection of both reveals this paradox. Dr. King's goals and dreams reflect the realism and passion of the sixties' Civil Rights Movement,¹ a phenomenon fueled by social consciousness and the proactive aftermath of the United States Supreme Court's path-breaking decision in *Brown v. Board of Education*.² Judicial action evidenced by the *Brown* decision must have influenced Dr. King's omnipresent conviction that societal norms may be altered by means of constructive engagement and deliberate action.³

Dr. King's messages present a fusion of justice, hope, and

1. See generally Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1063 n.88 (1984) (citing contemporary works that comment on the "passionate" Civil Rights Movement and its influence on interpretations of the Fourteenth Amendment and remedial legislation).

2. 347 U.S. 483 (1954). The Supreme Court's decision in *Brown* rejected the "separate but equal" doctrine and banned racial segregation of the nation's public schools. *Id.*; see Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1288 (1992) (opining that the desegregation of public schools under *Brown* marked a significant statement in the education of children in this country); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 176 (1994) (noting *Brown's* prohibition of the reliance on race for the purposes of advancing segregation). For more on the *Brown* decision, see generally Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995). But see Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for Post-Brown Era*, 46 VAND. L. REV. 865, 867 (1993) (acknowledging *Brown's* impact on segregation, but also expressing its limitations as a legal tool to bring about lasting, positive change).

3. See Laura Krugman Ray, *Judicial Fictions: Images of Supreme Court Justices in the Novel, Drama and Film*, 39 ARIZ. L. REV. 151, 153 (1997) (noting the *Brown* decision as an example of altering social as well as legal norms in the effort to advance justice). See generally DONALD E. LIVELY, *THE CONSTITUTION AND RACE* (1992) (explaining the dramatic effect of the *Brown* decision on American society).

morality contrasted with the contextual realism of society's struggle with what Dr. W.E.B. DuBois termed the "color line."⁴ Realism⁵ infused with optimism typifies Dr. King's rhetoric and plea for racial equality and harmony.⁶ His impassioned and immortal speech, *I Have a Dream*, constituted a striking prototype of the vehicle for his themes.⁷ Speaking from the steps of the Lincoln Memorial during the historic Civil Rights March on Washington, D.C. in 1963, Dr. King noted the feelings of hope and joy experienced by African Americans after the signing of the Emancipation Proclamation.⁸ He then contrasted this euphoria with the despair caused by racial conditions of the time. He stated:

[O]ne hundred years [after the signing of 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; one hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land.⁹

4. Dr. DuBois, a noted African American sociologist who received his undergraduate and doctorate degrees from Fisk and Harvard Universities in the nineteenth century, engaged in an intensive study of the racial dilemma of the United States. In 1903, he authored *The Souls of Black Folk*, a path-breaking text that delineates the burdens of racism and the need for social responsibility to cure its effects. His prophetic and still timely forethought typifies the book's thesis as well as America's continual struggle with racial issues. Dr. DuBois states:

Herein lie buried many things which if read with patience may show the strange meaning of being black here at the dawning of the Twentieth Century.

This meaning is not without interest to you, Gentle Reader; for the problem of the Twentieth Century is the problem of the color line.

W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* xi (1969).

5. For more on legal realism, see *infra* note 39 and accompanying text.

6. See MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1967), reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 555, 621-33 (James M. Washington ed., 1986) (indicating that Dr. King's later messages expanded his hope for change to encompass more universal issues such as world peace and economic justice); *infra* notes 16, 216 and accompanying text.

7. Martin Luther King, Jr., *I Have a Dream* (1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217 (James M. Washington ed., 1986) [hereinafter *A TESTAMENT OF HOPE*].

8. *Id.*

9. *Id.*

Dr. King further underscored the erosion of hope and joy, emphasizing with vivid imagery the African American's limited access to basic American entitlements—life, liberty and the pursuit of happiness.¹⁰

After focusing on past glory (emancipation from slavery) and the more contemporary malaise of African American disenchantment resulting from the denial of the fruits of that glory, Dr. King then advanced the lofty goal of universal inclusiveness. The "dream" portion of his speech proclaimed: "I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by content of their character."¹¹ He then dramatized this aspired universality with the plea for interracial harmony and unity in an unfathomable 1963 context: "[I]n Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers."¹²

Of course, Dr. King's philosophies of universality, hope, and social justice were not confined to his *I Have a Dream* speech. Many of his other writings and speeches echoed these themes, along with an agenda of proactivism, where responsible persons would embrace and take deliberate action to reinforce hope, dignity and social justice.¹³ Before an assassin's bullet felled him on April 4, 1968,¹⁴ at the Lorraine Motel in Memphis, Tennes-

10. See *id.* Dr. King's imagery of the reality of African American disenfranchisement included his view that African Americans had been given a "bad check; a check which has come back marked 'insufficient funds.'" *Id.* Yet African Americans clamor for the intended value of this "check," which encompasses notions of freedom and justice. King, *supra* note 7, at 217.

11. *Id.* at 219.

12. *Id.* The Alabama governor to whom Dr. King referred was George Wallace, who, in the 1960s espoused the view that a state had the authority under its own constitution and interpretative portions of the federal Constitution to "interpose" itself between the federal government and the state when the former sought to force notions found unconstitutional and contrary to the state on the latter. See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 86-87, 163 (1995).

13. For more analysis of Dr. King's works as they relate to hope, dignity, and social justice, see *infra* Parts II and III of this Article.

14. See Julian Bond, *Historical Perspectives on Fair Housing*, 29 J. MARSHALL L.

see,¹⁵ Dr. King authored *Where Do We Go From Here*, one of his last public addresses.¹⁶ This work not only emphasized this poignant charge of hope and dignity, but also expanded his message to include a more transformative agenda.¹⁷ Universal themes of global peace and proactive justice became cornerstone aspirations.¹⁸ Dr. King also tinged his aspirations with theological concepts of morality and abjectly renounced hedonistic individualism.¹⁹ His rallying cry became a moral commitment to alter societal circumstances that exacerbate hopelessness and despair.²⁰ He augmented this plea with an optimistic call for universal justice and harmony.²¹

Contract law, on the other hand, presents a seemingly stark

REV. 315, 325 (1996) (stating that in the aftermath of Dr. King's assassination by James Earl Ray on the balcony of the Lorraine Motel, Congress passed the landmark Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-819 82 Stat. 73, 81-89 (1968)); see also Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1307 (1992); Mark Tushnet, *Spite Fences and Scholars: Why Race Is and Is Not Different*, 26 CONN. L. REV. 285, 292 (1993).

15. The Lorraine Motel was one of the few motels in Memphis which rented rooms to African Americans. It now hosts the National Civil Rights Museum. See *The African American Internetwork* (visited Sept. 25, 1998) <<http://www.afamnet.com/citypage/memphis/memphis-frameset.html>>. For more regarding the Lorraine Motel, see JAMES A. COLAIACO, MARTIN LUTHER KING, JR. APOSTLE OF MILITANT NONVIOLENCE 196 (1988); ALICE FAYE DUNCAN, THE NATIONAL CIVIL RIGHTS MUSEUM CELEBRATES EVERYDAY PEOPLE (1995); GEROLD FRANK, AN AMERICAN DEATH 27 (1972).

16. Martin Luther King, Jr., *Where Do We Go From Here?* (1967), in A TESTAMENT OF HOPE, *supra* note 7, at 245.

17. *Id.*; see also notes 210-12, 214-16 and accompanying text.

18. See KING, *supra* note 6, at 621 ("Among the moral imperatives of our time, we are challenged to work all over the world with unshakable determination to wipe out the last vestiges of racism. . . . Racism is no mere American phenomenon. Its vicious grasp knows no geographical boundaries."); MARTIN LUTHER KING, JR., *Facing the Challenge of a New Age* (1957), in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 14, 26 (James M. Washington ed., 1992) [hereinafter I HAVE A DREAM]; Martin Luther King, Jr., *The Power of Nonviolence* (1958), in I HAVE A DREAM, *supra*, at 32-33; Martin Luther King, Jr., *The Rising Tide of Racial Consciousness* (1960), in I HAVE A DREAM, *supra*, at 63, 67 ("Whenever racial discrimination exists it is a tragic expression of man's spiritual degeneracy and moral bankruptcy. Therefore, it must be removed not merely because it is diplomatically expedient, but because it is morally compelling."); Martin Luther King, Jr., *Speech Before the Youth March for Integrated Schools* 36 (1959), in I HAVE A DREAM, *supra*, at 34, 36.

19. See KING, *supra* note 6, at 625-26.

20. See *id.*; see also *infra* notes 51, 210-12 accompanying text.

21. See KING, *supra* note 6, at 632-33.

contrast to Dr. King's messages of hope and justice. Contract rules possess few semblances of passion, hope or love. Dispassionate principles that presumably provide an efficient system of transactional conduct dominate its character.²² On its face, the theory of contract is objective,²³ eschewing any notion of societal inequities that girded Dr. King's beliefs.²⁴ The theoretical basis for contract, and bargaining conduct in general, revolves around the notion of assent²⁵ and the need for some bargained for exchange of value.²⁶ The deceptive simplicity of this formula fosters a variety of transactional goals which presumably offer societal benefits.²⁷ Moreover, economic principles, which offer

22. For more on the efficiency of contract, see Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1974 (1987); Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 41 (1991); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 648-49 (1990) (noting the limitations of efficiency in bargaining arrangements given the problem of imperfect information); Subha Narasimhan, *Relationship or Boundary? Handling Successive Contracts*, 77 CAL. L. REV. 1077, 1116 (1989) (stating that principles of law and economics stress contract rules' promotion of efficiency, even though that goal functions primarily among sophisticated bargainers within the business context); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 88, 89 (1977) (opining that the "law of contract not based on efficiency considerations will . . . be largely futile"); see also *infra* notes 159-69, 175-79 and accompanying text (discussing the basic tenets of contract law). But see John Eloffson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1 (1996); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 617 (1998); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647 (1988).

23. For more regarding contract objectivity, see Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 890-91 (1997).

24. See *supra* notes 1-6 and accompanying text.

25. See E. ALLAN FARNSWORTH, *CONTRACTS* § 3.1, at 184 (2d ed. 1990) (stating that "[t]he first requirement [for a valid contract], that of assent, follows from the premise that contractual liability is consensual"); see also JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 29, at 51 (3d ed. 1990) (acknowledging that a "basic question of contract law is whether two or more parties arrived at an agreement, i.e., whether the parties have expressed their mutual assent concerning their future conduct").

26. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); see also 1 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 4.1 (4th ed. 1990) (stating that "[m]utual assent must be manifested by one party to the other, and except so manifested, is unimportant").

27. For more regarding the function of contract rules, see *infra* notes 180-83

some theoretical justification for many contract rules, further this seeming objectivity.²⁸ As such, a superficial examination of contract law reveals resultant rules that function empirically, regulating seemingly objective human transactions. The morality of contract law functions more as a system of abstractions where fungible bargainers utilize "off-the-rack" rules to form binding agreements.²⁹ Justice, as a tacit force, results from strict adherence to stark rules of bargain formation.³⁰

Yet, the objectivity and abstraction fostered by the principles of contractual theory have an illusory quality when viewed in terms of actual human contexts.³¹ Because bargainers are affected and influenced by environmental and societal stimuli, their resultant conduct may not conform to the egalitarian goals of contractual rules. Indeed, the very act of bargain formation, i.e., discreet individuals searching out bargains to maximize the

and accompanying text.

28. For more on the economic theories of contract law, see RICHARD A. POSNER, *AN ECONOMIC ANALYSIS OF LAW* 441-42 (2d ed. 1993); see also Blake D. Morant, *Contracts Limiting Liability: A Paradox With Tacit Solutions*, 69 TUL. L. REV. 715, 761-71 (1995) (explaining that economic principles should be considered to determine whether a contractual transaction should be encouraged because it would benefit not only the parties but also society); *supra* note 22 and accompanying text (discussing contractual theory).

29. Note that parties are not strictly bound to all "off-the-rack" rules of contract. Many may be altered to suit individual bargaining situations. See Charles J. Goetz, *A Verdict on Corporate Liability Rules and the Derivative Suit: Not Proven*, 71 CORNELL L. REV. 344, 344 (1986) (stating that "[c]ontract law is generally permissive. It provides 'off the rack' rules that parties can tailor to their own needs"); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (discussing the alteration of reformative contract provisions); Narasimhan, *supra* note 22, at 1104 (noting that "off-the-rack" rules, also known as default rules of contract, may be challenged in questions regarding the validity of a renewal contract); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 574 n.159 (1983) (noting "off-the-rack" rules as an efficient mechanism to reduce the costs of negotiation). For more regarding the rules of contract and how they function, see *infra* notes 162-79 and accompanying text.

30. See *Project Dev. Group, Inc. v. O.H. Materials Corp.*, 766 F. Supp. 1348, 1352 (W.D. Pa. 1991) (stating that offer, acceptance, and a manifestation of assent are required for contract formation); *Local 529, United Bhd. of Carpenters v. Bracy Dev. Co.*, 321 F. Supp. 869, 875 (W.D. Ark. 1971) (requiring the manifestation of mutual assent and obligation for a binding contract); *Loneragan v. Scolnick*, 276 P.2d 8, 10 (Cal. Dist. Ct. App. 1954) (voiding a contract for lack of valid offer).

31. See Morant, *supra* note 23, at 891; see also note 263 and accompanying text (discussing the disparate treatment of certain individuals in purchasing automobiles and seeking residential accommodations).

gain,³² represents an interpersonal dynamic that automatically implicates subjective notions such as judgment, information processes, bias, opportunism, and discretion.

This latter, more contextual view of contract theory forms the theoretical bridge between Dr. King's beliefs and teachings and the practical law of contract. Dr. King's humanistic desire for universality, hope and love, interpreted within the contextual realities of pejorative human behavior, such as prejudices, discrimination, and bias, illustrates a theoretical weakness of contract law. Even his accommodations in the segregated Lorraine Motel during the eve of his assassination in 1968 provide a contextual link between his message of universality and positive change and bargaining theory.³³ The problems of bias, prejudice, and reduced acumen due to circumstance, all of which prompted Dr. King and many others to champion the courses of the disenfranchised, *can* allegorically reveal fallacies within the bargaining context. More critically, these problems expose the inability of contract rules, and the decision makers who interpret and apply those rules, to correct those fallacies. This reality of bargaining behavior shatters contract law's illusion of objectivity. It also commensurately prompts discussion of methods to cure the transitional ills resulting from those problems.

32. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (4th ed. 1992); Patrick W. Brennan, *Book Review*, 55 U. CIN. L. REV. 1159 (1987) (reviewing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986)); Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1323; Paula M. Taffe, Note and Comment, *Imputing the Wealth Maximization Principle to State Legislators*, 63 CHI.-KENT L. REV. 311, 312-13 (1987). But see Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 526 (1980); Whitney Cunningham, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141, 142 (1992); Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 826 (1990); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 228 (1980) (citing wealth maximization's various negative aspects); Robin Paul Malloy, *Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147, 149 (1990); Warren J. Samuels & Nicholas Mercuro, *Posneran Law and Economics on the Bench*, 4 INT'L REV. L. & ECON. 107, 108 (1984); Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1046 (1987) (arguing that wealth maximization is "nothing more than thinly veiled ideology to legitimate the inequalities wrought by market systems").

33. In the 1960s, the Lorraine Motel was one of the first and few motels in Memphis to house African Americans. See Alan Attwood, *The Age* (visited June 26, 1998) <<http://www.theage.com.au/daily/980403/news/news27.html>>.

To some extent, contract law has progressed to allow certain defenses to compensate for these transactional ills when bargaining positions are disparate and contractual terms are unfair,³⁴ as well as when individuals are unduly forced into agreements³⁵ or are improperly encouraged to enter into certain deals.³⁶ The law of contract also provides remedies for those who suffered some cognitive impairment at the time they entered the bargain.³⁷ However, these correctional tools remain elusive, and only scratch the surface of transactional problems related to greed, prejudice and other forms of negative opportunism. These problems alter bargaining judgment and marginalize disadvantaged bargainers.³⁸

My aim in this Article is to utilize the theoretical teachings of Dr. King to underscore the need for a more realistic and contextual application of contract rules. The principal term here is realism³⁹—where theoretical constructs of bargaining relation-

34. Unfairness in the bargain often invokes discussion of the unconscionability doctrine. For more regarding unconscionability, see *infra* notes 194, 252-59, 267 and accompanying text.

35. Coercion in the bargain is generally addressed by the concept of duress. See *infra* notes 195, 265-66 and accompanying text.

36. For more regarding undue influence, see *infra* notes 196, 268 and accompanying text.

37. For more on capacity, see *infra* notes 197, 265 and accompanying text.

38. When I speak of "disadvantaged bargainers," I am referring to those in the marketplace who may not possess the necessary information or who lack the acumen, sophistication, or resources to secure their interests adequately as they bargain. This is sometimes expressed in terms of bargaining power. See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 988-89 (1998) (noting that a lack of bargaining power can equate to a lack of resources necessary to strike a more prudent bargain); Morant, *supra* note 23, at 922. Those who possess bargaining skills and information may still be "disadvantaged" if the party with whom they bargain reacts to pejorative beliefs and attitudes about that individual due to stereotype or ignorance. It is important to note that the "disadvantaged" bargainer in this latter context may not necessarily strike a bad deal; however, she may face more transaction costs to attain that deal. See *id.* at 927 n.219.

39. Legal realism began in the early twentieth century as a rebuff of formalism and conceptualism as reflected in the United States Supreme Court case of *Coppage v. Kansas*, 236 U.S. 1 (1915) (allowing workers to contract with their employees without state interference), *overruled in part* by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). As a generalization, realism implores the recognition of the use of social condition as a variable in decision making, in lieu of mere reliance on legal rules which may advance outdated or dysfunctional policies. See G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW.

ships are deconstructed to allow for more proactive measures to counter pejorative conduct. This exercise is not intended to dismantle the rules of contract. Rules are fundamentally required mechanisms within any transactional enterprise.⁴⁰ But contextual realities demonstrate a need to construe and apply contract rules more flexibly, thereby allowing decision makers to take into account such transactional ills as bias, opportunism, and prejudice.

The allegorical use of Dr. King's teachings, which portray the contextual realities of human dynamics, can emphasize the need to take a more expansive, less rigid view of contractual rules. Contextual realities, if employed by both judicial and legislative decision makers, can support remedial efforts that counteract the effects of biased bargaining behavior. This, too, may lend further support to the now recognized defensive tools of unconscionability, duress, undue influence, and capacity.

Part II of this Article utilizes jurisprudential constructs to form an analytical bridge between Dr. King's teachings and contract law. Finally, Dr. King's embrace of natural law will be examined through an analysis of his critical speeches and writings. This examination will be contrasted with the theoretical basis of contractual rules which demonstrate more positivist characteristics. The underpinnings of traditional, classical contractual theory include bargaining autonomy. This policy will be contrasted with the pleas for justice and equality espoused by Dr. King, who does not necessarily reject autonomy outright, but acknowledges its limitations.

Part II will also highlight the failings of rigid, classical contract theory as an idealistic mechanism. In its unabashed and unchecked form, classical contract theory fails to maintain the overall transactional goal of efficiency and marketplace integrity. This, then, provides an appropriate transition into the

L.J. 819, 821 (1986). In effect, realism commands that rules be applied contextually in light of the effect of those rules on such factors as wealth, class, and condition. See *id.*

40. Throughout my scholarly life, I have maintained that contract rules constitute fundamentally mandatory tools for the efficient and orderly conduct of transactional affairs. See Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT. L.J. 453, 455-56 (1996).

motivational and perceptual factors which can dictate and influence bargaining conduct. Modern contractual theory fails to overtly recognize the influence of cognitive processes, i.e., motivation, bias, or prejudice, that drive bargaining behavior. But an appreciation of these influences, and the need to neutralize their effects, will provide a foundational parallel between the law of contract and the basic constructs of Dr. King's teachings. They also serve to underscore the need for transactional remedy.⁴¹

After establishing bargain motivation as a transactional variable, Part III of this Article will then use Dr. King's theories to buttress the need for a more flexible approach to the application of contract rules to transactions colored by bias or opportunism. The Article will debunk the belief that Dr. King's teachings were primarily tenets of natural law. An examination of the full dynamic of his writings reveals a more contextual ideology, one defined more by events of the time. Dr. King's teachings are defined more by circumstance than by abstractions. Despite the more superficial contentions that Dr. King called for judgment by character rather than color, the true essence of his teachings present a more complex agenda that embraced a proactive approach to the resolution of inequity and provision of justice. The contextual examination of his writings illustrates Dr. King's theoretical support for a more elastic application of the rules for contractual remedies such as unconscionability, duress, undue influence, and capacity.

Hopefully, this exercise will expand the conventional applicability of Dr. King's teachings beyond the customary problems of political disenfranchisement.⁴² His messages serve as a catalyst to examine the probative value of the effectiveness of contract rules. They also enliven the debate for a less abstract dependence on contractual rules as they relate to bargaining inequities.

41. See *infra* notes 199-204 and accompanying text.

42. Generally, disenfranchisement has been associated primarily with voting rights. See Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994); A. Leon Higginbotham, Jr. & William C. Smith, *The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099 (1992).

II. A JURISPRUDENTIAL ANALYSIS OF DR. KING'S TEACHINGS AND CONTRACT LAW

A comparison of Dr. King's teachings to the theory of contract law requires some common, analytical framework. While no mode of analysis can be dispositive of this exercise,⁴³ the jurisprudential roots of law offer significant insight. The three primary categories that are key to this analysis are: natural law (tenets based in morality),⁴⁴ positive law (human-generated laws designed to advance certain societal norms),⁴⁵ and "contextualism" (law or legal interpretations influenced by the context in which they are made).⁴⁶ As will be demonstrated in more detail below, these three facets of western law⁴⁷ serve

43. Note that there are many analytical tools: law and economics, see *supra* notes 22, 28, 32 and accompanying text; relational theory, see Henry N. Butler & Barry D. Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics and Organization Theory*, 32 EMORY L.J. 1009 (1983); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Morant, *supra* note 40, at 496-502; and critical legal studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984). Two other Critical Critiques of law are critical race, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 807 (1994); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991), and feminist theory, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987); Morant, *supra* note 23, at 933; Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). For an excellent survey of the various theories, such as efficiency, relational and consent, which are relevant to the enforcement of contractual obligations, see generally *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 1 (1993).

44. For more regarding natural law, see *infra* notes 49-115 and accompanying text.

45. For more regarding positive law, see *infra* notes 116-43 and accompanying text.

46. I have adopted "contextualism" as a singular term that equates to law in context theory. One must recognize that law develops in context as decision makers apply legal rules to variant situations. For more regarding contextualism, see *infra* notes 217-84 and accompanying text.

47. The concept of western law, that is law particular to that observed in the

both as comparative vehicles and analytical tools that reveal the ultimate effectiveness of contract rules.⁴⁸

A. *The Concept of Natural Law and Dr. King's Teachings*

Dr. King's teachings and theories have often been associated with the concept of natural law.⁴⁹ This logical association likely stems from Dr. King's continual appeal to such universal themes as love,⁵⁰ compassion,⁵¹ and morality.⁵² To appreciate fully

United States, has been categorized in the three positions of natural law, positive law, and "law-in-context." See COSTAS DOUZINAS ET AL., *POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW* 19 (1991). For a more detailed description of western law and its relation to Eurocentric legal principles, see Kenneth B. Nunn, *Law As a Eurocentric Enterprise*, 15 *LAW & INEQ. J.* 323, 339 (1997).

48. Some have identified other forms of law such as divine law and scientific law. See, e.g., Phillip E. Johnson, *Some Thoughts About Natural Law*, 75 *CAL. L. REV.* 217 (1987). To me, these represent subsets of either natural or positive law, and their application conjures notions of contextualism. I, therefore, do not offer detailed explanation of these legal forms. For more regarding jurisprudential methodologies, see Gerald Moran, *A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law—The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model*, 30 *AKRON L. REV.* 393, 408 n.56-58 (1997).

49. See Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's "What Is Positive Law?"* 100 *YALE L.J.* 701, 703 (1990); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 *MICH. L. REV.* 2152, 2189 (1989); E. Michelle Rabouin, *Law for Dreamers*, 6 *TEX. J. WOMEN & L.* 129, 133 (1996).

50. In his many speeches and writings, Dr. King echoes his recurring plea that the center of human existence, as well as any proactive tactics used to correct societal injustices, must be premised upon the concept of love. See KING, *Facing the Challenge of a New Age*, in *I HAVE A DREAM*, *supra* note 18, at 21. It is important to recognize Dr. King's definition of "love." He advances a Christian-inspired virtue of love which is based more on the concept of broadened respect for humanity than sentimentality or affection. *Id.* In fact, he embraces the Greek concept of love that is defined more in the term *Agape*, rather than those concepts of love expressed through the terms *Eros* or *Philia*. *Id.* at 22-23. Throughout his many speeches and writings, Dr. King emphasizes love as the healing force that also leads towards the resolution of many of the problems faced in the tide of injustice. *Id.* In 1963, he stated that "the universe is under the control of a loving purpose." Martin Luther King, Jr., *Strength to Love XV* (1963), in *THE MARTIN LUTHER KING, JR. COMPANION: QUOTATIONS FROM THE SPEECHES, ESSAYS, AND BOOKS OF MARTIN LUTHER KING, JR.* 51-52 (Coretta Scott King ed., 1993) [hereinafter KING COMPANION]. "Without love, benevolence becomes egotism and martyrdom becomes spiritual pride." *Id.* at 51. When accepting his Nobel prize in 1968, Dr. King continued to emphasize the overarching theme of love as not only a catalyst, but also a foundation for any kind of remedial change. Martin Luther King, Jr., *Nobel Prize Lecture* (1968), in KING

the naturalist features of Dr. King's philosophies, some definitional predicate of natural law is required.

"Natural law" has, from a historical perspective, an ephemeral basis, one derived from the Supreme Being, God, rather than humankind.⁵³ In effect, natural law is reflective of God's will and therefore commands greater obedience given its more lofty genesis.⁵⁴ These laws are of divine prescription and, therefore, remain embedded within the confines of human nature. They occur "naturally," making them an inexorable part of the world in which we live.⁵⁵ Because humanity's existence is rooted in God, the Supreme Being, natural law becomes that which is a preservative of human nature itself.⁵⁶ Human nature, then, becomes a significant component of natural law.⁵⁷ Moreover, the link between human nature and God's commandments is critical to the understanding of natural law. Naturalist thinking

COMPANION, *supra*, at 57. "The oceans of history are made turbulent by the ever-rising tides of hate. History is cluttered with the wreckage of nations and individuals that pursued that self-defeating path of hate. Love is the key to the solution of the problems of the world." *Id.*

51. Dr. King often intermingled his message of compassion with that of love. King, Nobel Prize Lecture, *supra* note 50. There are, however, specific references to his plea for compassion for those who are less fortunate. For example, in WHERE DO WE GO FROM HERE, he states that "[t]rue compassion is more than flinging a coin to a beggar; it understands that an edifice which produces beggars needs restructuring." KING, *supra* note 6, at 630.

52. See *infra* notes 83-86 and accompanying text.

53. See DENNIS LLOYD, THE IDEA OF LAW 70-71 (1976) (providing, as a characteristic of natural law, that humankind and all matters of the universe are guided by gods and the spirits of the supernatural).

54. DOUZINAS ET AL., *supra* note 47, at 4.

55. *Id.* at 19.

56. *Id.*; see also Douglas Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 223 (1995); Daniel Westberg, *The Relation Between Positive and Natural Law In Aquinas*, 11 J.L. & RELIGION 1, 2 (1994-95) (noting the characteristic of natural law as human law so long as "it is derived from the law of nature." That law which deviates from the law of nature cannot be considered natural law but a 'perversion of law'). Compare the tenets of positive law as delineated more specifically below, *infra* notes 116-33 and accompanying text.

57. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 102-03 (1980); Douglas W. Kmiec, *Behind the "Empty Cloud" of Autonomous Reason—Or Why It Doesn't Matter if the Natural Law of Veritatis Splendor Is "Real Law,"* 39 AM. J. JURIS. 37, 41 n.19 (1994) (citing ROBERT GEORGE, NATURAL LAW AND HUMAN NATURE 34 (1992)); Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 23 (1995) (describing natural law arguments as those rooted in perceptions of human nature).

would have these two components in complete parallel, thereby making the law a presumptive derivative of that union.⁵⁸ The totality of these qualities would make natural law presumptively and completely valid.⁵⁹

In more modern times, natural law comprises more of a mandate for social order and structure rather than a reflection of divine prescription.⁶⁰ This emphasis on societal structure transforms law into a confluence of the world's need for order and discipline and for the maintenance of basic human needs.⁶¹ This blending of structure and basic human rights is evident in legal structures of the United States. The Constitution of the United States has been described as natural law that "prescribes the right of self-preservation of life as well as the right to live and develop in community."⁶² Natural law then becomes a higher authority, one that retains its lofty tenets of morality and rationality.⁶³ Laws which have as their genesis rationality and, more importantly, morality, become reflective of a higher order.⁶⁴ Modern natural law has become less dependent upon nature, and more an embodiment of ethics and morality.⁶⁵

Morality then becomes an important element of natural-

58. See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 434 (1987).

59. Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 980-82 (1991).

60. See DOUZINAS ET AL., *supra* note 47, at 19, 75; LLOYD, *supra* note 53, at 82-83; for more regarding the change in the concept of natural law as it relates to European history, specifically to the European enlightenment, see Nunn, *supra* note 47, at 339-44.

61. Nunn, *supra* note 47, at 339-40; Williams, *supra* note 58, at 435.

62. Kmiec, *supra* note 56, at 222. Kmiec also recognizes the importance of the symbiosis between law and human nature in order for it to qualify as valid, natural law. *Id.* at 223. See generally Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (providing an overview of natural law as a theory that influenced the drafters of the Constitution).

63. See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 51-53 (1992); Williams, *supra* note 58, at 435.

64. See Westberg, *supra* note 56, at 2 (stating that "the theory of natural law points to the existence of some body of moral norms which can be used as a standard in assessing the positive laws of a state").

65. See FINNIS, *supra* note 57, at 125-26; Lloyd L. Weinreb, *The Natural Law Tradition: Comments on Finnis*, 36 J. LEGAL EDUC. 501 (1986). This more modern movement away from nature in natural law has been adopted by the critical pragmatists. Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 815 (1992).

ism.⁶⁶ The requirement of morality, also identified as a natural series of liberties that conforms to divine commandments helps natural law retain a tacit nexus with God-given tenets.⁶⁷ Moral order, while perhaps not an exclusive determinant of societal norms,⁶⁸ must be considered a central focus of naturalism. Morality rules irrespective of human custom, will, or any other human-declared proclamations.⁶⁹

Perhaps the most probative aspect of morality as a construct of natural law is its commensurate function as a litmus test for societal norms and laws.⁷⁰ In other words, naturalist principles can be used as a device to check the validity of civil laws.⁷¹ Consequently, laws that are moral and rational are maintained and enforced since they naturally serve human needs and promote general well-being.⁷² True natural law, then, is fundamentally just and must be obeyed. On the other hand, laws that are "unnatural," that is, inimical to human nature, should be altered or rejected.⁷³

66. See H.L.A. HART, *THE CONCEPT OF LAW* 151-52, 181 (1961) (stating that there is, in some sense, a necessary connection between law and morality). *But see* Rodney J. Blackman, *There Is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285, 287 (1995) (quoting HANS KELSEN, *PURE THEORY OF LAW* 77 (Max Knight trans., 1989) and opining that natural law is a "metaphysical theory of law [which] pretends to discover a natural law imminent in nature").

67. See Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 717-18 (1992) (noting the Hobbesian theory of natural laws and delineating the nineteen such laws which are reflective of the commands of God and morality).

68. Other arguable bases for societal norms include: God, positive law (law of the state), personalism, social contract theories, and wealth maximization. See Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233-37.

69. See James T. McHugh, *State Constitutional Commentary: On the Dominant Ideology of the Louisiana Constitution*, 59 ALB. L. REV. 1579, 1587 (1996).

70. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in *PHILOSOPHY OF LAW* 64 (Joel Feinberg & Hyman Gross eds., 1991) (asserting that "the existence of law is one thing, [but] its merit or demerit is another" (citation omitted)); see also Harold Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 781 (1988) (stating that any given set of moral principles can serve as the foundation for judging the validity of legal rules).

71. Civil laws are generally labeled as positive laws since they are a creation of people and enforced by a sovereign. See Chow, *supra* note 65, at 815; Westberg, *supra* note 56, at 2-3; *infra* notes 117-19 and accompanying text.

72. See DOUZINAS ET AL., *supra* note 47, at 19; Kmiec, *supra*, note 46, at 223; Nunn, *supra*, note 47, at 338-40.

73. See Berkowitz, *supra* note 56, at 703 n.5. For a more detailed description of

Essential characteristics of natural law can be found in Dr. King's messages.⁷⁴ The *I Have a Dream* speech, perhaps Dr. King's most famous work,⁷⁵ beckons for naturalist goals of human dignity.⁷⁶ His plea continually echoes the humanistic requirements of equality and justice. In the speech he declares: "I still have a dream. It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal."⁷⁷

But the one work which perhaps most closely associates Dr. King's theories with natural law must be his *Letter from Birmingham City Jail*.⁷⁸ Penned as an open letter while he served a sentence that resulted from his participation in civil rights demonstrations in 1963, Dr. King's letter espoused the need for civil disobedience as a proactive method to advance the basic rights of freedom, justice, and equality.⁷⁹ These naturalist rights comprised a higher authority which justified the use of nonviolent means to further that authority's will.⁸⁰

As a preliminary point, Dr. King's Letter expressed a dichotomy between just laws (those which preserve freedom, justice, and equality for all humankind) and unjust laws (those which fail to provide freedom, justice, and equality for all individuals).⁸¹ He specifically writes:

[T]here are two types of laws: there are just and there are unjust laws . . . [I would be the first to advocate obeying just laws. One

the limits of natural law, see LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 1-12 (1987).

74. See *supra* note 49 and accompanying text.

75. Dr. King's *I Have a Dream* speech comprises his most memorable and, arguably, most famous work. See Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 *GEO. L.J.* 1835, 1870 n.198 (1992); James Lindgren, Review Essay, 81 *CAL. L. REV.* 1059, 1059 (1993) (reviewing Andrew Kull, *SEEING COLORS: THE COLOR-BLIND CONSTITUTION* (1992)).

76. See *supra* notes 7-13 and accompanying text.

77. King, *supra* note 7, at 219; see Barry Sullivan, *Foreword: Civil Rights in 1995*, 1 *RACE & ETHNIC ANCESTRY L. DIG. IV*, iv (1995) (recognizing Dr. King's message of equality as a generalized goal that most Americans share).

78. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail* 1963, in *A TESTAMENT OF HOPE*, *supra* note 7, at 289.

79. *Id.*

80. See *supra* notes 49-59 and accompanying text.

81. See *supra* notes 72-74 and accompanying text.

has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.] "An unjust law is no law at all."

. . . A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law . . . [A]n unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.⁸²

Thus, Dr. King's close association with natural law results from his continual appeal to a high sense of morality. This moralistic plea for human rights comprised a critical tool in the struggle to restore the natural rights of people of color—that segment of American society which suffered the most egregious abridgement of natural law—slavery.⁸³ Dr. King's pleas became his persistent theme, appearing in his teachings as early as 1958. During that year, Dr. King espoused that "[c]ivil rights is an eternal moral issue which may well determine the destiny of our civilization in the ideological struggle with communism. We must keep moving with wise restraint and love and with proper discipline and dignity."⁸⁴

The nexus between Dr. King's messages and natural law also demonstrated his adeptness at resolving the potential, naturalist conflict between majoritarian rights and the human rights of the minority. Aside from his belief that just laws were grounded in morality, and unjust laws were not,⁸⁵ Dr. King advanced a theme that echoed a theological, as well as a quasi secular, basis for natural law.⁸⁶ In his *Letter from Birmingham City Jail*, Dr. King asserted that:

An unjust law is a code that a majority inflicts on a minority that

82. KING, *supra* note 78, at 293.

83. Robert George, *Natural Law and Civil Rights: From Jefferson's Letter to Henry Lee to Martin Luther King's Letter from Birmingham Jail*, Address at the 1993 St. Ives Lecture, in 43 CATH. U. L. REV. 143, 156 (1993).

84. King, *The Power of Nonviolence*, *supra* note 18, at 33.

85. See *supra* notes 81-82 and accompanying text.

86. The dichotomy between theological and mystical bases for natural law really is more a function of perception than reality. The mystical basis of natural law has a function in rationality as well as in practicality and fairness. The theological end also has a rational element but does not necessarily have a basis in universal fairness. See, e.g., Luban, *supra* note 49, at 2152.

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. This is sameness made legal.⁸⁷

In effect, Dr. King augmented the definition of unjust and just laws with a view toward the practical. Majoritarian infliction of restrictive rules that disadvantage the minority demands change under the naturalist's scheme of fairness, equity, and, most of all, freedom.⁸⁸ "Democratic equality," then, becomes a modern-day construct with natural law overtones.⁸⁹

Armed with the sense of moral purpose bound within the constructs of natural law, Dr. King then advances a naturalist critique against human-made laws which do not further the ends of justice.⁹⁰ This, of course, serves as the ideological justification for Dr. King's embrace of nonviolent, civil disobedience against laws which run counter to those basic constructs of freedom, justice, and dignity.

Dr. King's moralistic, nonviolent stance against unjust laws, i.e., those laws, rules, or customs that fail to advance equality and justice for the typically disenfranchised,⁹¹ had been a continual theme in many of his works. In 1961, Dr. King addressed the nobility of civil disobedience even to the point of arrest as a proper cause for a higher order of law:

Much has been made of the willingness of these devotees of nonviolent social action to break the law. Paradoxically, although they have embraced Thoreau's and Gandhi's civil disobedience on a scale dwarfing any past experience in American history, they do

87. See KING, *supra* note 78, at 294.

88. See *supra* notes 74-80 and accompanying text; see also Nunn, *supra* note 47, at 340 (noting that the basis of natural law, particularly within the post-enlightenment era, has a basis in both "psychological and sociological" ideas and theories).

89. Luban, *supra*, note 49, at 2203. Note that "natural law" and "natural rights" are distinguishable. Natural law embodies a philosophy based upon religious principles of order and emphasizes the duties of individuals as they intersect with morality. Natural rights, on the other hand, focus on restraints upon the government with respect to individual concerns and duties. They reflect the perspective of individual rights as opposed to maintenance of world order. Thus, natural rights proscribe limitations on state action that infringes upon individual natural rights. GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 223-25 (2d ed. 1995).

90. See Berkowitz, *supra* note 49, at 703.

91. See *supra* note 42 and accompanying text.

respect law. They feel a moral responsibility to obey just laws. But they recognize that there are also unjust laws.⁹²

From a purely moral point of view, an unjust law is one that is out of harmony with the moral law of the universe. More concretely, an unjust law is one in which the minority is compelled to observe a code that is not binding on the majority. An unjust law is one in which people are required to obey a code that they had no part in making because they were denied the right to vote.⁹³

Dr. King's use of morality as a guidepost for proactive change through nonviolent means permeated his works. In *Stride Toward Freedom V*, he emphasized that nonviolence is a way of life because of "the sheer morality of its claim."⁹⁴ Dr. King repeats this idea in another address, where he conjures the classic, moralistic dichotomy between good and evil as it relates to the procurement of civil rights: "The nonviolent strategy has been to dramatize the evils of our society in such a way that pressure is brought to bear against those evils by the forces of good will in the community and change is produced."⁹⁵ In his *I Have a Dream* speech, Dr. King echoes the theme of nonviolence within the context of peace and universality:

In the process of gaining our rightful place we must not be guilty of wrongful deeds.

. . . We must forever conduct our struggle on the high plane of dignity and discipline. We must not allow our creative protest to degenerate into physical violence.

. . . [Our white brothers' destiny] is tied up with our destiny and they have come to realize that their freedom is inextricably bound to our freedom.⁹⁶

His *Letter From Birmingham City Jail*, the work most often cited for Dr. King's embrace of natural law,⁹⁷ also creates a moral symbiosis between his advocacy of nonviolent action and

92. MARTIN LUTHER KING, JR., *The Time for Freedom Has Come* (1961), in A TESTAMENT OF HOPE, *supra* note 7, at 160, 164.

93. *Id.*

94. MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM V*, reprinted in KING COMPANION, *supra* note 50, at 43.

95. MARTIN LUTHER KING, JR., *Nonviolence: The Only Road to Freedom*, in I HAVE A DREAM, *supra* note 18, at 125, 131.

96. King, *supra* note 7, at 218.

97. See *supra* notes 78-87 and accompanying text.

the need for natural, human rights.⁹⁸ Human rights require equality and justice, both naturalist prescriptions that supersede any human-made law which fails to undergird equality and freedom. Just laws, which have their basis in naturalist principles, uplift and support the human spirit.⁹⁹ Unjust laws, which violate the tenets of natural law, represent an aberration and a diminution of the human spirit.¹⁰⁰ Consequently, to be "law abiding" within naturalist thinking sometimes requires the protest and disputation of unjust laws.¹⁰¹

Although Dr. King eschewed unjust laws, he did not advocate amoral means to oppose them. To the contrary, his continual themes of morality and love propelled him to accept and promote a nonviolent stance against such unjust laws.¹⁰² In his *Letter from Birmingham City Jail*, Dr. King asserts poignantly that: "I have consistently preached that nonviolence demands that the means we use must be as pure as the ends we seek. So I have tried to make it clear that it is wrong to use immoral means to attain moral ends."¹⁰³ In fact, Dr. King noted that disobedience of unjust or immoral laws must be accomplished "openly, lovingly, . . . and with the willingness to accept the penalty."¹⁰⁴

Despite Dr. King's affinity for natural law,¹⁰⁵ it would be overly simplistic, if not inaccurate, to confine the totality of his theories to that one concept. The very essence of natural law itself supports this conclusion. Natural law's basic definition appears readily comprehensible,¹⁰⁶ but that appearance is deceiving. While it can be understood conceptually, its perceptual meaning can fluctuate depending upon the various circumstances to which it is applied, and that application can be arguably diverse and varied.

Natural law's broad scope lends itself to varying interpreta-

98. See George, *supra* note 83, at 154.

99. See *supra* notes 60-73, 81 and accompanying text.

100. See *supra* note 73 and accompanying text.

101. George, *supra* note 83, at 155.

102. See *supra* notes 50-52

103. KING, *supra* note 78, at 301.

104. *Id.* at 294; see also George, *supra* note 83, at 155-56 (describing King's method of disobeying unjust laws).

105. See *supra* notes 74-90 and accompanying text.

106. See *supra* notes 49-114 and accompanying text.

tions of what is divine, what is representative of human nature, or what is moral. The very act of adjudication compels decision makers to make moral judgments and to incorporate these judgments into their reasoning.¹⁰⁷ The flexibility of these judgments is manifested by such review standards as "shocks . . . [the] conscience," "fundamental fairness," and "violative of ordered liberty."¹⁰⁸ This also affords decision makers the authority to sustain individual rights under such atypical authority as the Ninth Amendment.¹⁰⁹

But this flexibility in judgment afforded by naturalism can result in abuse,¹¹⁰ and that abuse bears strange fruit. Natural law principles have been used to foster such politically repugnant themes as slavery, segregation, and disenfranchisement.¹¹¹ The fluidity of naturalism can also lead to divergent and distorted uses and interpretations of Dr. King's ideolo-

107. See Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 398 (1985) (arguing that application of law to fact equates to moral reasoning by decision makers engaged in this exercise).

108. *In re Winship*, 397 U.S. 358, 381-82 (1970) (Black, J., dissenting) (refuting the idea that using natural law to strike down laws that "shock[] . . . [the] conscience" deprives one of "fundamental fairness" or violates "ordered liberty"); see also Michael Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism and a "Naturalist" Perspective*, 20 GA. L. REV. 995, 1011-12 (1986) (generally supporting the use of naturalist theory in decision making).

109. Jordon J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 234 (1975) (stating that the Ninth Amendment guarantees basic human rights). See *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965). But see Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 23-26 (1980) (arguing that utilization of the Ninth Amendment as a tool to thwart state action is suspect).

110. Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDIS. L.J. 549, 564 (1995) (noting the "positivist" judge's possible misuse of natural law).

111. See *Plessy v. Ferguson*, 163 U.S. 537, 548-52 (1896) (denying equal rights to persons of color and upholding the "separate but equal" doctrine pursuant to contemporary and contextual manipulations of natural law); see also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION*, at 44, 48 (1993) (stating that the *Plessy* and *Lochner* decisions were mistaken rationalizations of natural law); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 936 (1986) (noting judicial employment of natural law to uphold the "separate but equal" doctrine); Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 HOW. L. REV. 809, 834 (1985) (stating that the "separate but equal" doctrine represents an abuse of natural law); Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1207 (1991) (citing the misuse of natural law to uphold segregation).

gies.¹¹² These distortions seem to counter natural law's essence, which is to remedy injustice rather than to allow it to fester.

This possible distortion of Dr. King's views prompts a more comprehensive study of Dr. King's ideas and theories.¹¹³ He cannot be seen as a total natural law idealogue. The realistic context of the dilemmas that surrounded him comprised a synergistic force that forged his message of equality and justice.¹¹⁴ As will be demonstrated more cogently below, this more expansive, contextual view of Dr. King's teachings forms the comparative bridge between his ideas and contractual principles.

But full comprehension of the import of the dichotomy between natural law and human-made law requires an examination of positive law.¹¹⁵ Understanding positivism should further assist in the analysis of Dr. King's general philosophies as they relate to contract rules.

112. See David Oppenheimer et al., *Rethinking Equality in the Global Society*, 75 WASH. U. L.Q. 1586, 1638 (1997) (recanting Proposition 209 proponents' misuse of Dr. King's *I Have a Dream* speech as a vehicle for a color-blind agenda); Deval L. Patrick, *What's Up Is Down, What's Black Is White*, 44 EMORY L.J. 827, 830 (1995) (asserting that Dr. King's *Dream* speech was used, "not to inspire . . . but to discredit effective remedies for our country's sad legacy of discrimination"); Arthur Brice, *GOP's Use of King Speech Denounced*, ATLANTA J. & CONST., Oct. 23, 1996, at A1 (describing California Republicans' use of Dr. King's *I Have a Dream* speech to promote anti-affirmative action initiative). For a detailed exposé on Proposition 209, the initiative in California which effectively banned affirmative action programs, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); see also Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. L. REV. 63, 70 n.31 (1993) (discussing the view that Dr. King's promotion of race-conscious affirmative action was contradictory to his goals of integration and a color-blind society).

113. For a comprehensive explanation as to why Dr. King's messages do not support a color-blind agenda, see generally Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996).

114. Dr. King's *Letter from Birmingham City Jail*, authored during his incarceration for participating in a non-violent civil rights protest, bespeaks this very idea. KING, *supra* note 78, at 289; see also *supra* notes 78-87 and accompanying text.

115. For more on positive law, see *infra* Part II.B.1. of this Article.

*B. Contractual Theory and the Concept
of Positivism*

1. *From Naturalism to Positivism.*—As previously discussed, natural law functions secondarily to adjudicate the propriety of rules generated to promote societal order.¹¹⁶ These so-called “humanly created” covenants can be generally categorized as positive laws.¹¹⁷ In theory, positive law has been seen as a derivative of natural law, in which human-authored laws regulate the more specific variables of societal life.¹¹⁸ As a consequence, positive law provides some palpable meaning to naturalist principles.¹¹⁹

Despite its basic definition and characteristics, positive law historically existed on a variety of theoretical planes.¹²⁰ A Hobbesian view of natural law dictated that individuals will employ any means, including violence, to attain and defend power, possessions, and reputation.¹²¹ Such conduct resulted from a natural state of humankind.¹²² This natural antagonism ultimately would have led to a secondary, but instinctive, pursuit of peace which could have maintained personal liberties.¹²³ The need and desire for peace would, of course, have established some type of commonwealth which could produce law that preserves the “natural” virtues of humankind.¹²⁴

116. See *supra* notes 60-65 and accompanying text.

117. Berkowitz, *supra* note 49, at 703 (stating that “[p]ositive law is often said to be those rules which are man-made, which have been promulgated by a particular community, city, or nation”).

118. Christopher L. M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 319 (1988) (noting that positive law is derived from natural law); see FINNIS, *supra* note 57, at 234-37; Westberg, *supra* note 56, at 1.

119. See *infra* notes 139-43 and accompanying text.

120. See *infra* notes 121-28 and accompanying text.

121. See Allen & Morales, *supra* note 67, at 717.

122. *Id.*

123. *Id.*

124. *Id.* Thomas Hobbes, a noted scholar in the field of jurisprudence, believed that “norms found in nature authorized the sovereign to issue binding commands.” Chow, *supra* note 65, at 763. This represented an extension of Thomas Aquinas’ naturalist view that the universe contained a code of natural laws that were reflected in positive laws. *Id.* at 763 n.21. To Hobbes, basic naturalist principles imbued the sovereign with the power to issue any number of rules to carry out those

Unlike Hobbesians, who focus upon the authority to issue positive law through a foundation of naturalist principles,¹²⁵ Austinians essentially ignored the source of rules as the root of legislative power.¹²⁶ Positive law functioned as commands that embody the sovereign's expressed desire for certain behavior.¹²⁷ Rules were supported by the sovereign's power and ultimate means to sanction those who disobey those rules.¹²⁸ Both the Hobbesian and Austinian views of positivism contrast with the more modern conceptualizations of H.L.A. Hart, who endorsed legal positivism without such foundational requirements as divine ordinance or sovereign power.¹²⁹ To Hart, politics played a crucial role in the definition and enforcement of rules.¹³⁰

This historical perspective provides the general features of positive law. Rules become the primary product of positivism.¹³¹ And a sovereign authority promulgates these rules of law for general application.¹³² Positive law, in effect, can be seen more as law that is, rather than law as it should be. In other words, positivism recognizes law as a more pragmatic, operating norm, rather than a normative truism of divine right.¹³³

Positive law is not so much directly reflective of morality as it is a demand to respect sovereign power and civility.¹³⁴ Posi-

principles. *Id.* at 763. Thus, source, rather than content, of positive law becomes the critical component giving positive laws their legitimacy. *Id.* Note that Hobbes' theory starts from a premise of naturalism. GEORGE C. CHRISTIE, JURISPRUDENCE 293 (1973).

125. Allen & Morales, *supra* note 67, at 717.

126. JOHN AUSTIN, THE AUSTINIAN THEORY OF LAW 1-30 (W. Jethro Brown ed., 1906).

127. *Id.*

128. *Id.*; see also Chow, *supra* note 65, at 763 n.22 (noting the Austinian view that "law was a set of rules embodying the desire of the sovereign expressed in a command that others behave in a certain way, backed by the sovereign's power and will to sanction disobedience").

129. See generally HART, *supra* note 66, at 49-120 (criticizing the doctrine of sovereignty as an over-simplification incapable of accounting for features of the modern municipal legal system and presenting a more complex social situation as the foundation of the legal system).

130. *Id.* at 77-96.

131. See Harold Berman, *supra* note 70, at 781.

132. See AUSTIN, *supra* note 126, at 96-116.

133. *Id.* See generally HART, *supra* note 66, at 49-76.

134. Westberg, *supra* note 56, at 6-8.

tive law results from the command of a sovereign.¹³⁵ Thus, it derives its force from a human authority rather than from such naturalist sources as the Divine Being or concepts of morality.¹³⁶ Positivist rules need not appeal to a higher authority nor conform to any lofty sense of morality. Rules possess authority inherently, irrespective of laws' appeal to justice.¹³⁷ Positive laws are moral by their very prescription and, as such, must be obeyed as a logical edict from the sovereign. In effect, positive laws reflect the power of the state, irrespective of the law's nexus to morality.¹³⁸

To classify positive law exclusively in terms of power would be disingenuous given its ideological basis in naturalist principles.¹³⁹ The need for more specific, human-made rules to preserve societal order also has an appeal to logic.¹⁴⁰ Indeed, the Hobbesian approach to positivism recognizes civil law as a necessary construct of an orderly society built upon the peaceful coexistence of its citizenry.¹⁴¹ To break a civil law, regardless of its conformity to morality or rationality, should be inherently unjust.¹⁴² With its goal of societal order, positivism gained sig-

135. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Isaiah Berlin et al. eds., 1954) (1832).

136. Westberg, *supra* note 56, at 6 nn.11-12 (noting the Thomist view of positive law as laws which derive their "peculiar force, [and] vigor, from the fact that they have been instituted by human authority, not from natural and moral law," which is the opposite of Aquinas' theory of naturalism, stating that law is more of an abstract of reason, rather than the arbitrariness of positivist laws). This view is reflective of H.L.A. Hart's concept of positivism. See *supra* notes 129-30 and accompanying text.

137. Berkowitz, *supra* note 49, at 704; see LLOYD, *supra* note 53, at 100; *supra* notes 129-30 and accompanying text.

138. Nunn, *supra* note 47, at 340; see also Rudolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455, 456 (1995) (depicting positivism in totalitarian countries). Others have challenged the notion that positive laws affirm the power of the state. See HART, *supra* note 66, at 181-207; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18, 26-37 (David Caraways ed., 1982); Gary Minda, *100 Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1995).

139. See *supra* notes 118-19 and accompanying text.

140. See Nunn, *supra* note 47, at 340.

141. Allen & Morales, *supra* note 67, at 717 (noting Hobbes' theory that the natural condition of human-kind is a condition of war and, to "escape the perils of violent competition among equals over resources and social standing, individuals seek the protection of a common power or sovereign." Thus in Hobbes' view, "natural" liberties propel individuals toward positivist law).

142. *Id.* at 719 (noting Hobbes' view that "when a covenant is made, then to

nificant popularity among western jurisprudential thinkers.¹⁴³

2. Contract Law as a Positivist Concept.—

a. Contract Theory and Naturalism

Contract law represents a hybrid of jurisprudential principles. The law of contract aspires to the more lofty, naturalist goals of freedom and individuality and its invocation through normative rules more closely associates it with positivism.¹⁴⁴ Moreover, its close association with theories of efficiency and economics¹⁴⁵ serves to identify contract law with contextualism, if only to a limited extent.¹⁴⁶

Because contract law preserves private associations and bargains through established rules of engagement, it has a limited nexus with natural law. The maintenance of bargains, particularly those that create legitimate expectations, equates to the

break it is unjust. The definition of INJUSTICE, is no other than the not performance of covenant. And whatsoever is not unjust, is just!" (quoting THOMAS HOBBES, LEVIATHIAN; OR, THE MATTER, FORM, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 113 (1651)).

143. See LLOYD, *supra* note 53, at 95-115. See generally AUSTIN, *supra* note 135, at 11; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970); DAVID HUME, A TREATISE OF HUMAN NATURE (J.M. Dent and Sons, Ltd., 1977) (1911). For a more comprehensive explanation of jurisprudential tenets, see generally WILLIAM M. WIECK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937 (1998).

144. See *infra* notes 162-197 and accompanying text. In this Article, I tend to use "positive law" and "positivism" interchangeably. This is not to imply that the terms have no distinction. While related, positive law and positivism may connote idiosyncratic differences within the operation of legal jurisprudence. Positive law embodies those sovereign-created legal rules that define or create certain rights and obligations. In effect, positive law relates more to the source of rights. See *supra* notes 116-24. Positivism, on the other hand, pertains more to the effect and implementation of positive law; namely, that those who are subject to the law and, perhaps more importantly, those who interpret the laws created by the sovereign, are required to adhere strictly to the commands of the law, regardless of its implications on equity. In a sense, positivism is the antithesis of realism, which employs a more contextual approach to the application of legal rules. See *infra* Part III.B. 2.

145. See *supra* notes 22, 28 and accompanying text.

146. See Nunn, *supra* note 47, at 339; see also David Gray Carlson, *Secured Lending as a Zero-Sum Game*, 19 CARDOZO L. REV. 1635, 1636 (1998) (stating that economic principles embrace bargaining autonomy and eschew governmental intrusion into bargaining relationships).

more sacred, moralistic, and naturalist foundation for contractual theory and rules.¹⁴⁷ The constitutionally guaranteed right to make a contract confirms this thesis.¹⁴⁸ The Contract Clause, as provided in the United States Constitution, states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."¹⁴⁹ This seminal provision represents the heart and soul of the basic, natural, and private right to obtain and use property.¹⁵⁰ Although this right also ushered in a conflict between private rights and governmental interference with those rights through legislation,¹⁵¹ it remains at the core of modern contract theory and the rules generated therefrom.¹⁵²

Contract law's naturalist roots can be seen through its ideological foundation of bargaining autonomy and contractual freedom. These liberties are extensions of Jeffersonian democracy.¹⁵³ Thus, freedom, particularly when applied to one's liveli-

147. See Samuel R. Olken, *Charles Evans Hughes and The Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 524 (1993). This moralistic tone does not overshadow contract law's primary identification with positivism. The law of contract creates a quasi-property interest in expectations. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1715 (1976). Although bargaining freedom resonates with a semblance of natural rights, it can be viewed as contrary to the originalist conceptions of natural order. See generally Nunn, *supra* note 47, at 339-45.

148. For more regarding the United States Constitution as an embodiment of "natural" rights, see *supra* note 62.

149. The complete text of the Contract Clause includes the following:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10, cl. 1.

150. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835*, at 597 (1988).

151. *Id.* at 601; see also Olken, *supra* note 147, at 513-15 (discussing *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), in which the Court upheld the Minnesota Mortgage Moratorium Act as a reasonable exercise of state powers during an emergency and rejected the argument that the act impaired the obligation of a private contract within the meaning of the Contract Clause).

152. See generally Douglas Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 COLUM. L. REV. 647 (1988).

153. Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921) (noting that metaphysical and political philosophers of the late eighteenth century advocated the merit of freedom). Professor Williston also notes that the concept of

hood or personal arrangements, has historically been viewed as a basic, fundamental right.¹⁵⁴ At the turn of the century, the United States Supreme Court, in its landmark decision in *Lochner v. New York*,¹⁵⁵ recognized the importance of personal freedom in the construction of bargains.¹⁵⁶ Freedom to contract, then, is a naturalistic principle because of its ideological link to basic freedoms defined in both the Declaration of Independence and the Constitution.¹⁵⁷

Contractual freedom signifies that parties have the autonomy to bargain in a free market with minimal restriction.¹⁵⁸

"freedom" constitutes a definitive base of the Declaration of Independence and remains reflective of Jeffersonian democracy, thereby facilitating individual action and minimizing governmental activity or interference. *Id.* at 366. Professor Williston goes on to note that philosophers have historically applied the concept of freedom to contract law. *Id.* at 367. See also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (indicating that an individual's right "to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment").

154. See Williston, *supra* note 153, at 373-74. "Freedom of contract" became a rallying cry among philosophers and politicians during the eighteenth and nineteenth centuries. *Id.* Until the early twentieth century, the Supreme Court recognized freedom of contract as an element of due process guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY: 1888-1986*, at 7-50 (1990).

155. 198 U.S. 45 (1905).

156. *Lochner*, 198 U.S. at 52-65.

157. See *supra* note 62 and accompanying text; see also Kmiec, *supra* note 56, at 222 (stating that "the natural law of the American Constitution prescribes the right of self-preservation or life as well as the right to live and develop in community").

158. *Brokers Title Co. v. St. Paul F. & M. Ins. Co.*, 610 F.2d 1174, 1179 (3d Cir. 1979) (noting that the "essence" of contracts is the concept of "volition," wherein the agreement between the parties connotes a "free exercise of will by parties who are on a relatively equal economic footing and who are brought together in the dynamic market place by their needs and desires") (quoting J. MURRAY, *MURRAY ON CONTRACTS* § 350, at 735-36 (1974)); see also Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 570 (1982) (recognizing that "[f]reedom of contract is freedom of the parties from the state as well as freedom from imposition by one another"). Professor Kennedy also indicates that the notion of "freedom of contract" fits within the "domain of pre-existing property rights." *Id.* at 568. Irrespective of the traditional notion of freedom of contract which entails an individual's freedom to make, or not to make, agreements, Professor Kennedy recognizes that the decision maker's fostering of the freedom of contract notion embodies the power not only to enforce agreements but also to refuse enforcement of agreements. *Id.* This "balance" of non-intervention and over-intervention, which are freedoms, serves to justify the impositions of paternalistic motives regarding the refusal to enforce certain agreements which are contrary to the interests of one of the bargainers. *Id.* at 569-70.

Given this moralistic postulate, decision makers should foster and maintain this freedom through judicious lawmaking that respects voluntarily consummated contracts.¹⁵⁹ From this naturalist position springs the genesis of contract law which focuses upon the existence of an exchange of promises.¹⁶⁰ Contract law functions to enforce voluntary exchanges.¹⁶¹

159. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (stating that the "formalistic norm" of the freedom of contract notion requires that contracts be enforced as written). *But see* A. Darby Dickerson, Note, *Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments*, 41 VAND. L. REV. 129, 138 (1988) (noting that courts should not honor parties' freedom to contract, thereby allowing exculpatory clauses, absent legislation to the contrary); Note, *Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics*, 97 HARV. L. REV. 978 (1984).

160. *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 744 (6th Cir. 1993) (illustrating that the prerequisites for contract formation are offer, acceptance, and consideration); *Tsiatsios v. Tsiatsios*, 663 A.2d 1335, 1339 (N.H. 1995) (stating that "[o]ffer, acceptance, and consideration are essential to contract formation"); *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. Ct. 1995) (stating that "[i]t is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds"); *Serand Corp. v. Owning The Realty, Inc.*, No. C-941010, 1995 WL 653846, at *2 (Ohio Ct. App. Nov. 1, 1995) (stating that elements of an effective contract are offer, acceptance and consideration). The RESTATEMENT OF CONTRACTS defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). The UNIFORM COMMERCIAL CODE provides that "contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11) (1997). For a more detailed description of the variety of definitions of the term "contract," see Orville C. Snyder, *Contract—Fact or "Legal Hypothesis?"* 21 MISS. L.J. 304 (1949). See also Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 236 n.3 (acknowledging efficiency theory as a descriptive tool in contract law, and adopting the RESTATEMENT's definition of contract that "[a] contract is not a certain sort of promise. Rather, a contract is a promise 'for the breach of which the law provides a remedy'").

161. Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 653 (1983) (stating that "the very purpose of a contract is to ensure performance"); Steven R. Salbu & Richard Braham, *Strategic Considerations in Designing Joint Venture Contracts*, 1992 COLUM. BUS. L. REV. 253, 305 (noting that contracts "perform the traditional legal role of enunciating the terms . . . and helping to ensure performance or to fashion a remedy in the absence of performance").

b. *Contract Rules and Positivism*

As a general precept, modern contract law and its rules function as archetypical positive law.¹⁶² A basic tenet of traditional, classic¹⁶³ contract theory requires that parties steadfastly obey the rules of bargain formation in order to have binding agreements. An exchange of promises which are "bargained for" qualifies as an enforceable contract.¹⁶⁴ Those whose agreements manifest mutual assent¹⁶⁵ and contain consideration¹⁶⁶ may expect the enforcement of their resultant agreements, barring some impediment.¹⁶⁷ These basic rules of contract formation, particularly the need for consideration, provide bargaining structure as well as compulsory rules to guarantee an enforceable bargain.¹⁶⁸ If the final bargain is truly voluntary and contains the requisite element of consideration, decision makers have no choice but to enforce the agreement.¹⁶⁹

The key to contract theory remains enforcement, where bargainers gain security through the use of contract rules and

162. L. FULLER, ANATOMY OF THE LAW 43-47, 71-72, 105 (1968); Allen D. Boyer, *Samuel Williston's Struggle with Depression*, 42 BUFFALO L. REV. 1, 27-28 (1994) (observing that contract law, as a twentieth century concept recognized by Professor Williston, is positive law); see also Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 105-06 (1991) (discussing the reductionist view of eliminating ambiguities by strictly adhering to the letter of the law).

163. Morant, *supra* note 23, at 900-01.

164. *Metro Communications*, 984 F.2d at 744; *Tsiatsios*, 663 A.2d at 1339 (stating that "[o]ffer, acceptance and consideration are essential to contract formation"); see RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979); U.C.C. § 1-201(11).

165. See Hillman, *supra* note 161, at 653; Salbu & Braham, *supra* note 161, at 305; *supra* note 25 and accompanying text.

166. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 185-87 (3d ed. 1987); see FARNSWORTH, *supra* note 25, § 3.1, at 161. Despite the importance of consent as a factor of enforcement, consideration remains an obligatory element. See also Susan L. Martin, Note, *Platinum Parachutes: Who's Protecting the Shareholder?*, 14 HOFSTRA L. REV. 653, 662 (1986) (noting the need for consideration in enforceable contracts).

167. See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 104 (1982); Michael Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 777-84 (1985).

168. See Gregory M. Silverman, Note, *Dualistic Legal Phenomena and the Limitations of Positivism*, 86 COLUM. L. REV. 823, 835 (1986) (stating that "the narrative structure of pure monistic positivism adequately describes many legal phenomena, such as the doctrine of consideration in contract law").

169. See *supra* note 25 and accompanying text.

from the knowledge that any breach of a validly formed contract will result in a remedy.¹⁷⁰ This remedy is usually in the form of damages.¹⁷¹ The remedial nature of contract rules reinforces the law's positivist character.¹⁷²

Of course, freedom of contract is not without its limitations.¹⁷³ These limitations comprise intrusions on bargaining autonomy, further substantiating contract rules as positive law.¹⁷⁴ Voluntariness encompasses the concept of consent, which must be genuine to support the agreement.¹⁷⁵ Not only must there be genuine consent,¹⁷⁶ but the parties' minds must meet to form a bargain.¹⁷⁷ Even though subjective intent was

170. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

171. U.C.C. §§ 2-701 to -723 (1997); RESTATEMENT (SECOND) OF CONTRACTS §§ 344, 345, 346 (1979); see also L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

172. See Oliver Wendell Holmes, *The Path of the Law*, in 10 HARV. L. REV. 457, 462 (1897); reprinted in 110 HARV. L. REV. 991, 995 (1997) (denoting the positivist nature of contract remedies, and stating that a "duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it--and nothing else"); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1417 (1997) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1987) and observing that the obligatory force of contract is natural law, but any remedy for breach is positive law); see also David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13 Bankruptcy Cases*, 13 BANK. DEV. J. 1 (1996) (referring, in the context of bankruptcy, to contract rules as positive law which dictates entitlement to damages). Note that remedies exhibit manifestations of positivism, but can also have a basis in natural law. Rights, more so than remedies, have their genesis in naturalist principles. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 13-14 (1989).

173. Morant, *supra* note 28, at 718.

174. Holmes' adherence to positivism explains his dismissal of freedom of contract as a "theory" not valued by many in the United States. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see also William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes' Legal Scholarship*, 90 COLUM. L. REV. 809, 832 (1990).

175. See *supra* notes 159-60 and accompanying text.

176. Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421, 424 (1993) [hereinafter Barnett, *Contractual Consent*]; see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 299 (1986) [hereinafter Barnett, *Consent Theory*] (arguing that the "consent theory" is a "moral component that distinguishes valid from invalid transfers of alienable rights"). Professor Barnett further states that the consent theory not only provides a foundation for the "objective" approach to the determination of contractual intent, but also constitutes a more effective theory to substantiate the enforcement of bargained-for exchanges. *Id.* at 291-94, 297-309.

177. See CALAMARI & PERILLO, *supra* note 166, § 1.4(b), at 8; E. Allan

the original requirement for genuine assent, this was ultimately replaced by the need for a finding of objective manifestation of assent.¹⁷⁸ Despite the change from subjective to objective manifestation, consent remains a significant, moralistic component that undergirds the rules of contract formation and enforcement.¹⁷⁹

The traditional classical rules of contract law formed the essence of the bargain theory which continues as the theoretical governance of bargaining relationships today.¹⁸⁰ These traditional rules also have comprised the theoretical foundation for the more modern codification of bargaining rules known as the Uniform Commercial Code.¹⁸¹ Because these general rules preserve bargaining order or peace within society, they are imbued with a positivist trait. Customarily, strict adherence to the general rules was required for contractual enforcement. This was needed, not so much because the rules themselves were just or moral, but because the logical consequence of compliance generally was thought to serve the general good and promote transactional order.¹⁸² Thus, contract rules were designed to maintain the efficient operation of society's marketplace.¹⁸³ These rules also provided state recognition of private bargaining rights,

Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 577 (1969); Roscoe Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 3 (1954). The need for genuine consent may also extend to "gap filler" provisions. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 84 (1980); Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1184 (1992).

178. See RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 19, 75 (1979); see also Morant, *supra* note 23, at 901 (1997) (discussing the historical context of assent).

179. See Barnett, *Consent Theory*, *supra* note 176, at 290 (defending the view that "consent is at the heart of contract law"). But see MACNEIL, *supra* note 177, at 47-48 (challenging the element of consent as the focus or center of contractual enforcement).

180. See Morant, *supra* note 23, at 901 n.78.

181. The UNIFORM COMMERCIAL CODE (U.C.C.) provides a probative definition of contract, meaning the "total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11) (1997). For a more detailed description of the variety of definitions of the term "contract," see Snyder, *supra* note 160, at 304. Article 2 of the U.C.C. is based upon fundamental tenets of common law. See U.C.C. § 1-102 (1997).

182. See James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 556 (1995) (commenting on the formality of contract rules as positive law).

183. See *supra* notes 22-30 and accompanying text.

thereby obscuring any naturalist underpinnings of those arrangements.¹⁸⁴

Contractual rules, while prescribed to accomplish the lofty goal of bargaining autonomy and freedom, failed to accommodate completely the variables in bargaining conduct.¹⁸⁵ Anomalies of the marketplace included opportunism,¹⁸⁶ the lack of perfect information,¹⁸⁷ and bargaining inequity.¹⁸⁸ These imperfections did not go unheeded by the contract theorists and decision makers. By the end of the nineteenth century, the notion that an imperfect market required some modification in the strict rules of bargaining engagement became somewhat more popu-

184. See J. ELY, *DEMOCRACY AND DISTRUST* 52 (1980) (opining that common, private rights found in contract, torts, and property are found in positive law of the states); see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (finding that common law was the "voice of some sovereign"); Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decisions*, 69 *NOTRE DAME L. REV.* 1, 14 (1993); Olken, *supra* note 147, at 530 (noting that state law sets the "parameters of contract rights").

185. See Morant, *supra* note 23, at 911-18.

186. The definitions of opportunism range both by fields of study and within these same fields. The most frequently cited definition comes from economist Oliver Williamson, who defines opportunism as "self-interest seeking with guile." G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 *VAND. L. REV.* 221, 228 (1991) (quoting OLIVER WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 26 (1975)); see George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 *HOFSTRA L. REV.* 941, 957 (1992) ("[A]ny contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality."); Timothy Muris, *Opportunistic Behavior and the Law of Contracts*, 65 *MINN. L. REV.* 521, 521 (1981). See generally Julie P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 *HASTINGS L.J.* 621 (1993) (advocating the use of default rules to prevent opportunism); Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 *BROOK. L. REV.* 877 (1992) (advocating the use of tort damages to prevent opportunism); Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 *LOY. L.A. L. REV.* 789 (1993) (discussing the threat opportunism poses to bargaining relationships).

187. Imperfect information during precontractual negotiations often causes problems for the bargainers. See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 *MD. L. REV.* 1, 8 (1992) (discussing the difficulties faced in dispute bargaining as a result of imperfect information); Perlstein, *supra* note 186, at 882 (stating that contracts would be "self-executing if information [were] perfect both during the formation of the contract and through its performance").

188. See *supra* notes 31-32, 34, 262-63 and accompanying text.

lar.¹⁸⁹

Neoclassicists ushered in a more modified version of the rigid bargaining theory.¹⁹⁰ While clinging to the notion of contractual freedom and bargaining autonomy, neoclassicists appreciated some of the realities of bargaining differences.¹⁹¹ Most notably, not all enforceable bargains had to evidence an exchange of promises, more commonly referred to as consideration.¹⁹² As such, notions such as promissory estoppel appreciated the fact that certain promissory exchanges should be enforced notwithstanding the traditional presence of consideration.¹⁹³ Other ameliorative devices were recognized to cure such inequities as one-sided bargains,¹⁹⁴ coercion,¹⁹⁵

189. Perlstein, *supra* note 186, at 882.

190. *Id.*

191. *Id.*

192. See *supra* notes 166-68 and accompanying text.

193. A promise that could be enforced if it induced reliance under prescribed circumstances is commonly referred to as "promissory estoppel," which is now codified in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). It has been eschewed as a blow to the reality of true contract. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* 57 (1974) (stating that Holmes and Williston's "theory of contract . . . [has] gone into its protracted period of breakdown almost from the moment of its birth").

194. "Unconscionability" has been defined as "the absence of a meaningful choice on the part of one party together with contract terms that are unreasonably favorable to the other party." *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587 (Wis. Ct. App. 1992). Similarly, the West Virginia Supreme Court describes unconscionability as an "overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court's refusal to enforce a contract as written." *McGinnis v. Cayton*, 312 S.E.2d 765, 776 (W. Va. 1984); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (indicating that unconscionability is recognized to include "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party"); see, e.g., Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993); Kennedy, *supra* note 147, at 1685; Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649 (1993); Arthur Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424 (1980); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985).

195. Duress constitutes an unlawful threat or coercion used by a person to induce another to act (or refrain from acting) in a manner she otherwise would not (or would). RESTATEMENT (SECOND) OF CONTRACTS §§ 174, 175(1); BLACK'S LAW DICTIONARY 504 (6th ed. 1990). Courts have held that "[a] finding of duress at least must reflect a conviction that one party to a transaction has been so improperly imposed upon by the other that the court should intervene." *In re Hellenic Lines, Ltd.*, 372 F.2d 753, 758 (2d Cir. 1967). Furthermore, a contract entered into under duress is

undue influence,¹⁹⁶ and impaired cognitive abilities.¹⁹⁷

But even with the expanded flexibility provided by the neoclassicists, questions remain regarding the ability of the traditional classicist's notion of autonomy to accommodate transactional ills inherent in the bargaining process.¹⁹⁸ As will be demonstrated below, Dr. King's teachings may shed some light on the need for flexibility in the application of these rules.

III. DR. KING, CONTRACT LAW, AND THE NEED FOR INTROSPECTION

A. *Economic Liberties, Civil Rights, and Dr. King's Views*

Dr. King's desire for true freedom and equality may seem alien to any discussion of bargaining theory. His embrace of the lofty pursuit of basic human rights seems more appropriately discussed in the context of political rather than economic circumstances. But such an assumption is myopic in view of the realistic context of substantive rights and power.

Basic human liberties of freedom, equality, and justice¹⁹⁹

voidable at the insistence of the party suffering duress. *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978). Duress is predicated on the unlawful acts of the other party. *Id.* Thus, one who enters into a contract because of an unfortunate financial situation or where the other party has refrained from pursuing a legal right in exchange for the contract has not suffered duress. *Id.*; see also H. GRAVELLE & R. REES, *MICROECONOMICS* 248-253 (1981) (explaining the stability of equilibrium).

196. See FARNSWORTH, *supra* note 25, § 4.2.

197. A person is incapacitated when he or she is unable to exercise the legal power "a normal person would under the same circumstances." RESTATEMENT (SECOND) OF CONTRACTS § 12, cmt. a (1981). For a contract to be void on the ground of mental incapacity, the person, at the time the contract was entered into, must have "had no reasonable perception or understanding of the nature and terms of the contract." *Lloyd v. Jordan*, 544 So. 2d 957, 959 (Ala. 1989) (quoting *Williamson v. Matthews*, 379 So. 2d 1245 (Ala. 1980)).

198. See generally *Morant*, *supra* note 23; *Morant*, *supra* note 40.

199. I employ the term "justice" here as a universal term implying fundamental fairness. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *McGann v. H&H Music Co.*, 946 F.2d 401, 403 (5th Cir. 1991). For more regarding fundamental fairness, see James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382, 1404 (1994) (noting courts which evaluate certain health care contracts on the basis of fundamental fairness); Kevin M. Teeven, *Development of*

cannot be remedied solely from a political posture. Political and social rights exist symbiotically with economic rights, and they cannot exist as singular entities.²⁰⁰ In fact, any dissimilarity between civil rights and economic inclusion is related more to character than to palpable effect.²⁰¹ True change in the plight of the disenfranchised can occur only if an effort is made to ensure economic fairness and access.²⁰² This represents a true transformative agenda²⁰³ which calls for both the elimination of discrimination and equality or fairness in the marketplace.²⁰⁴ In fact, the Civil Rights Movement has been criticized

Reform of the Preexisting Duty Rule and Its Persistent Survival, 47 ALA. L. REV. 387, 420 (1996) (regarding modifications to contracts allowed for fundamental fairness); see also Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 382-83 (1995) (commenting on the fairness in contracts). Note too that Dr. King's theory of justice naturally incorporates his bid for equality for people of color. See *supra* note 83 and accompanying text. The concept of equality cannot be confined to a sterile version of sameness. Because individuals fail to view everyone in terms of equal perceptions, Dr. King's version of equality cannot be simply stated as a uniform blanket assertion where individuals are viewed as fungible. This of course counters the notion that Dr. King's embrace of natural law and his concept of equality equate to the acceptance of color blindness. See Turner, *supra* note 113, at 101.

200. See Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928, 929 (1995) (observing that "[a]ll economic, social, and cultural relations, beliefs, and institutions exist in dialectical relationship. . . . The very definition of the term 'racism' depends on the social and economic relations of the time").

201. David Schultz, *Scalia, Property, and Dolan v. Tigar: The Emergence of a Post-Carolene Products Jurisprudence*, 29 AKRON L. REV. 1, 8-9 (1995) (noting also that basic constitutional rights such as freedom of speech can be sustained only through the protection of institutions such as property rights).

202. See Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1073-74 (1989); William E. Mahoney, Jr., Comment, § 1981 and Discriminatory Discharge: A Contextual Analysis, 64 TEMP. L. REV. 173, 214 (1991) (noting that the scope of § 1981 is intertwined with congressional ideas of economic freedom).

203. See *supra* notes 100-02 and accompanying text. See generally Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn't (with Notes on Martin Luther King, Jr. and Malcolm X)*, 1995 U. ILL. L. REV. 191 (debunking the claim that Dr. King's teachings advanced a colorblind agenda, and asserting that his message was more transformative in nature). For more regarding transformative agenda, see Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Model*, 84 CAL. L. REV. 953, 956 (1996), and Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1086-87 (1991) (promoting a transformative agenda through political participation).

204. Guinier, *supra* note 203, at 1086-87 (noting that voting rights proponents

for its failure to advance economic equality with the same fervor as political equality.²⁰⁵

Historically, positivist means were employed to secure economic equality. The United States Congress passed the Civil Rights Act of 1866, § 1981 of which provided that "all persons" have the right "to make and enforce contracts . . . enjoyed by white citizens."²⁰⁶ That Act also protected the right to purchase property.²⁰⁷ Judicial decision makers have indicated that §§ 1981 and 1982 apply to private actors²⁰⁸ despite more recent attempts to limit this legislation.²⁰⁹

Dr. King seemingly recognized this nexus between political and economic rights. While his earlier speeches and writings focused primarily on the overarching theme of political rights and basic civil liberties, his later works clearly embraced economic reform. In his last Southern Christian Leadership Conference public address, *Where Do We Go From Here*, Dr. King acknowledged the economic void experienced by many people of color in the United States: "The economic highway to power has few entry lanes for Negroes. Nothing so vividly reveals the crushing impact of discrimination and the heritage of exclusion as the limited dimensions of Negro business in the most powerful economy in the world."²¹⁰ He further stated that, "the rich must not ignore the poor because both rich and poor are tied to-

"sought . . . to expand the liberal vision toward a redistributive agenda premised on equality of condition, and not just freedom from overt discrimination").

205. See Harold Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 DET. C.L. REV. 567, 599-600; David Bernstein, Note, *The Supreme Court and Civil Rights 1886-1908*, 100 YALE L.J. 725, 726-28 (1990) (noting, generally, the need for "occupational liberty" along with equal rights).

206. Civil Rights Act of 1866, ch. 31, § 1, 14 stat. 27 (1888) (codified as amended at 42 U.S.C. § 1981 (1994)).

207. *Id.*

208. See *Runyon v. McCrary*, 427 U.S. 160, 172-73 (1976) (prohibiting the rejection, on the basis of race, of an African American applicant by a private school); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 413 (1968) (banning racial discrimination in private housing); see also ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS 1866-76*, (1985); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 395 (1988) (discussing the Act's goal of protecting economic rights).

209. See *infra* notes 272-78 and accompanying text.

210. KING, *supra* note 6, at 600.

gether.²¹¹ Dr. King further recognized that the economic problem in America was universal, touching the lives of many regardless of race or gender.²¹²

The significance of this portion of Dr. King's teaching cannot be overstated. Over a time span of eleven years, Dr. King continued to broaden his message to one that applied to a wide spectrum of individuals.²¹³ Economic disenfranchisement constituted a universal problem and a political bridge among varying groups. Dr. King's ultimate hope was that the struggle for economic parity would serve to galvanize individuals to push for more positive change.²¹⁴ Thus, the link between economic and political rights also served to broaden the constituency which would favor, and perhaps demand more vociferously, those rights.²¹⁵ Dr. King's perceived coalition for change embraced not only varying groups within the United States but also those who faced economic struggles in foreign lands.²¹⁶ His appreciation for the universal problem of economic inequality and its nexus with political rights serves as the ideological bridge to examine the particulars of economics. This of course leads to the examination of economic theories such as contract.

211. *Id.* at 626.

212. *Id.* at 608. In WHERE DO WE GO FROM HERE, Dr. King states: "Millions of under-privileged whites are in the process of considering the contradictions between segregation and economic progress. White supremacy can feed their egos but not their stomachs." *Id.*

213. *See id.*

214. KING, *supra* note 6, at 609. In WHERE DO WE GO FROM HERE, Dr. King states that:

The time may not be far off when an awakened poor and backward white voter will heed and support the authentic economic liberalism of former Governor Arnall of Georgia and former Lieutenant Governor Flowers of Alabama. Then with the growing Negro vote they will develop an alliance that displaces the Wallaces [speaking of George Wallace, former Governor of Alabama] and with them racism as a political issue.

Id.

215. *Id.*

216. *Id.* at 632. According to Dr. King:

A genuine revolution of values means in the final analysis that one's loyalties must become ecumenical rather than sectional. [T]his call for a world-wide fellowship that lifts neighborly concern beyond one's tribe, race, class and nation is in reality a call for an all-embracing and unconditional love for all men.

Id.

B. Dr. King, Contract, and Contextualism

1. *Contextualism and Dr. King's Messages.*—Dr. King's messages of transformative change²¹⁷ rise from both the struggles borne by citizens of color and his appreciation of economic equality.²¹⁸ This, then, evidences his proclivity toward a more contextual approach to social problems.

Contextualism, as a broad construct, demands that the dynamics of human interaction and perceptual realities born from human experience be considered an integral element in reasoned decision making. Pursuant to this mode of thought, law is examined in light of the problems, policies, or ideological assumptions which accompany its genesis and application.²¹⁹ This methodology, commonly referred to as "law in context,"²²⁰ shares striking commonalities with realism. The latter rejects judicial formalism and encourages decision making that acknowledges social conditions.²²¹ This mode of thought also challenges the objectivity of decision making, particularly in light of environmental realities and the impact of circumstance and beliefs upon human judgment.²²² Moreover, contextualism has a close nexus with other critical theories such as humanism²²³ and interpretivism.²²⁴

In effect, seemingly objective rules cannot be applied blindly without regard for the contextual realities that shape an event

217. See *supra* notes 203-04 and accompanying text.

218. See *supra* notes 210-15 and accompanying text.

219. See William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 373-74 (1985) (avoiding the term "contextualism" as a vague theoretical exercise).

220. *Id.* at 374-75; see Nunn, *supra* note 47, at 342-43.

221. See White, *supra* note 39, at 821.

222. See Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 178 n.38 (1992); see also Anthony J. Sebok, Note, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835 (1991) (noting the impact of context on judicial decision making, thus leading to divergent results such as the *Plessy* and *Brown* decisions).

223. Humanism employs the use of human history and circumstance, explained by natural law, to comprehend the workings of legal rules and their application. Angela P. Harris, *Forward: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 221 n.26 (1996).

224. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209-17 (1987) (providing a probative explanation of interpretivism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1104-06 (1989) (concluding that interpretation promotes thinking about similarities and dissimilarities in social contexts).

and influence the actors and the decision makers. Law, then, becomes a dynamic of experience, with decision makers influenced by the effect their decisions will have on future human exchanges.²²⁵ Law, through reliance and usage, develops into a social institution, producing causes and effects that become critical evaluative criteria.²²⁶ Legal rules also function as an arm of society, deriving their meaning and import from that society.²²⁷

Contextualism challenges the positivist notion that law emerges primarily from internal logic.²²⁸ Logic comprises only a portion of the dynamic of legal rules. Similar to the postmodernists and pragmatists, contextualists find that law is more a product of external relationships.²²⁹

The distinction between natural law and contextualism may

225. See Mensch & Freeman, *supra* note 59, at 932 (discussing the consequences of decision making); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 359, 361 (Lawrence M. Friedman & Harry W. Scheiber eds., 1988).

226. See Alexander Somek, *From Kennedy To Balkin: Introducing Critical Legal Studies from a Continental Perspective* 42 U. KAN. L. REV. 759, 766 (1994).

227. DOUZINAS ET AL., *supra* note 47, at 20; FITZPATRICK, *supra* note 63, at 6-7.

228. See Tushnet, *supra* note 43, at 625. *But see* Twining, *supra* note 219, at 375 (noting "law in context" as a "body of rules," therefore having roots in positivism). I take issue with Professor Twining's conclusion that "law in context" proponents are simply positivists, thereby weakening their theoretical posture. While one may acknowledge the operations of a "body of rules," that alone does not connote belief in the efficacy of those rules. Sovereign power evidenced by legal rules does not prove functionality. Contextualists challenge legal rules in view of environmental realities. Consequently, rules may rise or fall based upon their relative applicability and adaptability to circumstance.

229. See Mensch & Freeman, *supra* note 59, at 1083. This mode of legal analysis bears some similarity to postmodernism. See Stephen N. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1995). It also shares some commonality with pragmatism. See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 544. Pragmatism can be more feasibly described than defined. It stresses faith in the need for community and seeks to supplant the formalist conception of rules with more realistic interpretive practices. Pragmatist goals include the fostering of some degree of social progress. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, *JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES* 452-87 (1994).

appear spurious given the reality of true decision making. In effect, a natural law thinker who adjudicates a claim must employ a degree of context to resolve a problem. The application of situational facts to specific legal rules requires some contextual analysis.²³⁰ Yet, the naturalist adjudicator would likely restrict contextual realities to the view of what is required to preserve world order. Her personal perceptions of that order may distort the idiosyncratic operations of bias which can escape sanction under formalistic contractual rules. In turn, this adjudicator may ignore the conceptualizations of individuals or events that are foreign to her.

True contextualism requires a more broad-based approach. The contextual adjudicator would look at disputes, not only within the confines of an objective or personal view, but also in terms of circumstances and realities of the bargainers themselves and the world in which they function. In other words, a contextual evaluation extends beyond the individual adjudicator's concept of self, morality, and order. She must view transactional problems in light of history, circumstances, and the nature of human dynamics as they relate to bargaining circumstance.

Contextual realities permeated Dr. King's messages. His teachings were conceived within the social tumult of the times—his times. And his experience within these times shaped and influenced his philosophies.²³¹ A contextual²³² analysis of Dr. King's messages might lead to the conclusion that his philosophy pertains only to overt instances of racism within the context of basic human rights such as dignity and personal integrity. However, this message transcends such superficial barriers, if not by his own design, then by the more broad construct of liberty, justice and dignity.²³³ Concepts of justice, fairness, and dignity converge with personal safety and integrity, as well as economic liberty and justice.²³⁴ Indeed, economic liberty and

230. See *supra* notes 33, 39, 107-08 and accompanying text.

231. See Thomas R. Peake, *Introduction to The Speeches of Martin Luther King, Jr.*, in *MASTERPIECES OF AFRICAN AMERICAN LITERATURE* 523-26 (Frank N. Magill ed., 1992).

232. See Turner, *supra* note 113.

233. See *supra* notes 4, 6-7, 209 and accompanying text.

234. See *supra* notes 210-16 and accompanying text.

justice actually may influence and control personal integrity.²³⁵

Dr. King's *Letter From the Birmingham Jail*, which is often cited as proof of his natural law leanings,²³⁶ proves his contextual origins. The *Letter* was authored during his personal struggle with oppression and observance of civil disobedience.²³⁷ Moreover, many of his other speeches and writings were formed within the context of specific instances of struggles for basic political and economic rights.²³⁸ Dr. King's philosophies represented a dynamic that extended beyond the constructs of natural law. He was also a contextualist, whose societal circumstances shaped his beliefs and, ultimately, his teachings and writings.

Dr. King's messages also eschewed positive law as the lone remedy for discrimination. Again, in *Where Do We Go From Here*, Dr. King observed that "[t]he legal structures have in practice proved to be neither structures nor law. The sparse and insufficient collection of statutes is not a structure; it is barely a naked framework. . . . Significant progress has effectively been barred by equivocations & retreats of government"²³⁹ He noted the limitation of rules when he observed that "[e]very civil rights law is still substantially more dishonored than honored."²⁴⁰ He further underscored the reticence of the judiciary, an observation that remains prophetic to this day:

In this light, we are now able to see why the Supreme Court decisions on school desegregation, which we described at the time as historic, have not made history.

Even the Supreme Court, despite its original courage and integrity, curbed itself only a little over a year after the 1954 landmark cases, when it handed down its pupil placement decision, in effect returning to the states the power to determine the tempo of change.²⁴¹

Moreover, Dr. King appeared to rebuff total reliance on formalism, which is so revered in classical contract theory.²⁴²

235. See *supra* notes 210-12 and accompanying text.

236. See *supra* notes 78-89, 103-04 and accompanying text.

237. See KING, *supra* note 78, at 289.

238. See Peake, *supra* note 231, at 525.

239. KING, *supra* note 6, at 561.

240. *Id.*

241. *Id.*; see *infra* notes 273-75 and accompanying text.

242. See *supra* notes 153-61 and accompanying text. Note that the autonomy that

Dr. King's realist view of economic equality, access, and justice provides the link between his teachings and the theory of contract. But to appreciate that link, one must first reject the absolutist view that Dr. King is solely a naturalist thinker.²⁴³ Utilization of that label as the total embodiment of Dr. King's philosophies would be an incomplete, if not an erroneous, categorization. The sum of his ideas extends beyond the bounds of basic morality to embody a greater sense of realism and circumstance as the ideas intersect with morality and, hopefully, lead to justice. Dr. King, then, can be considered a contextualist, one who evaluated the societal norms in terms of contemporary circumstance and effectiveness.²⁴⁴

supports the naturalist leanings of contract law would not be revered completely by Dr. King. He noted that:

[C]apitalism has often left a gulf between superfluous wealth and abject poverty, has created conditions permitting necessities to be taken from the many to give luxuries to the few, and has encouraged smallhearted men to become cold and conscienceless. . . . The profit motive, when it is the sole basis of an economic system, encourages a cutthroat competition and selfish ambition that inspire men to be more I-centered than thou-centered.

KING, *supra* note 6, at 629-30. He also rejected complete positivism that regulates all conduct and quashes individual liberty: "[e]qually, communism reduces men to a cog in the wheel of the state. . . . Under such a system, the fountain of freedom runs dry." *Id.* at 630. Dr. King recognized a hybrid form of bargaining regulation, one that fits the circumstance. He wrote that "[t]ruth is found neither in traditional capitalism nor in classical communism. . . . The good and just society is neither the thesis of capitalism nor the antithesis of communism, but a socially conscious democracy which reconciles the truths of individualism and collectivism." *Id.*; see also *supra* notes 134-43 and accompanying text (discussing positivism and restrictions on autonomy).

243. Labeling Dr. King solely as a proponent of natural law would lend some credence to the assertion that he would have little difficulty with the traditional, classical notion of contract and its basic theme of bargaining autonomy and contractual freedom. See *supra* notes 49-52, 74-89 and accompanying text; *infra* notes 217-42 and accompanying text. But see *supra* notes 113-14 and accompanying text.

244. See *supra* notes 33, 217-18 and accompanying text. My view of contextualism does not signify that Dr. King is solely a contextualist. His transformative agenda commands a more complex description. An accurate depiction of Dr. King's philosophy would be one that appreciates context, while adhering to moral values and a lofty view of human capacity. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 988 (1990) (noting that Dr. King was committed to the transformation of human reality through a belief in human potential, a vision he often referred to as the "Beloved Community"). Dr. King's theory of social change emanated from both theory and experience. This amalgamation serves as a catalyst for the deconstruction of established societal norms and underscores the need to change those norms proactively. *Id.* at 988, 1012-13, 1031-33.

This more expansive categorization of Dr. King as a contextualist provides an excellent vehicle to critique contract law and its related rules. A contextualist approach does not destroy contract rules of formation and enforcement. Rather, it evaluates the application *in light of the bargaining realities of context*.²⁴⁵ In other words, the basic assumption that bargainers are fungible and will be equally served by contract rules cannot be a presumptive norm. Individual bargainers differ, and the playing field on which they bargain may not always be level.²⁴⁶

2. A "Kingian" Approach to Contract—An Exercise in Contextualism.—A "Kingian" approach to the evaluation of contract rules lies in the examination of the function of these rules in a variety of bargaining contexts.²⁴⁷ Formalism, that is, the manifestation of assent and the objective presence of consideration,²⁴⁸ may not warrant the enforcement of an agreement.²⁴⁹ Contracts made by individuals with limited experience, education, or understanding which result in patently unfair bargains should be closely scrutinized.²⁵⁰ Parties should be given ample evidentiary opportunity to attack consummated

245. See *supra* notes 243-44 and accompanying text; *infra* notes 247-52 and accompanying text.

246. See *supra* notes 186-89, 191 and accompanying text.

247. The nexus between Dr. King's teachings and the tenet of contract may appear somewhat attenuated. To appreciate the applicability of Dr. King's teachings to contract adjudications, it may be instructive to think of Dr. King as the quintessential jurist or decision maker. This exercise is closely akin to Ronald Dworkin's use of Hercules as the ideal judge to test the bounds of legal integrity. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-06 (1977) (discussing Hercules as "a lawyer and judge of superhuman skill, learning, patience, and acumen"); see also RONALD DWORKIN, *LAW'S EMPIRE* 379-99 (1986). Circumstances heavily influenced Dr. King's messages. See *supra* notes 33, 39, 230 and accompanying text. Consequently, his adjudications of contractual problems would likely employ context as a methodological tool.

248. See *supra* notes 164-66 and accompanying text.

249. Others have deconstructed the formalism of contract rules. See, e.g., Kennedy, *supra* note 147, at 1710-13 (finding that a rule-based system of jurisprudence suffers from incoherence and susceptibility to manipulation). See generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1995) (discussing the permeation of contract doctrine with the difficulties of power and knowledge); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. REV.* 829 (1983) (examining modern contract law from the perspective of critical legal studies).

250. See *supra* note 194 and accompanying text.

bargains which include onerous terms²⁵¹ or lead to unconscionable practices in the performance of those terms.²⁵² A "Kingian" evaluation of these problems would not rest on a blind faith in naturalist/positivist rules of bargain formation. The decision whether to enforce must include an evaluation of the situational variables that influenced the particular bargain. As such, decision makers would be implored to consider those variables when applying abstract rules of bargain formation.

That all bargainers are not equal, or are not treated equally, has an evidentiary basis. The famous case of *Williams v. Walker-Thomas Furniture Co.*,²⁵³ in which an African American mother on government assistance attempted to invalidate a sales contract containing patently unconscionable credit terms,²⁵⁴ presents a clear case of an unfair deal. Even though the contract in the *Williams* case conformed to rules of contract formation,²⁵⁵ the terms of the agreement were so one-sided that the situation merited relief for the disadvantaged party.²⁵⁶ While the court ultimately provided relief to the disadvantaged party, it did so with difficulty,²⁵⁷ and without evaluating the contextual realities of her bargaining situation.²⁵⁸ A contextual analysis would demand the evaluation of all bargaining realities to substantiate relief. The paternalistic device of unconscionability would easily accommodate this examination, without modification to the doctrine's elements.²⁵⁹

Contextual analysis permits exploration of the possible operation of stereotype²⁶⁰ and prejudice²⁶¹ within the bargain-

251. See *supra* note 194 and accompanying text.

252. See *infra* notes 267-78 and accompanying text.

253. 350 F.2d 445 (D.C. Cir. 1965).

254. *Williams*, 350 F.2d at 447.

255. *Id.*

256. *Id.* at 450.

257. *Id.* at 449.

258. *Id.* In providing relief to Mrs. Williams, the court failed to acknowledge or evaluate her race as a factor in the pre-bargain phase of the deal. *Williams*, 350 F.2d at 449. Moreover, the court's analysis failed to incorporate any pre-bargain perceptions which may have contributed to the Walker-Thomas Furniture Company's proffer of a contract containing unfair terms. *Id.*; see also *Morant*, *supra* note 23, at 925-30 (noting the failure of the *Williams* court to include contextual realities such as stereotype and bias possibly resulting from race and gender).

259. *Morant*, *supra* note 23, at 934-56.

260. Stereotyping consists of placing people into groups and then assigning cer-

ing context. These negative beliefs can often operate in ostensibly valid bargains. For example, a consumer's success in negotiating an advantage deal for an automobile may depend upon not only their negotiation acumen, but also their race and gender.²⁶² Moreover, there is evidence of the disparate treatment of some individuals who seek to rent residential accommodations.²⁶³ The fact that inequities occur within bargaining contexts, both before and after consummation of the bargain, requires abstract contract rules to be evaluated for their effectiveness in these situations.

Contract law and the rules generated therefrom are not totally insensitive to some of these inequities. Variables in bargaining expectations and conduct were appreciated by the so-called neoclassicists, who recognized that some bargains should

tain attributes to that group. Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 489 (1990). To Duncan Kennedy, stereotyping is the ill-formed belief that "race in any of its various socially constructed meanings is an attribute biologically linked to any particular meritorious or discreditable intellectual, psychological or social traits of any kind." Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 710. A stereotype is also a "false generalization[] about [a] group[] of people that [is] used to justify negative actions about individuals within the group or about the group as a whole." Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849, 878 (1990). For additional sources which address the issue of stereotype in a variety of circumstances, see Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 740-44 (1995); Steven H. Hobbs, *Gender and Racial Stereotypes, Family Law, and the Black Family: Harpo's Blues*, 4 INT'L REV. COMP. PUB. POL'Y 35 (1992).

261. According to Professor Armour, prejudice is the acceptance and adoption of a negative cultural stereotype. Armour, *supra* note 260, at 742.

262. See generally Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (demonstrating through testing in the Chicago area that African Americans and women received worse deals for automobiles than white males).

263. *Oliver v. Shelly*, 538 F. Supp. 600, 602 (S.D. Tex. 1982) (refusal to rent to interracial couple is legally actionable discrimination); John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289 (1993); Florence Wagman Roisman, *The Role of the State, the Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study*, 27 SETON HALL L. REV. 1386, 1396 (1997) (citing John Goering et al., *Promoting Housing Choice in HUD's Rental Assistance Programs: Report to Congress* 34-36 (Apr. 1995) (survey by the National Opinion Research Center showing 86% of African Americans and 75% of Whites agree that African Americans experience at least some discrimination in the purchase or rental of a home)); Kerry Alan Scanlon, *A Report on the Committee's Fair Housing Project 1975-1983*, 27 HOW. L.J. 1457 (1984).

be enforced even though they did not comply with the requirement of consideration.²⁶⁴ This new way of contractual thinking also provided that certain individuals should be excused from the performance of an ostensibly valid contract when impediments to assent were present.²⁶⁵ These remedies, which recognize the situational variables that give rise to the exception of the rigid rule of contract formation, have a definite contextual bent.

The existence of regulatory devices such as duress,²⁶⁶ unconscionability,²⁶⁷ and undue influence²⁶⁸ cannot, by themselves, sufficiently accommodate marketplace inequities. The very dearth of cases where individuals are successful in obtaining relief through those devices substantiates this point.²⁶⁹ This result is compounded by the heavy burden of proof placed upon the claimant of such relief.²⁷⁰

If contractual rules are to be truly functional within the reality of bargaining contexts, decision makers must expand the interpretation of these rules to allow a more complete evaluation of situational variables.²⁷¹ It is unclear, however, how receptive

264. The concept of "promissory estoppel" provides that an exchange of promises which is not secured by consideration could nonetheless be enforced as a function of reliance interest as long as certain elements were present. See *supra* note 193 and accompanying text.

265. See *supra* notes 188, 194-97 and accompanying text.

266. See *supra* note 195 and accompanying text.

267. See *supra* note 194 and accompanying text.

268. See *supra* note 196 and accompanying text.

269. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

270. See *id.*; *Morant*, *supra* note 28, at 719 (discussing contracts which limit liability and the law governing the enforceability of them); *Morant*, *supra* note 40, at 455-56 (arguing that law which does not accommodate "contextual nuances" should be revised); *Morant*, *supra* note 23, at 921-36 (noting the interaction of race and unconscionability).

271. Note that decision makers commonly invoke their own judgments of context, societal circumstances, and policy in resolving disputes. See *supra* notes 219-24, 230 and accompanying text. A more contextual approach to adjudication may seem difficult to implement given its less structured nature. Duress, unconscionability, and undue influence provide some latitude for context, albeit with limitation. See *supra* notes 266-70. Perhaps an even stronger conduit for contextual evaluation is the contractual term of good faith and fair dealing, implied in all contracts. Determination of honesty and fairness within the bargain requires examination of the circumstances surrounding contract performance. E. ALLAN FARNSWORTH, *CONTRACTS* § 7.17, at 526 (2d ed. 1990); *RESTATEMENT (SECOND) OF CONTRACTS* § 205 (1981). For more

decision makers are to this philosophy. While Congress has historically proffered positive law to enforce economic equality and equity,²⁷² judicial decision makers have been somewhat more reluctant to address these variables proactively.²⁷³

In the case of *Patterson v. McLean Credit Union*,²⁷⁴ the Supreme Court of the United States strayed from the spirit of precedent²⁷⁵ to deny relief to an African American woman who had suffered racial harassment on her job.²⁷⁶ In denying her a remedy, the Court adopted a decidedly formalistic and narrow interpretation of § 1981 of the Civil Rights Act, which was designed to provide equal contractual rights to persons of color.²⁷⁷ The court opined that unpleasant working conditions were "terms and conditions" of employment and, as such, could not be remedied under § 1981, which applies to the right to "make and enforce contracts."²⁷⁸

Despite the expectation that an employer impliedly warrants a conducive working environment *sans* racial harassment, it seems incredulous that the Court would believe that an em-

regarding good faith and fair dealing, see Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299 (1988); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness on the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); see also Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Risks from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483 (1994) (discussing the viability of the tort remedy of implied covenant of good faith and fair dealing for a breach of contract); Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy, and Tort Claims*, 571 LITIG. 871 (1997) (discussing the implied covenant of good faith and fair dealing in the employment context).

272. See *supra* notes 206-07 and accompanying text.

273. See *supra* note 204 and accompanying text; *infra* note 274-81 and accompanying text.

274. 491 U.S. 164 (1989) ("*Patterson II*").

275. See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

276. *Patterson II*, 491 U.S. at 171.

277. *Id.* at 177; see also 42 U.S.C. § 1981 (1994).

278. *Patterson II*, 491 U.S. at 176.

ployee would knowingly bargain for such a condition. In denying the plaintiff relief in *Patterson II*, the Court diminished, if not ignored, the contextual realities of a racially charged work environment.²⁷⁹ It seems clear that judicial decision makers are unwilling to meaningfully utilize context in their judgments,²⁸⁰ even though Congress appears more willing to do so.²⁸¹

A true "Kingian" approach to the evaluation of contractual bargains, both at formation *and* during performance, would be to implore decision makers to assume a more contextual application of contractual rules to bargaining situations. In other words, one should evaluate the bargain as a human dynamic, subject to the idiosyncracies of individual bargainers. As a result, perceptual biases and opportunism become discernable traits which contribute to the prudence of bargain enforcement. Contractual rules in their most objective and abstract forms cannot provide a method to accommodate the idiosyncracies of bargaining dynamics. Rules are far too inflexible, rigid, and crude to perform this function.²⁸² True equity in contract remedy as well as efficiency of rules, requires decision makers to assume more decisional latitude in implementing contextual realities. This should be done not so much as a decoy or deflection tool from the obligations of contract, but more as a means to expose the realities of bias and unfairness that can negatively influence an objectively valid agreement.

If Dr. King's philosophy promoted economic advancement as well as justice,²⁸³ then a more equitable means of applying rigid contractual rules must be employed to fulfill any semblance of

279. See generally Allan H. Macurdu, *Classical Nostalgia: Racism, Contract Ideology, and Formalist Legal Reasoning in Patterson v. McLean Credit Union*, 18 N.Y.U. REV. L. & SOC. CHANGE 987 (1991).

280. Subsequent decisions, all adverse to minority claimants in the quest for racial parity and justice, reflect the Supreme Court's refusal to value contextual realities. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *United States v. Hays*, 515 U.S. 737 (1995). See generally Joseph William Singer, *No Right to Exclude Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

281. Congress effectively overruled the Supreme Court in *Patterson II* through the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

282. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1007 (1995); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995).

283. See *supra* notes 210-16 and accompanying text.

justice and fairness. This is not a scheme to destroy or obliterate rules of bargain formation. Clearly such an extreme agenda would wreak more havoc on basic transactional order and discipline, disadvantaging all potential bargainers.²⁸⁴ This methodology, as suggested by Dr. King's overall philosophy of realism within the constructs of morality, simply makes contractual rules more responsive to contextual realities, which should result in a more equitable adjudication of bargains.

IV. CONCLUSION

The Reverend Martin Luther King, Jr. was multidimensional, and his writings reflected that diversity. While he embraced the ideal of morality as a higher order, that naturalist notion only defines one aspect of his overall philosophy. Indeed, morality served as a preliminary litmus test that evaluates existing legal structures and illuminates their fallibility. But this critique does not end with legal deconstruction by mere comparisons to naturalist principles. The context in which legal structures or rules operate becomes an operative, evaluative factor.

Dr. King's views were born of circumstance, and that circumstance should be used to evaluate the effectiveness of societal structures such as legal rules. Certainly, his messages focused upon the political ramifications. However, Dr. King's broad critique of law has had applicability to *every* legal structure, both political as well as economic.

If political rights are synchronous with economic rights, then the evaluation of economic structures becomes critical in the attainment of true equality and justice. Certainly the foundational elements of contract law can be focal points in that analysis. As Dr. King has observed, rules alone are not solutions—they are mere attempts at solutions. That limitation, however, need not end the analysis. Rules, adjudicated within the full scope of actual human dynamics, have the potential of effectuating bona fide, remedial change. Perhaps decision makers will eventually heed this point as they wade through the sterile rules of contract law.

284. See Morant, *supra* note 40, at 461-62; Sunstein, *supra* note 282, at 980-83.

