

“Martin Luther King, Jr., Jean-Jacques Rousseau,
and Civil Disobedience Reconsidered”

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On April 12, 1963, Civil Rights protestors affiliated with the Southern Christian Leadership Conference and led by, among others, Reverend Dr. Martin Luther King, Jr., were arrested en masse in Birmingham, Alabama, in just one of many such protests throughout the turbulent decades of the 1950s and 1960s. Written during his subsequent confinement, and in response to public criticism of the “untimeliness” of civil rights actions by eight leading members of Birmingham’s clergy, King’s “Letter from Birmingham Jail” does more than merely memorialize that particular civil rights demonstration. It has come to be recognized as one of the great philosophical articulations of non-violent resistance in the history of political thought. In this masterful piece of political rhetoric King outlines his criteria for civil disobedience and anchors these justifications for passive resistance in a broad and complex tradition of natural law thinking.

Scholars have identified numerous intellectual sources for King’s arguments in the “Letter.” These include religious figures such as Saint Augustine, Thomas Aquinas, Reinhold Niebuhr, and Paul Tillich among other Christian thinkers, and King’s central distinction between just and unjust laws explicitly references the Thomistic conception of natural law.¹ Likewise, King cites the Jewish theologian

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1. See, e.g., VINCENT W. LLOYD, *On Martin Luther King, Jr.*, in BLACK NATURAL LAW (2016). For King’s references to these Christian figures, see MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in WHY WE CAN’T WAIT 91, 93–94 (2000) [hereinafter *King’s Birmingham Letter*.].

Martin Buber by way of analogizing segregation in terms of an “I-it” rather than an “I-thou” relationship.² Besides these appeals to the Christian and Jewish traditions, other commentators have stressed the importance of non-Western influences, in particular the writings of Mahatmas Gandhi, whose strategy of passive resistance and “spiritual purification” did so much to inform King’s unique species of non-violent social activism.³

More recently, however, archival materials have come to light that reveal an even wider range of philosophical sources which may have shaped King’s thinking on matters of law, social justice, and resistance. The publication of King’s collected papers offers a fascinating glimpse of his reading and teaching from the period immediately preceding the Birmingham protests. We now have King’s handwritten “outline” of a draft syllabus from a “Seminar in Social Philosophy” which he co-taught at Morehouse College in Atlanta in the Fall 1961 semester, for example, as well as his final examination questions for the seminar.⁴ Drawing on hints from these and other archival materials, as well as a close reading of “Letter from Birmingham Jail,” the following essay advances three main claims about King’s intellectual influences and the tradition of civil disobedience more broadly.

First, I propose a novel source of inspiration for King’s “Letter:” namely, the Genevan political philosopher Jean-Jacques Rousseau. Although Rousseau is never mentioned in the “Letter,” I want to explore similarities between King’s criteria for distinguishing between just and unjust laws and Rousseau’s treatment of law in the *Social Contract*. This comparison is apposite, I contend, insofar as King was teaching and thinking about Rousseau’s political philosophy less than a year and a half before the civil rights protests in Birmingham. While it may be impossible to demonstrate conclusively the extent of Rousseau’s influence, a consideration of King’s political philosophy in light of Rousseau’s seminal *Social Contract* brings to the foreground unique aspects of King’s “Letter.” Besides illuminating King’s understanding of natural law and civil disobedience, my second claim is that these comparisons draw attention to the flip-side of Rousseau’s defense of political obligation as well. Rather than an unqualified defender of patriotism, civic duty, and love of country, Rousseau acknowledges, as per King, that not all laws are just and legitimate. Even for Rousseau, as we will see, political obligation has its limits. Finally, and more broadly, King’s recourse to Rousseau reminds us of the extent to which doctrines of civil disobedience may be rooted not only in the substantive dimensions of natural law thinking, but also

2. KING, *supra* note 1, at 94.

3. For a more extensive discussion of this relationship, see Karuna Mantena, *Showdown for Nonviolence: The Theory and Practice of Nonviolent Politics*, in *TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.* 78 (Tommie Shelby & Brandon M. Terry eds., 2018).

4. These two documents from the King Papers have recently been published online. See Justin Weinberg, *Martin Luther King, Jr.’s Social Philosophy Course*, DAILY NOUS (Jan. 16, 2023, 7:15 AM), <https://dailynous.com/2023/01/16/martin-luther-king-jr-s-social-philosophy-course> [https://perma.cc/9VEA-QJFA].

in certain formal criteria for law. For King, Rousseau, and many other “natural law” thinkers such as Lon Fuller, the legitimacy of law hinges as much on satisfying requisite conditions of generality, popularity, and non-arbitrariness as its substantive accordance with a higher moral law.

KING’S INTELLECTUAL BACKGROUND

Let me begin by acknowledging the difficulty of attributing King’s complex and evolving political philosophy to the influence of any single thinker or intellectual tradition. As we know from his own testimony, King’s strategy of non-violent resistance is best understood as a palimpsest of many different intellectual positions and considerations, both moral and tactical. His theory of civil disobedience gets worked out over the course of a lifetime of philosophical curiosity and real-world political engagement. Protests in Montgomery, Alabama, and thereafter, were no doubt inspired by general notions of civil disobedience drawn from the Sermon on the Mount and Gandhian non-violence, as King attests. But it was only “the actual experience of the protest” and the “sphere of practical action” that transformed otherwise inchoate ideas “to which I gave intellectual assent” into a concrete “commitment to a way of life.”⁵

The ultimate sources of the ideas themselves are hard to pin down, but King’s comments here and elsewhere suggest two likely starting points. There is most obviously the matter of his religious upbringing and formal training in philosophy and Christian theology. At least with respect to the “Letter from Birmingham Jail,” the basis for many of King’s specific arguments in support of civil disobedience are either explicitly identified or readily identifiable as Christian in provenance. In the “Letter,” for example, King cites Augustine and Aquinas by name, two thinkers often associated with the so-called “natural law” tradition of resistance theory. The moral essence of civil disobedience boils down to the following: “I would agree with St. Augustine that ‘an unjust law is no law at all.’”⁶

Beyond the obvious universe of Christian authorities—which would come to include contemporary theologians such as Paul Tillich and Reinhold Niebuhr—non-Western or post-colonial sources are also conspicuous in King’s political thought. Once the moral permissibility of disobedience to unjust laws has been established, there is a second and related question of acceptable methods for resistance. With respect to the latter, King is adamant about the extent to which he was inspired by the political philosophy of Mahatmas Gandhi—not only by

5. Reflecting on the formative period of protest in Montgomery, Alabama, King observes that “[w]hen the protest began, my mind, consciously or unconsciously, was driven back to the Sermon on the Mount, with its sublime teachings on love, and the Gandhian method of nonviolent resistance. As the days unfolded, I came to see the power of nonviolence more and more. Living through the actual experience of the protest, nonviolence became more than a method to which I gave intellectual assent; it became a commitment to a way of life. Many of the things that I had not cleared up intellectually concerning nonviolence were now solved in the sphere of practical action.” MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 89 (1958).

6. KING, *supra* note 1, at 93.

Gandhi's writings, it should be noted, but also by his personal example during the Salt March of 1930 and other acts of defiance against British colonialism in India. King's appreciation for Gandhi's opposition to British imperialism eventually came to encompass the broader post-colonial struggles by people of color around the world to achieve national independence and human rights in the second half of the twentieth century.⁷ "Letter from Birmingham" begins by invoking "the interrelatedness of all communities and states" and lamenting in this global context the relative lack of progress made toward achieving civil rights by Blacks in the United States. Their faltering pace toward equality is juxtaposed to the "jet-like speed" by which "nations of Asia and Africa" are moving toward gaining political independence in various post-colonial movements across the globe.⁸

Likewise, when King describes the process of spiritual purification that civil rights protesters must undergo before engaging in acts of non-violent resistance, one thinks immediately of Gandhi and the swaraj movement in India. As King explains elsewhere, his chance discovery of Gandhi's ideas and techniques transformed his understanding of how the civil rights movement ought to proceed. Singling out Gandhi's concept of "Satyagraha" (*Satya* is truth which equals love, and *agraha* is force; 'Satyagraha,' therefore, means truth-force or love-force)," King credits these ideas with impressing upon him the power of love, or *agape*, as an instrument of political transformation: "As I delved deeper into the philosophy of Gandhi my skepticism concerning the power of love gradually diminished, and I came to see for the first time its potency in the area of social reform."⁹

In contrast to Christian theology and non-Western philosophy, both of which have been widely discussed as formative of his thinking, much less attention has been focused on King's more traditional philosophical training. Yet his formal education included a wide range of what might be considered canonical texts in the history of Western philosophy. In the first of his trilogy of autobiographical political memoirs, *Stride Toward Freedom* (1958), King recounts his immersion in the tradition of Western philosophy relatively early in his training at Crozer Theological Seminary in Pennsylvania, where he took a degree in Divinity in 1951, before going on to Boston University and receiving a doctorate in Systematic Theology in 1955. Describing these early years at Crozer, King recalls the time spent reading and pondering the so-called "great philosophers":

7. For a fuller account of King's first encounter with and eventual embrace of Gandhi's ideas, see especially KING, *supra* note 5, at 83–92. On the broader point about the global dimensions of the struggle for civil rights, see especially MARTIN LUTHER KING, JR., *THE TRUMPET OF CONSCIENCE* 64 (1967) ("I have said that the problem, the crisis we face, is international in scope. In fact, it is inseparable from an international emergency which involves the poor, the dispossessed, and the exploited of the whole world. Can a nonviolent, direct-action movement find application on the international level, to confront economic and political problems? I believe it can. It is clear to me that the next stage of the movement is to become international.").

8. KING, *supra* note 1, at 87, 91–92.

9. KING, *supra* note 7, at 84. For Gandhi's account of this "truth" or "soul" force, see M. K. GANDHI, *HIND SWARAJ AND OTHER WRITINGS* 88–99 (Anthony Parel ed., 1997).

After reading Rauschenbusch, I turned to a serious study of the social and ethical theories of the great philosophers, from Plato and Aristotle down to Rousseau, Hobbes, Bentham, Mill, and Locke. All of these masters stimulated my thinking—such as it was—and, while finding things to question in each of them, I nevertheless learned a great deal from their study.¹⁰

King goes on to assay his subsequent interest in—and struggle with—various Marxist and socialist traditions of economic and political thinking, whose concerns for social justice he found attractive, but whose materialism, historical determinism, and deprecation of individual freedom he ultimately rejected as counterproductive.¹¹ He also mentions along the way how his convictions about the transformative power of love were nearly shaken by the writings of Friedrich Nietzsche.¹²

As King summarizes of his intellectual peregrinations and their eventual culmination in his own unique philosophy of nonviolence:

In 1954 I ended my formal training with all of these relatively divergent intellectual forces converging into a positive social philosophy. One of the main tenets of this philosophy was the conviction that nonviolent resistance was one of the most potent weapons available to oppressed people in their quest for social justice.¹³

This synthesis of Christian and Gandhian ideas provided a sense of “intellectual and moral satisfaction” lacking in the otherwise estimable philosophical traditions he navigated along his “intellectual odyssey” toward non-violent resistance as “the only morally and practically sound method open to oppressed people in their struggle for freedom.”¹⁴

Despite their insufficiency in the quest for social justice, the canonical Western philosophers King first encountered in the late 1940s and early 1950s hardly vanished from his repertoire. Indeed, the best evidence of their enduring significance to his thinking and political activism is King’s reading list for a “Seminar in Social Philosophy” offered in the Fall 1961 term at Morehouse College. This course, co-taught by King and Professor Samuel W. Williams, Chair of Morehouse’s Department of Philosophy, met weekly and was attended by nine undergraduate students from Morehouse and Spelman Colleges.¹⁵ As expressed in his letter of thanks to Morehouse College President Benjamin E. Mays, King cherished the opportunity to explore philosophical ideas, and the seminar “gave me an opportunity to spend a few quiet hours with some of the great thinkers of the ages.”¹⁶ Which of

10. *Id.* at 79.

11. *Id.* at 79-83.

12. *Id.* at 83.

13. *Id.* at 89.

14. *Id.* at 85.

15. Clayborne Carson & Tenisha Armstrong, *Introduction*, in 7 THE PAPERS OF MARTIN LUTHER KING, JR.: TO SAVE THE SOUL OF AMERICA, JANUARY 1961-AUGUST 1962 1, 21-22 (Clayborne Carson & Tenisha Armstrong eds., 2014).

16. *Id.* at 22.

these ideas seem to have left the strongest impressions on King in this crucial period of the civil rights struggle, we may wonder, and what can we learn about his political thinking from the design of the course?

King's projected reading list begins with ancient Greek thinkers such as Plato and Aristotle, continuing on through Augustine, Aquinas, and the medieval Christian tradition, covering exemplars of the modern social contractarian tradition such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, and culminating in the moral traditions of Immanuel Kant, on the one hand, and the Utilitarians Jeremy Bentham and John Stuart Mill, on the other.

Offered approximately a year and half before his arrest in Birmingham and the composition of the "Letter," King's recently-published syllabus and lecture notes from the period document his engagement with canonical philosophers including, most notably, Augustine and Aquinas, who figure explicitly in King's arguments on behalf of civil disobedience, as well as other thinkers such as Hobbes, Locke, Rousseau—and arguably Kant, Bentham and Mill as well—who reckon more broadly with questions of natural rights, moral obligation, and political legitimacy.

The reading list offers a glimpse into the philosophical writings King considered most appropriate for an academic seminar, but we also have his final examination questions for the same course. The latter provides even greater insights into what King intended his Morehouse College students to take away from these readings. King was not only teaching figures specifically cited in the "Letter from Birmingham" such as Augustine and Aquinas, as previously noted. His final exam questions also show that he was asking his students to confront the relevance of these thinkers for concrete, tangible questions of civil disobedience, social justice, and political obligation.

King posed questions, for example, about the "radical" possibilities and divergent accounts of justice in classical Greek thinkers such as Plato and Aristotle. [His lecture notes hint that he was unimpressed by Aristotle's numerous errors and alleged apologies for gender inequality and racialized slavery and more appreciative of Plato's radicalism].¹⁷ He asked undergraduates to assess the Student Movement's stance on civil disobedience in view of Aquinas' Doctrine of Law. [This was a theory whose conceptions of "eternal" and "natural law" King juxtaposed to "human law" in his lecture notes, a distinction which has traditionally underwritten natural law theories of resistance].¹⁸ He also, albeit more implicitly, pressed students to compare and critically assess different versions of social contractarian thinking and, more notably, the significance of the writings of Locke and Rousseau for the Declaration of Independence and the American Founding. [With respect to their contributions to modern ideas of equality, natural rights, democracy, and revolution, interestingly, King seems to accord more credit to Rousseau than Locke in his notes].¹⁹

17. See *Seminar in Social Philosophy*, in 7 THE PAPERS OF MARTIN LUTHER KING, JR., *supra* note 15, at 109, 292–93.

18. *Id.* at 299.

19. *Id.* at 299–302.

In addition to the final exam questions, King's rough lecture notes from the seminar give further indication of his appreciation for Rousseau and the latter's contemporary relevance. Approximately the first half of King's notes on Rousseau pertain to the Genevan's embrace of romanticism and critique of the ailments of civilization. These more or less generic biographical remarks parallel the standard sketch of Rousseau's life and philosophy from introductory-level surveys such as William Kelley Wright's *A History of Modern Philosophy* (1947)—one of the books King consulted in preparing background lectures for the seminar.²⁰ In the second half of his lecture notes on Rousseau, however, King affirms the more "constructive" aspects of the *Social Contract*.²¹ "It is possible for a critical reader today to eliminate from this book the vagaries and impracticalities, and to extract a valuable philosophy for a democratic state," King declares. Besides its general importance for the development of the republican ideal in France and the United States, the *Social Contract* is identified as having "contributed to the Declaration of Independence."²² It is precisely the democratic and egalitarian dimension of Rousseau's political philosophy that seems to constitute the *Social Contract*'s most important legacy, as per King's notes. Rousseau's greatest contribution is his endorsement of "direct government by the citizens, who should in public meetings and elections make the laws."²³ Even more fundamentally, according to King, Rousseau is worthy of emulation insofar as:

He recognized the civil and political rights of every citizen. In this he represented an advance over those who thought only of the Middle Class & the Aristocracy. In this work he realizes that true freedom is found in a state in which the natural rights of all men to life, liberty and property will be conserved by laws which the people impose upon themselves. Such laws should be the expression of the general will in which each citizens [sic] wills the common good.²⁴

More could perhaps be inferred from what King says—and ignores—in his treatment of Rousseau and other thinkers on the syllabus. The sparse and derivative character of his lecture notes make this highly speculative, however. Still, prompted by the revelation that King was appealing to canonical philosophers on questions of social justice and civil disobedience, I want to explore a neglected dimension of his unique species of natural law theory. King's debts to the substantive parts of Thomistic natural law thinking are explicit, as noted, and have been widely recognized as such in the "Letter." Yet King's attempt to articulate a defensible theory of civil disobedience is hardly exhausted by the familiar

20. On these lecture notes and King's likely sources of preparation, see 7 THE PAPERS OF MARTIN LUTHER KING, JR, *supra* note 15, at 22, 291–302.

21. KING, *supra* note 17, at 300–01.

22. *Id.* at 300.

23. *Id.* at 301.

24. *Id.*

substantive distinction between just and unjust laws. King bolsters the distinction by appealing to another set of formal or procedural criteria.

One potential source of these formal or procedural criteria, I speculate here, is a thinker whose connection to King—let alone a theory of civil disobedience—has scarcely been acknowledged. That figure is the Genevan philosopher of democratic equality, Jean-Jacques Rousseau. Especially in Books I and II of the *Social Contract* we find a direct analogue for King's insistence in the "Letter" that human laws must be general in form, non-arbitrary in their applicability, and willed by the people over whom they purport to exercise authority. In these and other respects, King's repudiation of the injustice and illegitimacy of the Jim Crow laws of the American South relies on arguments very much akin to those of the *Social Contract*.

I. NATURAL LAW AND SUBSTANTIVE MORALITY

Among the central moral and political dilemmas of the Civil Rights movement is how protestors can simultaneously condone resistance to some laws while demanding obedience to others? On the one hand, as King acknowledges, the Civil Rights movement argues for the legitimate and compulsory quality of laws such as the US Supreme Court's decision in *Brown v. Board of Education*. On the other hand, however, Civil Rights activists deny that other laws pertaining to segregation are morally obligatory:

Now, what is the difference between the two? How does one determine when a law is just or unjust? 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. To put it in the terms of St. Thomas Aquinas, an 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. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.²⁵

Thus, King concludes, "I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong."²⁶ Civil disobedience is hardly a call for indiscriminate anarchism.²⁷

The difference between these two cases depends mainly, if not exclusively, on the substantive standards of natural law. But setting aside the question of whether we are really allowed to disobey unjust laws, how can we distinguish what is "morally right" from what is "morally wrong" in the first place? Why is this not just a matter of public opinion, an artifact of one's own self-serving perspective, or

25. KING, *supra* note 1, at 93–94.

26. *Id.* at 94.

27. *Id.* at 95.

ultimately a reflection of power? Surely the segregationist is just as convinced as the civil rights activist that his preferred law is “morally right.”

As per Aquinas and other leading thinkers in this tradition, there is a higher “moral” or “natural” law discernible by all human beings. This is because all people are endowed with a faculty of reason. Rather than relying on some specific set of theological tenets accessible only to Christians, the Thomistic tradition—following Aristotle, and the Apostle Paul—is ostensibly universal in purview and derivation.²⁸ Natural law represents the aspect of eternal law accessible to human beings by reason and reason alone. The universal accessibility of such a higher or natural law is what allows citizens to determine for themselves if any particular human law is just or unjust. In cases where the human law diverges too greatly from the natural or eternal law, citizens have the right to resist the law in question so long as their actions do not generate what Aquinas called “scandal and disorder.”²⁹

The Birmingham clergy’s letter reproaching Civil Rights protestors for fomenting disorder in their community is premised on qualifications of this very sort. Civil rights protestors have allegedly violated a limiting provision of resistance theory by precipitating violence in Birmingham and other Southern cities rather than waiting patiently for inevitable, albeit incremental, progress toward civil rights. This is what makes their protests “unwise and untimely.”³⁰ King takes up these recriminations in the opening of his own “Letter.” If protests in Birmingham and elsewhere have indeed been accompanied by social disorder and violence, King contends, this is no fault of the peaceful Civil Rights movement, whose protestors have steeled themselves in techniques of self-restraint and moral purification.³¹ Rather, defenders of the status quo such as Birmingham’s Sheriff Eugene “Bull” Connor are the instigators of any violence, and thus to denounce civil disobedience on these grounds is to blame victims of injustice for defending themselves.³²

Lest this appeal to higher law or natural law appear too abstract or subjective, King adds further sociological support to the contention that laws upholding segregation are contrary to natural law. Concretely, segregation is unjust because it degrades the soul rather than uplifting the human personality. Invidious racial distinctions introduce a damaging sense of shame, inferiority and “nobodiness” on the part of the oppressed, not to mention a false sense of pride and superiority on the part of the oppressor.³³ Such unjust laws fail to accomplish the natural purpose of law: that is, leading human beings to achieve their highest and best.

28. King’s invocation of the cosmopolitan vocation of the Apostle Paul is further suggestive of the naturalness and universality of Christian morality. *See id.* at 86. As Paul argues in Romans 2:14, “For when the Gentiles, who have not the law, do by nature the things contained in the law, they, not having the law, are a law unto themselves.” *Romans* 2:14 (King James).

29. On this distinction between natural law and human law, as well as Aquinas’ disallowing of resistance likely to generate “scandal and disorder,” see THOMAS AQUINAS, *ON POLITICS AND ETHICS* 46–55 (Paul Sigmund ed. & trans., 1988).

30. KING, *supra* note 1, at 85.

31. *Id.* at 88–89.

32. *Id.* at 88.

33. *Id.* at 92–93.

The point here, while perfectly consistent with Aquinas's views on law, seems to hark more immediately back to Aquinas's own proximate inspiration, Aristotle, who likewise plays a key role in King's seminar and is aptly represented on its final examination. It is Aristotle who speaks of the effects of laws on the soul, and whose observations about the function of the political community identify the good regime with laws that encourage citizens to cultivate their *telos*, end or purpose. King's characterization of segregation as a form of spiritual mutilation speaks to the concrete, sociological dimensions of discrimination so long lamented by African-American critics such as Frederick Douglass, W. E. B. Dubois, and many others.

II. GENERALITY

Thus far in King's argument, the justice or injustice of law hinges strictly on the matter of its moral substance. Concretely, does a given human law accomplish its moral objective of uplifting the human personality and guiding human beings toward excellence in a way that is consistent with natural law? If so, then this law must be reckoned just and legally obeyed. If not, as with the morally obtuse and psychologically stultifying racial segregation laws of the American South, which cannot but degrade the human personality, then they are unjust and may legitimately be disobeyed.

All of the above tenets of natural law theory are widely understood—both for students of King's political thought as well as scholars of the natural law tradition more generally. Yet the above-cited definition marks only the beginning of King's discussion of just and unjust laws in the "Letter." King does not regard substantive criteria as exhaustive of whether a law is just or unjust. No matter how unlikely they may be to occur independently of the aforementioned substantive criteria, certain formal conditions are also determinative of just and unjust laws.³⁴ In the next few paragraphs of the "Letter," King introduces three further considerations that must be met by a just law. These conditions are what might be termed procedural or formal, related to the form or the process by which law is enacted, some elements of which would have had little or no bearing for a thinker

34. It is worth acknowledging the likely endogeneity of what I am here calling the "substantive" and "formal" criteria for just laws. For example, hypothetically, one could imagine a law that meets all of the formal criteria of generality, popular affirmation, and non-arbitrariness which nonetheless violates the substantive dimensions of natural law. This seems like a generic shortcoming of democratic politics. Even Rousseau concedes that while the general will never errs—axiomatically—the deliberations of the majority frequently go awry. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 59, 68 (Victor Gourevitch ed., 1997). Conversely, one could imagine a law that substantively conforms to natural law, say, by affirming and uplifting the human personality, and yet which is not generally willed by the people at large or violates some other formal conditions identified by King. I take King's point not to be that any single one (or all) of these conditions are necessary, or sufficient, for a law to be reckoned just. Rather, he seems to assume that there is a tendency for laws that fall short on one dimension to be lacking in several or all of them. As we will see, for example, following Rousseau, laws formally enacted by only one part of the political community to the exclusion and detriment of another are almost certain to run afoul of the substantive requirements of justice.

such as Aquinas writing in a pre-democratic age. As King elaborates with respect to the formal consideration of generality:

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.³⁵

What King expresses here is very much akin to the condition Rousseau describes in the *Social Contract* as “generality.” As Rousseau notes in SC II.4, in the chapter titled “Of the Limits of Sovereign Power,” the very nature of sovereignty is premised on a kind of reciprocity according to which laws must apply generally and equally to all citizens:

From whatever side one traces one’s way back to the principle, one always reaches the same conclusion: namely, that the social pact establishes among the Citizens an equality such that all commit themselves under the same conditions and must all enjoy the same rights. Thus by the nature of the pact every act of sovereignty, that is to say every genuine act of the general will, either obligates or favors all Citizens equally.³⁶

The condition of generality is first and foremost for Rousseau a moral question of justice and right. The terms of the original social agreement are premised on the assumption that all citizens give themselves absolutely and unconditionally, and on precisely equal terms. Consequently, the laws must treat all citizens the same way, lest the very terms of the social compact be violated: “The Citizens being all equal by the social contract, all may prescribe what all ought to do, but no one has the right to require that another do what he himself does not do.”³⁷

Aside from the obvious harms of discrimination and racial exclusion with which King and the Civil Rights movement are concerned, Rousseau’s injunction against differential treatment takes the form of a categorical moral imperative. Regardless of whether laws are supposed to burden or to advantage, any attempts to favor or disfavor by singling out some particular person or group, or even speaking in terms which themselves are not perfectly general, are transgressions of the general will and ipso facto illegitimate:

35. KING, *supra* note 1, at 94–95.

36. ROUSSEAU, *supra* note 34, at 62–63. For a comprehensive analysis of Rousseau’s generality condition and other formal dimensions of law, see JOSHUA COHEN, *Rousseau: A Free Community of Equals* (2010). For a discussion of the paradoxes of the generality condition in Rousseau, see Richard Boyd, *Justice, Beneficence, and Boundaries: Rousseau and the Paradox of Generality*, in *THE GENERAL WILL: EVOLUTION OF A CONCEPT* 247, 247–69 (James Farr & David Williams eds., 2015).

37. *Id.* at 116.

Thus, just as a particular will cannot represent the general will, so the general will changes in nature when it has a particular object, and it cannot, being general, pronounce judgment on a particular man or fact. For example, when the people of Athens appointed or cashiered its chiefs, bestowed honors on one, imposed penalties on another, and by a multitude of particular decrees indiscriminately performed all the acts of government, the people no longer had a general will properly so called.³⁸

Rousseau seems to be making two distinct points here, both immediately and throughout his argument. The first has to do with the source and derivation of the general will. No act of generality is capable of arising from a will that is particular. As he asserts, no matter how beneficent or well-intentioned a particular will or “partial interest” within a political community may be, it cannot in and of itself advance a will that achieves the essence of generality.

Consider, for example, a political community whose most enlightened faction endorses a policy ostensibly intended to benefit the political community as a whole, say, by offering social welfare benefits that ultimately reflect the particular will and aspirations of this single faction. No matter how broadly framed or well-intended, Rousseau contends, the act would be particular rather than general—and thereby unjust. Likewise, as he argues by analogy, no act or law born out of conditions of generality can speak to a particular object without ceasing to be general as a result. The people of Athens might very well enact general laws providing honors to war heroes or the ability to banish leaders for malfeasance, but it cannot single out such individuals by name as a matter of general legislation. Imagine, in another case, the whole political community comes together to address a matter of general concern such as public assistance of the poor, and yet the manner of so doing grants special privileges to a specific family, identifiable group, or exclusive list of persons. This approach, too, would fail to achieve Rousseau’s requisite conditions of generality.

Besides these conceptual and normative arguments about why formal generality is a prerequisite for legitimate rule, Rousseau offers a second and much more pragmatic rationale in support of the generality condition. Put simply, laws that everyone in the political community is equally obliged to obey are unlikely to be oppressive. “Since each gives himself to all entirely,” Rousseau explains, “the condition is equal for all, and no one has any interest in making it burdensome to the rest.”³⁹ This reciprocity underwrites what Rousseau describes as the “admirable agreement between interest and justice.”⁴⁰ The claim is based on an empirical supposition, to be sure, but it seems plausible nonetheless, at least in its weaker version. That is, it may not be the case that no citizen will ever support laws that are oppressive or burdensome. Rather, Rousseau’s contention seems to be that, at the

38. *Id.* at 62.

39. *Id.* at 50.

40. *Id.* at 62.

very minimum, no one has an interest in making laws burdensome so long as—and only so long as—they are themselves compelled to obey whatever laws come to be ratified. The flip-side of this proposition is even more empirically convincing—namely, that laws are most likely to be burdensome whenever one group has the numbers or power to make rules that apply not to themselves but only to some other group. What is this scenario if not the “*difference made legal*” of which King complains?

III. POPULARITY

The previous point about the power to make laws is closely related to another formal consideration identified by King in the “Letter.” This pertains not to the terms of the law and the condition of generality but rather to whether the law was in fact willed by the people over whom it presumes to exercise authority. Here we find another of Rousseau’s conditions for law being flagrantly violated, as King explains in the case of voting rights abuses and exclusions in the American South:

Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state’s segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?⁴¹

We find, unsurprisingly, a direct analogue in Rousseau’s *Social Contract*. “The general will,” Rousseau specifies, “to be truly such, must be so in its object as well as in its essence.”⁴² That is, not only must the *object* of legislation be general—applying uniformly to all citizens rather than favoring or excluding any particular individuals or groups, as per the first condition described above. It must also be general in its *essence*, or inspiration, as emanating from the entirety of the people rather than being adopted only by some citizens to the inevitable detriment of others. “[I]t must issue from all in order to apply to all,” Rousseau elaborates, for “it loses its natural rectitude when it tends toward some individual and determinate object.”⁴³ Rousseau’s assumptions here are two-fold.

First, there is the normative claim that in order for a particular act of the political community to be legitimate and binding, it must be *generally willed* by all the citizens. As Rousseau later clarifies, it need not be the case that laws are actually written or proposed by the citizens themselves—and indeed most likely the laws will be drafted by a legislator or some other official for the people’s consideration. Yet, regardless of their source—even if highly undemocratic in conception

41. KING, *supra* note 1, at 95.

42. ROUSSEAU, *supra* note 34, at 62.

43. *Id.* at 62.

and provenance—it is absolutely imperative that laws be affirmed or disaffirmed by the whole sovereign people. Thus, as he later insists, the “simple right to vote” is inherent in every legitimate act of sovereignty, a “right of which nothing can deprive Citizens.”⁴⁴

The second aspect of Rousseau’s proposition is the more empirical observation that laws or acts of sovereignty from which some citizens are excluded are in fact more likely to deviate from the general will, thereby becoming tyrannical and oppressive. It should hardly be surprising that laws enacted by some without any consultation of others will tend toward a particular and determinate, rather than a truly general interest. Although Rousseau’s language veers uncomfortably into the realm of metaphysical abstraction, one cannot help but imagine how King might have reckoned concretely with the following philosophical characterization of the moral significance of domestic divisions:

Then a relation is formed between the whole and its part that makes them into two separate beings, of which the part is one, and the whole less that part, the other. But the whole less a part is not the whole, and as long as this relation persists there is no longer a whole but two unequal parts; from which it follows that neither is the will of one of these parts general in relation to the other.⁴⁵

Stripping away Rousseau’s abstractions, the main point seems to be that in a political community divided between two different groups, each of which possesses a distinct will of its own, the relationship between them is adversarial and particular, rather than general. In no way should the will of the greater part be mistaken for the totality of the general will. Thus, laws passed solely by the white majority in the South cannot be presented as consistent with the common good of the political community as a whole. They are “separate” or “foreign” to the Black minority compelled to live under them. Rousseau’s analogy to international relations and a “foreign” power outside the state is suggestive of the predicament of a minority that must abide a veritable state of war between itself and the part of the political community that purports to be a whole. This condition of alienness will obtain in any circumstances where laws rest on force alone, rather than on the legitimacy that can only be conferred by citizens having participated in the general act of willing them undertaken by the entire community.

IV. NON-ARBITRARINESS

The final criterion raised by King has to do not with the facial terms of the law itself, or whether such a law was indeed democratically ratified by all members of a political community, but whether a law can be applied in a way that is arbitrary. As King distinguishes, there may be many laws whose justifications are ostensibly consistent with the natural law and the common good, and yet whose

44. *Id.* at 122.

45. *Id.* at 66.

application is either intrinsically arbitrary or which lend themselves to being deployed to the detriment of one particular group of people:

Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.⁴⁶

One must look not only to the nominal intention of a law but also and more importantly to the manner in which it is applied—equally and impartially, or arbitrarily—in order to determine whether the law in question is just or unjust.

King does not cite the example of voting rights under this heading, but one cannot help but think in this context of various kinds of restrictive voting laws such as poll taxes, literacy tests, and other “devious methods. . . used to prevent Negroes from becoming registered voters.”⁴⁷ While often framed in ways that are facially neutral and conceivably justifiable on the basis of public purposes, the application of such laws cannot help but be arbitrary and restrictive.

John Stuart Mill, for example, hypothesized a justification of literacy tests as a way of determining the civic capacity of potential voters in an era when representative government was being extended toward the limits of universal suffrage. Citing “positive reasons,” which he claimed did not conflict with the animating principles of universal suffrage, Mill confessed that “I regard it as wholly inadmissible that any person should participate in the suffrage, without being able to read, write, and, I will add, perform the common operations of arithmetic.”⁴⁸ The difficulty Mill immediately conceded, however, is that absent “any trustworthy machinery for ascertaining whether they have been acquired or not,” laws intended to gauge civic literacy “would lead to partiality, chicanery, and every kind of fraud.”⁴⁹ Thus, Mill concluded, “It is better that the suffrage should be conferred indiscriminately, or even withheld indiscriminately, than that it should be given to one and withheld from another at the discretion of a public officer.”⁵⁰

Cases such as these give rise to a distinction between two very different ways in which law can be deemed arbitrary. On the one hand, there are nominally defensible laws such as the one King mentions, where the ostensible purpose of the law is legitimate and whose application can—at least in principle—be conducted in ways that are non-arbitrary. Laws requiring the issuance of a permit for public assembly fall into this category, as King acknowledges.⁵¹ That is, legitimate

46. KING, *supra* note 1, at 95.

47. *Id.*

48. JOHN STUART MILL, *Considerations on Representative Government*, in ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 181, 287 (Mark Philp & Frederick Rosen eds., 2015).

49. *Id.* at 288.

50. *Id.*

51. KING, *supra* note 1, at 95.

concerns for public safety underwrite laws controlling the time and manner of public assembly, and there is no inherent reason why governments could not apply them in ways that are non-discriminatory. Civil rights protestors might apply for and be granted a permit to gather and engage in peaceful protests against racial injustice. If this is correct, then certain laws of this kind may in point of fact be deployed arbitrarily, but they need not be dismissed as categorically unjust simply because they are susceptible to abuse. These are failures not of legislation but of what Rousseau distinguishes as “acts of government.”⁵²

On the other hand, however, King’s criticism points toward a second class of laws whose very nature is to be arbitrary and thereby unjust. This category would include laws whose true purpose is to be invidious and discriminatory, such as poll taxes or literacy tests for voting, which are designed specifically to deprive some group of its suffrage rights. Here determining the real, as opposed to nominal, purpose of the law becomes paramount. Alternatively, this category of intrinsically unjust legislation would include other sorts of laws whose intention is otherwise defensible, but whose application cannot be conducted in ways that are non-arbitrary. Mill made another claim of this sort in his criticism of the Contagious Diseases Acts of 1866 and 1869, a series of laws requiring women suspected of prostitution to undergo an examination by a public surgeon.⁵³ Although presumably justifiable on grounds of public health and safety, national defense, and consistent with his utilitarian philosophy, Mill objected that such legislation could not help but be applied in ways that were arbitrary, created invidious distinctions, and impugned the character of the innocent.⁵⁴ Laws of this sort cannot be condoned because there is no way to apply such a law that does not involve wrongful abuses of the privacy and personal dignity of any woman so accused. Following Mill, Jeremy Waldron has made the same criticism of recent search and seizure laws deployed in the “War on Terror” requiring passengers to undergo searches as a condition of using public transportation. According to Waldron, these laws are inherently unjust by virtue of being impossible to apply without an element of arbitrariness or invidious discrimination.⁵⁵ Their application depends solely on the “discretion of a public officer” elsewhere condemned by Mill.⁵⁶

The possibility that nominally general laws might be applied in abusive ways—for or against certain individuals or groups—is one of Rousseau’s concerns as well. He allows that laws may create general categories, ranks, qualifications, or rules, but the discretion to nominate particular persons or to judge actions that fall within them goes beyond the domain of legislative power, properly speaking.⁵⁷

52. ROUSSEAU, *supra* note 34, at 62.

53. *The Contagious Diseases Acts 1871*, in THE COLLECTED WORKS OF JOHN STUART MILL 333, 333-52 (John M. Robson ed., 1984).

54. *Id.*

55. See Jeremy Waldron, *Mill on Liberty and on the Contagious Diseases Acts*, in J. S. MILL’S POLITICAL THOUGHT: A BICENTENNIAL ASSESSMENT 11 (Nadia Urbinati & Alex Zakaras eds., 2010).

56. MILL, *supra* note 48, at 288.

57. ROUSSEAU, *supra* note 34, at 67.

Rather, the power to administer and execute these general laws falls under the purview of magistrates, judges, and other public officers dedicated to the tasks of “[g]overnment,” which Rousseau insists is “improperly confused with the Sovereign.”⁵⁸

In addition to being concerned about the natural tendencies of popular governments to decay into forms of government that are increasingly oligarchical and tyrannical, Rousseau identifies a specific point of breakdown when government—of whatever form—is no longer responsive to the sovereign will of the people, as, for example, when kings or magistrates govern arbitrarily in their own interest. Rousseau’s description of this moment when the deliberate and general will of the sovereign gets usurped by the arbitrary actions of government is both striking and has profound implications for political obligation: “So that the moment the Government usurps the sovereignty, the social pact is broken, and all ordinary Citizens, restored by right to their natural freedom, are forced to obey but not obligated to do so.”⁵⁹

With respect to the requirement of non-arbitrariness, then, Rousseau indicates two fundamentally different ways that law may cease to be morally obligatory by virtue of becoming arbitrary. First, there is the case where legislation itself fails to meet the condition of generality. We have seen how this consideration stands at the very heart of King’s opposition to the segregation laws of the American South. Second, and equally problematic, there is the case when government officials pervert an otherwise general set of laws by applying them in ways that are arbitrary, self-serving, punitive, or discriminatory. In either case, Rousseau and King concur, arbitrary laws cease to be morally legitimate and may be resisted whenever possible.

ROUSSEAU AND CIVIL DISOBEDIENCE?

Thus far, we have seen some of the surprising affinities—if not influences—linking King’s “Letter” and Rousseau’s *Social Contract*. The main point of the discussion has been to shed new light on King’s theory of civil disobedience by revealing its formal as well as substantive dimensions. We should note, however, that these comparisons between King and Rousseau also have profound implications for reading the Genevan political philosopher and his famous espousal of republican virtue and patriotism.

One lingering question of Rousseau’s *Social Contract* pertains to the obverse of the generality condition. What are we supposed to do with instances of legislation that fail the test of generality? Rousseau seems clear enough that laws which are particular rather than general are not “genuine,” “equitable,” “legitimate,” or even “just” expressions of the general will, as we have seen. But regardless of their injustice, are they still laws nonetheless, and how should citizens—

58. *Id.* at 82–83. For an account of this distinction in Rousseau between “sovereignty” and “government,” see RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016).

59. ROUSSEAU, *supra* note 34, at 108.

especially the duty-bound republican citizens Rousseau is determined to create—relate to them? This is precisely the issue with which King is struggling in the “Letter”: are we still obliged to obey laws that are not general in nature?

It may seem like a stretch to cast Rousseau as a theorist of civil disobedience. At minimum this view is counter-intuitive, reading Rousseau and the *Social Contract* against the grain. After all, his normative political philosophy is mainly concerned with instilling love and reverence for the laws in the hearts of citizens. This is true to the extent that breaking the laws is not just a crime but tantamount to a renunciation of one’s membership in the political community itself. As he admonishes, “every evil-doer who attacks social right becomes a rebel and a traitor to the fatherland by his crimes; by violating its laws he ceases to be a member of it, and even enters into war with it.”⁶⁰ At first blush there is little wiggle room even for the sort of principled, peaceful civil disobedience advocated by King and the Civil Rights movement.

Still, how much of Rousseau’s hortatory language of republican duty and self-sacrifice is premised on the ideal assumption that the sacrosanct laws in question are perfectly general and willed by the people? “The commitments which bind us to the social body are obligatory *only because they are mutual*,” Rousseau specifies.⁶¹ Does this mean that insofar as they *aren’t* mutual, they cease to oblige? While downplayed against the *Social Contract*’s overarching ambition of “making our chains legitimate,” to paraphrase its opening lines, this is a very significant qualification of his normative justification of political obligation.⁶² A “proper” or “genuine” act of sovereignty is “not a convention of the superior with the inferior,” but rather a “convention of the body with *each one of its members*,”—a convention which is legitimate “*because*”—and only so far as?—“it is based on the social contract, equitable because it is common to all, and secure because the public force and supreme power are its guarantor.”⁶³ Acknowledging that these formal conditions are not always satisfied in practice, however, Rousseau qualifies that “*So long as subjects are subjected only to conventions such as these*,” that is, conventions that are reciprocal and generally affirmed, they are free in obeying no one other than themselves. Thus does Rousseau resolve the paradox with which the *Social Contract* begins, of how citizens can sacrifice all their liberties and yet remain just as free as before.⁶⁴

Rousseau indicates in this passage that laws which fail one or more of these conditions may prove to be neither legitimate, equitable, nor secure. But in addition to potentially differentiating between the qualities of legitimacy and equity in the law, one wonders if this amounts to the same thing as saying that a law is *unjust*? One way of making sense of Rousseau’s point is to conclude that legitimacy and equity are two distinct qualities, both of which are necessary in order

60. *Id.* at 64–65.

61. *Id.* at 61 (emphasis added).

62. *Id.* at 41.

63. *Id.* at 63 (emphasis added).

64. *Id.* at 63 (emphasis added).

for a law to be considered just by its citizens. So, for example, a law that emanates from the social contract is *legitimate* insofar as it reflects the general will of the political community—meeting the condition of popularity in being generally willed—and it is also *equitable* in the sense that it is common, applying to all citizens equally. If these conditions of legitimacy and equity are indeed distinguishable—whether in theory or practice—it raises the possibility that there may be some laws that are legitimate—reflecting faithfully the terms of the social compact—but fail to be equitable insofar as they are not commonly applied to all. This seems to present a problem for the thesis I have advanced thus far.

One potential remedy to this apparent conundrum may be found in the third of the three considerations mentioned above by Rousseau: namely, security. A convention, he explains is “secure because the public force and supreme power are its guarantor.” On its face Rousseau’s point seems to boil down to the tautology that laws are secure when they are effectively enforced by the power of the public and the supreme threat of force it wields. Still, while this claim may at base just amount to the observation that conventions need some power to compel obedience, the absence of this condition of enforcement speaks to the original dilemma with which we began. In order to be both effective and legitimate laws must be based on a force that is public in nature, rather than, say, private or arbitrary. What is the force that meets this condition of efficacy and that is most likely to be regarded as duly obligatory by all citizens? Nothing other than a power that represents the sovereign will of the people. Enforcement of laws, say, by rogue police, militias, contractors, factions, vigilantes, or Mill’s “public officer” acting on their own arbitrary discretion will be unlikely to secure compliance in the same way as when they are enforced by an agent or institution unambiguously representing the will of the people.

When these conditions are not met, though, as will be the case in most actual political communities, then obedience to law is underwritten by force and prudence alone, as Rousseau elucidates in great detail in SC I.2-5, disposing of alleged attempts to derive right from force, conquest, or the historical accident of patriarchal descent. According to Book I, Chapter Two of the *Social Contract*, one of the most commonly cited sources for political obligation is the patriarchal authority of the father. “The most ancient of all societies,” Rousseau concedes, “and the only natural one is that of the family.”⁶⁵ Nonetheless, Rousseau follows Locke and other leading figures of the liberal tradition in rejecting the patriarchal authority of the father as sufficient grounds for political obligation. Whereas the family may be the “first model of political societies,” patriarchal authority ceases the moment that children no longer need the father for their preservation. Consequently, political obligation cannot be grounded in any such analogy between fathers and kings, nor in any spurious Biblical stories about the descendants of Adam.⁶⁶ Likewise, political obligation cannot be derived from the right of the stronger, as Rousseau argues in Book I, Chapter Three. “Force is a physical power,” he admonishes, “I fail to see what

65. *Id.* at 42.

66. *Id.* at 43.

morality can result from its effects.”⁶⁷ As a matter of physical necessity only, force cannot give rise to a sense of “duty” or “right.” Thus, Rousseau specifically counsels, “one is only obliged to obey legitimate powers.”⁶⁸ Is this not the converse of a theory of civil disobedience, condoning resistance to illegitimate power whenever possible or advantageous?

After dismissing purported attempts to derive the legitimacy of law from paternal authority or physical compulsion, Rousseau turns in *Social Contract* I, Chapter Four to a question one might expect to be of great interest to King: namely, the purported analogy between political authority and slavery. What are the conditions under which a people or individual could be imagined to alienate all of their freedom to a master, Rousseau wonders? And how could the terms of this submission ever give rise to legitimate authority and moral obligation? Not surprisingly, Rousseau’s answer to these questions is an unqualified “never.”⁶⁹ “To renounce one’s freedom is to renounce one’s quality as a man, the rights of humanity, and even its duties,” Rousseau explains.⁷⁰ Even if this kind of one-sided subordination could be construed as voluntary, rather than an act of madness, conquest, or duress, it would have no moral legitimacy, insofar as the act of surrendering one’s freedom is incapable of generating any reciprocal moral obligations, either on the part of the subordinate to the master, or even the master to the subordinate.⁷¹

The upshot of these three critical chapters of the *Social Contract*, then, is to underscore the flip-side of a theory of political obligation such as the one Rousseau proceeds to derive in the remainder of Book I and Book II. Absent the stringent conditions of generality, popularity, and non-arbitrariness that Rousseau insists are necessary for any legitimate government, the laws are nothing more than disguised expressions of force that may be disregarded whenever the opportunity conveniently arises to do so. There is no right to disobey just laws enacted by the legitimate sovereign, but there is every possible justification for disobeying unjust acts of government rooted in force alone.

CONCLUSION: NATURAL LAW THINKING AS SUBSTANTIVE OR FORMAL?

Thus far we have seen how King’s seminal arguments on behalf of civil disobedience may be related—if only by way of comparison—to Rousseau’s most celebrated work of political philosophy, the *Social Contract*. The lines of causality between the Genevan dreamer of democracy and the twentieth-century Black Civil Rights leader may be mostly circumstantial, but their affinities illuminate novel aspects of the arguments of both, or so I have argued in the preceding. Before concluding, however, I want to suggest briefly one additional way in which this comparison of Rousseau and King may be fruitful. This relates to the

67. *Id.* at 44.

68. *Id.* (emphasis added).

69. *Id.*

70. *Id.* at 45.

71. *Id.* at 46.

contemporary legacy of natural law thinking and how this tradition may be more nuanced than is often appreciated.

For historians of political thought, the natural law tradition is associated with medieval Christianity and especially the thinking of Thomas Aquinas. For contemporary jurists and moral philosophers, however, one of the most influential examples of natural law thinking may be Lon Fuller's celebrated "natural law" criticisms of H. L. A. Hart and other so-called "legal positivists." While the Hart-Fuller debates and a full assessment of Fuller's embrace of natural law thinking go well beyond the scope of this essay, the preceding discussion does call attention to one significant if often overlooked dimension of Fuller's seminal work on the *Morality of Law*. Along with Rousseau and King, Fuller shares a sense of how the "lawness" of law depends not so much on its correspondence with some abstract, metaphysical morality or higher law, the "morality of aspiration," but rather hinges on certain formal conditions that all legitimate laws have to satisfy.⁷²

Recall the difficulties of Fuller's proverbial lawgiver, "Rex." Rex's travails as an absolute sovereign stem not so much from making laws that are substantively bad, or as Martin Luther King, Jr. would say, "morally wrong." Instead, Rex's most fundamental failures to make law seem to relate to the very kinds of formal considerations to which Rousseau and King refer. Rex neglects to consider whether, for example, laws he adduces for one set of circumstances ought to be binding on other cases—past, present, or future.⁷³ His sense of law is a matter of ad hoc edicts intended for specific plaintiffs rather than systematic and general legislation of the sort both Rousseau and King would demand. It is not that Rex is malevolent or prejudiced; to the contrary, he prides himself on being an enlightened reformer. Yet he fails his subjects anyway, as the decisions he proffers by way of making law end up being just as oppressive and inimical to the well-being of his subjects as those of the most hardened dictator. For all of his will to do good, many subjects get treated abusively as a consequence of Rex's inability to craft laws that are general, predictable, non-arbitrary, and broadly consistent with the moral beliefs of his subjects and the practical realities of compliance.

As Fuller explains, by way of assessing Rex's many errors, the condition of "generality" stands as one of the central elements of the "inner morality" of any given system of law.⁷⁴ Laws not only apply to all citizens—and similar cases—equally, and in ways that are widely promulgated and predictable ex ante, but also possess some element of relative constancy throughout time.⁷⁵ Fuller's approach to the sources of law is somewhat more agnostic than Rousseau or King—bracketing the question of whether legislation must be democratically enacted or might instead arise by means of regulatory statutes, judicial precedents, or executive orders—but what he calls the "procedural," as distinct from the "substantive,"

72. See LON L. FULLER, *THE MORALITY OF LAW* 34–38 (rev. ed. 1969).

73. *Id.* at 35, 39.

74. *Id.* at 46–50.

75. *Id.* at 79.

dimensions of natural law remains decisive.⁷⁶ The “inner morality of law” is concerned with “the ways in which a system of rules for governing human conduct must be constructed and administered,” and many requirements Fuller identifies as central to this enterprise are consistent with if not identical to the considerations of generality, popularity, and non-arbitrariness discussed above.⁷⁷

In conclusion, then, the natural law tradition has done much to justify and advance theories of political resistance, but the ways it has done so are complex and go well beyond the usual conflation of this tradition with hortatory ethical appeals to a “higher law.” A more careful consideration of this tradition’s development may help to inform a finer-grained understanding of what conditions must be met in order for us to relinquish our duty to obey the laws and, even more broadly, to determine when a given constitutional system should be reckoned as legitimate rather than just a contrivance of arbitrary force.

76. *Id.* at 97, 184, 213-215.

77. *Id.* at 96-97.