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ARTICLE

ETHICS IN THE SHADOW OF THE LAW: THE POLITICAL OBLIGATION OF A CITIZEN

Robert P. Lawry[†]

INTRODUCTION

This article is a series of meditations on texts. The focus is on the moral quandry a citizen faces when confronted with what he or she perceives to be an unjust or immoral law or policy, emanating from the State in which that citizen has membership. As such, it is a contribution to the rich literature of political obligation. It joins the long debate in jurisprudence and political and legal theory over the citizen's "obligation to obey the law," or "fidelity to law."¹ It joins that debate obliquely, however, not by trying to argue philosophically for one particular theory of political obligation, but by reflecting on interesting and historically important texts in that literature. The particular texts have been chosen for two reasons: (1) each has had a position of historic prominence in the debate, and (2) each represents not just an abstract argument, but the position of a person who has a direct and dramatic confrontation with the State over issues of justice and obligation. Even when the person involved is fictional, someone's life or freedom is on the line and, therefore, provides a "thick" story of a real quandry.

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¹ The debate begins famously in the West. See PLATO, *Crito*, in THE LAST DAYS OF SOCRATES 69, 69-92 (Hugh Tredennick & Harold Tarrant trans., Penguin Books 1993) (discussing Crito's suggestion that Socrates escape from prison) [hereinafter *Crito*]. In recent times, an entire course book in jurisprudence has been organized around the concept of obligation. See STEPHEN E. GOTTLIEB, JURISPRUDENCE (1993).

For a long time in the West, there was a consensus that the existence of a law entailed a prima facie obligation to obey it.² That obligation could only be overcome by a more stringent moral obligation. Over the past three decades, that consensus has been attacked in a series of articles by prominent philosophers, who find no basic obligation to obey the law at all.³ Unfortunately the debate has been conducted at a high level of abstraction, and has centered on the narrow question of the existence of a prima facie obligation.⁴ I find the debate both remote and sterile. It never gets to the more important, moral issue: Faced with a law I believe to be unjust or immoral, what should I do? For those who argue that there is no prima facie obligation to obey the law, the concern may be met too easily. Do what is otherwise the right thing, discounting the morally neutral fact of the law itself. The problem is, however, that the law is never quite so easily dismissed. It plays a role in the moral debate at least because it raises expectations or creates patterns or otherwise partakes of the moral webs in which humans are caught. Of course, there are many who believe the prima facie moral obligation exists. Most philosophers who do not accept the prima facie obligation still seem to admit the relevance of law to moral decision-making, but they choose not to discuss that relevance because of their focus on the abstract question of the existence of a prima facie obligation to obey the law. I want to tackle the more particular moral issue head-on.

I come to this debate late in my academic career, but from a curious early history. After graduating from the Penn Law School in 1966, I had the privilege of spending the following academic year under the tutelage of H. L. A. Hart, then in his prime as Professor of Jurisprudence at Oxford. Under Hart's generous supervision, I produced a graduate thesis entitled *The Moral Justification for Civil Disobedience*. This was 1966-67, the hey-day of the civil rights and anti-Vietnam War movements in America. I wanted to understand where a citizen, especially one who was a newly-minted lawyer, might stand on this question of political obligation. Although I defended my thesis well enough to receive my degree, I was dissatisfied with the results of my efforts, and never tried to publish the piece. The difficulty lay in a fundamental disagreement I had with Professor

² See JOHN RAWLS, A THEORY OF JUSTICE 350-55 (1971) (assuming the existence of a prima facie obligation to obey the law).

³ Of course many jurists and philosophers accept the idea of a prima facie obligation. For a compilation of writings on this subject, see THE DUTY TO OBEY THE LAW (William A. Edmundson ed., 1999) [hereinafter DUTY TO OBEY].

⁴ See M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, in DUTY TO OBEY, supra note 3, at 75, 76 (arguing that there is no prima facie obligation to obey all laws). Smith's article is both seminal and typical.

Hart. He allowed my topic, but insisted that I should make a “lawyer’s” contribution to the question. I should not try to do moral philosophy itself, but should merely help moral philosophers in their task of “justification,” by teaching them something helpful about law. I argued with Professor Hart against this approach, but submitted to my advisor’s position. Subsequently I went on to specialize as an academic in the ethics of lawyers, determined that I should try to integrate my law-thinking with my moral-thinking, and help others to do the same. Thus, this article is not just another jurisprudential foray into the minefields of political obligation. It is an attempt to do practical ethics, not an original effort in moral philosophy. It is also the first of three such efforts. I plan to follow this article with an article on the political obligation of the judge and another on the lawyer’s political obligation.

For me, the positivistic separation between law and morality has thinned efforts to understand each. It is like trying to understand the left hand without mention of the right hand. It can be done, but every effort at real understanding entails an attempt to come to terms with both. The great positivist, Oliver Wendell Holmes, Jr., called the law “the witness and external deposit of our moral life.” Simultaneously, Holmes insisted that even the language of law and morality must be distinct.⁵ Law influences morality as morality influences law. It is a dynamic two-way street. This is not a definitional issue. It makes sense to talk of “unjust laws.” It just makes no sense to try to understand one without trying to understand the other. This may seem an audacious statement. However, I think one’s specific moral obligation in a given case is often shaped or dictated by law in reasonably just democratic societies. We stop at a red light in city traffic because we do not want to cause an accident that brings harm to ourselves or to others. However, we stop specifically because the light is red and the law directs up to stop.

Thus, although the question “What should I do in the face of an unjust law?” is wholly “ethical,” it cannot be answered without grappling with the concept of law itself. This is also what I am attempting to do, but again I do so obliquely through an examination of important texts.

A word on terminology. Although it is commonplace to use the words “ethics” and “morality” as synonyms, for purposes of clarity I want to insist on separate meanings. I mean to use the word “ethics” when talking about the philosophical effort to clarify and give coherent meaning to the moral life. In philosophical parlance, this means

⁵ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

“normative” ethics, as opposed to descriptive ethics or meta-ethics, although both of these branches of philosophical ethics play a role in understanding normative ethics.⁶ I will use the word “morality” to fix on those actions and behaviors (including intention and other mental states) which deal with fundamental matters of good and evil, right and wrong, judgment and character, virtue and vice, values and choices. Morality is largely a social idea. Our “morality” is learned in a variety of ways—mostly, by being part of one or more moral communities.⁷ Ways of behaving are taught (or learned) implicitly or explicitly in all kinds of communities, from family to neighborhood to church to political entity to profession. Sometimes one moral community so dominates a person’s life that his or her morality is a fair representation of that community’s morality. Often there is overlap and conflict between the moral views of one or many communities. Ethics presents an opportunity to critique any moral position within any moral community. Some argue that no objective ethical positions exist in the world. The best we can do is live richly within one moral community—and hang on. Presently in modern America, it is nearly impossible to live within just one moral community. Diversity is more than a politically correct slogan. It is our reality, our heritage, our polyglot lot. Moreover, ethics is the philosophical discipline that presents the challenge to every moral community to justify its principles and way of life to the larger miscellaneous group. I believe there is no trump card, either in terms of an ethical system, or a moral community. For many people, their religious beliefs, ethnicity, or some other community reference point, clearly dominates their moral behavior. Nevertheless, the fragmentation of the moral life that Alasdair MacIntyre describes is real enough.⁸ At least it is clear that, even when the fragmentation does not seem as serious substantively as it does to MacIntyre (as it does *not* to the authors of *Habits of the Heart*⁹), there still seems to be the absence of a moral language comprehensive enough to be utilized by desperate communities. Nevertheless, there are moral exemplars—people whose virtuous lives inspire us. An ethical evaluation of people, caught in the quandry of trying to live a good life in the face of a seemingly unjust law brings us closer to understanding the nature of political obligation in a concrete way. I begin with Socrates, as he is the moral exemplar in the West, *par excellence*.

⁶ For a good introduction to these terms, see WILLIAM K. FRANKENA, *ETHICS* 4-6 (Elizabeth & Monroe Beardsley eds., 2d ed. 1973).

⁷ See ALASDAIR MACINTYRE, *AFTER VIRTUE* 104 (1981) (explaining thesis that “moral utterance . . . can only be understood as a series of fragmented survivals from an older past”).

⁸ *Id.*

⁹ See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 50 (1985).

I. SOCRATES: THE *CRITO*

The situation in which Socrates found himself at the opening of Plato's *Crito* is well-known and can be stated briefly. After a trial on charges of impiety and of corruption of the youth of Athens, Socrates was convicted by a jury of his peers and sentenced to death. Plato told that story in his *Apology*.¹⁰ As the *Crito* unfolds, we soon discover that Socrates' good friend, Crito, has invited him to escape his prison cell and go into exile. Crito assures Socrates that the escape can be managed easily, at little or no risk to anyone. Moreover, because the invitation has been extended before and rejected, Crito offers several arguments that he hopes will persuade Socrates to change his mind and escape.

In the course of his first extended reply to Crito, Socrates makes some points about his approach to the invitation that bear on the very nature of the philosophic enterprise that is ethics.¹¹ First of all, he says he will not consider efforts to prey upon his emotions. He needs to be clear-headed and calm. He will listen only to an argument that is based on the facts of the matter at hand, and "that seems best on reflection."¹² Second, although he invites dialogue, he will not be swayed by the opinions of others. He must follow his own conscience. Third, he says once it is determined what is the right thing or the best thing to do, he must do it. Summing up this last point Socrates obtains Crito's agreement that "the really important thing is not to live, but to live well"—that is, "to live honourably and justly."¹³

Although these three points (reason, conscience, and the primacy of the moral) seem simple enough, they are complex ideas. To be reasonable does not mean simply to be logical. For the ancients, the very idea of reason was a normative, not an instrumental idea.¹⁴ It was David Hume in the eighteenth century who turned the ancient notion on its head by declaring that "reason is . . . the slave of the passions."¹⁵ Nevertheless, we in the modern world can still make sense of an admonition to think clearly about an issue, and to act on the basis of reasonable thought, not emotion, though we are leery of the

¹⁰ PLATO, *The Apology*, in *THE LAST DAYS OF SOCRATES* 29 (Hugh Tredennick & Harold Tarrant trans., Penguin Books 1993) [hereinafter *Apology*].

¹¹ *Crito*, *supra* note 1. Although packed into a very short section of the *Crito*, these preliminary statements are of great use. See FRANKENA, *supra* note 6, at 2 (discussing Socrates' dialogue at the beginning of *Crito*). I am indebted to William Frankena for beginning the unpacking for me.

¹² *Crito*, *supra* note 1, at 80.

¹³ *Id.* at 83.

¹⁴ See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). Hart reminds us of this point.

¹⁵ 1 JOHN PLAMENATZ, *MAN AND SOCIETY* 302 (1968) (citing DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739)).

“coldly rational” as well. Again with the ancients, we think reason must take account of emotion in a serious and realistic way.¹⁶ Otherwise, we are machines and not humans. So if reason is not quite normative for us, it is surely not quite instrumental either. However understood in detail, reason is for philosophers and for all who want to do “ethics,” at least the basic coin of the realm.

Conscience, too, is not simply a synonym for naked will. Traditionally, conscience had to be “informed.” A responsible person had to make a serious investigation into the matter at hand, and address the arguments on all sides before making a judgment, before committing the self to a position in tune with the self.¹⁷ It is that individual self, however, that must decide and commit. “[H]ere I stand,” says Martin Luther, “I cannot do otherwise.”¹⁸

Finally, the moral life is the only life worth living. In fact, it is the way humans exist and flourish in the world. In Mary Midgley’s words, it is the element in which we exist, like the air we breathe.¹⁹ Nothing overrides the moral—not physical comfort, not economic gain. However conceived, it is the basic tie-breaking point in any determination of one’s action. “What shall I do?” is always, at base, a moral question.

In reflecting on the primacy of the moral, one further idea needs to be explicated. Socrates did not differentiate moral duty from moral aspiration as we moderns are wont to do.²⁰ For us, obligation is the moral minimum, beneath which, if we fall, we are subject to justifiable criticism or even punishment.²¹ If we are not subject to an obligation, we claim to be free to decide for ourselves, without further explanation. One is not blameworthy unless one has failed to fulfill

¹⁶ See MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE* 78-101 (1994) (discussing Aristotle’s view on emotion); L.A. Kosman, *Being Properly Affected: Virtues and Feeling in Aristotle Ethics*, in *ESSAYS ON ARISTOTLE’S ETHICS* 103, 103-116 (Amélie Oksenberg Rorty ed., 1980) (analyzing reactions and emotion in moral life). Aristotle is the Greek philosopher who was most articulate about the place of emotion in the moral life.

¹⁷ For a theological statement, see BERNARD HÄRING, *I THE LAW OF CHRIST* 151-54 (Edwin G. Kaiser trans., 1963). For an informed psychological and philosophical study, see SIDNEY CALLAHAN, *IN GOOD CONSCIENCE* (1991).

¹⁸ Martin Luther, *Luther’s Reply at the Diet of Worms*, in *GREAT VOICES OF THE REFORMATION* 80 (Harry Emerson Fosdick ed., 1952). There is some question whether Luther ever uttered the precise words for which he is famously known, though, of course, his identification with the idea of the primacy of conscience was vitally true about him. See ERIK H. ERIKSON, *YOUNG MAN LUTHER* 231 (1958) (noting that this credo may have arisen from legend).

¹⁹ See MARY MIDGLEY, *CAN’T WE MAKE MORAL JUDGEMENTS?* 10 (1991).

²⁰ See LON L. FULLER, *THE MORALITY OF LAW* 5 (1964). The nomenclature contrasting the morality of “duty” with the morality of “aspiration” seems to have originated with Lon Fuller. *Id.* at 5 n.2. He claims the substantive distinction, however, begins with the Greeks. *Id.* at 5.

²¹ See HART, *supra* note 14, at 180-84, for a succinct summary.

an obligation.²² Socrates did not think that way. The moral life was the pursuit of excellence in being human. Socrates surely believed his decision to be morally "best," though he may or may not have been obligated to do it. Therefore, his refusal to escape was either an act of folly, or perhaps, a supererogatory act. For Socrates, however, the moral life is the via for becoming an excellent person. This is a "perfectionistic" theory. Whatever one thinks of it as a moral theory, it at least complicates moral questions. Nevertheless, it is a complication to which we are heirs. The dichotomy between aspiration and duty is easy to state, but hard to separate in practice. For example, what is the nature of the moral issue Dorothea Brooke faces in George Eliot's *Middlemarch*? Shall she stay with her limited and neurotic husband or divorce him to be with a man she truly loves? Certainly she asked herself wherein lay her duty. She asked simultaneously: What kind of person am I? and What kind of person do I want to be?²³

In our own time, Lon Fuller showed us how blurred the line between duty and aspiration could be, when he said:

[O]ur moral vocabulary itself straddles this distinction and obscures it. Take, for example, the term "value judgment." The concept of value is congenial to a morality of aspiration. Had we chosen some other companion for it, and spoken, say, of "the perception of value," we would have had an expression thoroughly at home in a system of thought directed toward the achievement of human excellence. But instead, we coupled "value" with the term "judgment," an expression which suggests not a striving toward perfection, but a conclusion about obligations.²⁴

However we unravel the obligation/aspiration conundrum, it is clear that for Socrates the moral point of view is equated with the fully human point of view. In short, the morally appropriate thing to do overrides all other considerations. And the word Socrates used to express this position comes down to us in translation as "justice." So it is that Socrates proceeds, after a brief excursion into fundamentals, by putting the question at hand in the following way: "[W]e must consider whether or not it is just for me to try to get away without

²² Presumably it was Kant that set us on this path. See Mary Mothersill, *Duty*, in *THE ENCYCLOPEDIA OF PHILOSOPHY* 442, 444 (Paul Edwards ed., 1968) ("[I]t is not clear that anyone before Kant succeeded in holding in focus the idea of a morality which is not . . . dependent on considerations of prudence.").

²³ Such an analysis has contributed to the return to "virtue ethics" among many. See Greg Pence, *Virtue Theory*, in *A COMPANION TO ETHICS* 249, 250 (Peter Singer ed., 1993).

²⁴ FULLER, *supra* note 20, at 13.

being released by the Athenians?"²⁵ With a rhetorical swipe of the hand, he dismisses the arguments that Crito originally makes by saying:

As for the considerations you raise about expense, reputation and bringing up children, I am afraid, Crito, that these are the concerns of the ordinary public, who think nothing of putting people to death, and would bring them back to life if they could, with equal indifference to reason.²⁶

At the end of the dialogue Socrates does address these "worldly" arguments through the mouth of the Laws or the Naomi,²⁷ but for now, he is trying to wean Crito from the values of ordinary people, whose concerns are for money, success, or reputation, but not for the good of the soul. He then puts the question more precisely:

Our real task . . . is to consider one question only, the one which we raised just now: shall we be acting justly in paying money and showing gratitude to these people who are going to rescue me, and in escaping or arranging the escape ourselves, or shall we really be acting unjustly in doing all this?²⁸

In answering this question, Socrates articulates two moral principles upon which the arguments in the *Crito* largely rest. The first is one Socrates has made before, notably in the *Gorgias*.²⁹ It is this: "[I]t is never right to commit injustice or return injustice or defend one's self against injury by retaliation."³⁰ And the second is: One ought "to fulfil all one's agreements, provided that they are just."³¹ Socrates was able to get Crito to assent to both these principles in the abstract, but when Socrates asked his friend if both principles do not apply in the case at hand, forbidding Socrates to escape, Crito says, "I can't answer your question, Socrates; I am not clear in my mind."³²

At this point in the dialogue, Socrates introduces the voice of the Naomi.³³ Scholars vehemently disagree on the significance of the

²⁵ *Crito*, *supra* note 1, at 83.

²⁶ *Id.* at 83.

²⁷ *Id.* at 90-92.

²⁸ *Id.* at 83-84.

²⁹ PLATO, *GORGIAS* (W.C. Helmbold trans., Liberal Arts Press 1952).

³⁰ *Crito*, *supra* note 1, at 85.

³¹ *Id.*

³² *Id.*

³³ In most editions of Plato, Naomi is translated to mean "Laws." For reasons evident in what follows in the text, I prefer not to use the word "Laws" as a translation for Naomi. Instead I will retain the word Naomi itself. The word "Laws" immediately calls to mind a more modern conception, like "command of the sovereign," to use the best-known jurisprudential phrase. See JOHN AUSTIN, *PROVINCE OF JURISPRUDENCE DETERMINED* (David Campbell & Philip Thomas

Naomi and the force of her arguments.³⁴ Many seem to accept the voice as Socrates' own, and see the interpretive problem as one of reconciling the Socrates of the *Apology* with the Socrates of the *Crito*, who, through the voice of the Naomi, seems to argue for an absolute obligation to obey the law.³⁵ The Socrates of the *Apology*, of course, told two stories of his own determination not to do something unjust despite the seeming command of the law, or, at least, of those in authority.³⁶ He also makes a hypothetical statement, in which he says he would reject an offer of freedom at his trial if conditioned on his agreement to stop philosophizing.³⁷ Can that Socrates be squared with the one who will accept death rather than break the law? I side with the majority who believe that a reconciliation is possible. For some, however, that reconciliation is possible only because they believe the voice of the Naomi is not the voice of Socrates.

In a nuanced reading, James Boyd White suggests that the *Crito* was not centrally about the question of political obligation at all, but about Socrates' effort to soothe his friend, Crito, and quell his anxiety about the Socratic decision to accept his death. For White, the topic of "obligation to obey the law" is a sidelight to the deeper issue of the concern Socrates had for his friend, suffering as Crito was because of the impending death of his old and dear friend, Socrates.³⁸ In a recent book, Roslyn Weiss goes even further than White. She thinks of Socrates as the great dissenter, one who cares not a whit for the laws or obedience at all. Her argument is that Socrates' two moral principles, announced just before the Naomi speak, are to be applied to matters already discussed rather than to any elaboration yet to come through the Naomi.³⁹ The first principle—that one should never commit an injustice, even if one has suffered an injustice—is to be applied to acts of "paying money and showing gratitude to these people who are going to rescue me."⁴⁰ Bribery is wrong. It consists of paying someone not to do his or her official duty. Of course, the jailer's duty is a

eds., Ashgate Publ'g Co. 1998) (1832). Whatever Plato meant by use of the word Naomi, he did not have in mind the Austinian positivistic idea.

³⁴ Compare R.E. ALLEN, *SOCRATES AND LEGAL OBLIGATION* (1980), with ROSLYN WEISS, *SOCRATES DISSATISFIED* (1998).

³⁵ ANTHONY D. WOOLEY, *LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S CRITO* 3 (1979). As one prominent scholar puts it, "[S]ome have thought that it is impossible that both works should be giving an accurate account of Socrates' views on the individual's duty of obedience to law, on the ground that his position in the one flatly contradicts his position in the other." *Id.*

³⁶ *Apology*, *supra* note 10, at 56.

³⁷ *Id.* at 52-53.

³⁸ James Boyd White, *Plato's Crito: The Authority of Law and Philosophy*, in *THE GREEKS AND US* 97 (Robert B. Loudon & Paul Schollmeier eds., 1996).

³⁹ See WEISS, *supra* note 34, at 73.

⁴⁰ *Crito*, *supra* note 1, at 83.

legal one—and so, presumably, is the duty of the rescuers “not to rescue” also a legal duty. If it is a moral duty, it is one precisely because it is a legal duty. This Weiss fails to see. In any event, there is nothing internal to the dialogue that suggests Socrates was referring only to his preceding arguments, and not, at least in some significant way, to the arguments that now follow through the speeches of the Naomi.

Weiss' second point is that Socrates' principle that one should fulfill all one's agreements if they are just should be read to refer to his remarks in the *Apology* after the death sentence has been pronounced.⁴¹ In referring to his accusers, Socrates says: “When I leave this court I shall go away condemned by you to death, but they will go away convicted by Truth herself of depravity and injustice. And they accept their sentence even as I accept mine.”⁴² This is hardly an agreement, and surely not one about justice. Heavy with Socratic irony, would it not be more reasonable to interpret these lines as a refusal to accept the sentence as just, because produced by wicked people? In any event, again, we have the argument made by Weiss *but not* by Socrates in the *Crito*. Weiss assumes Socrates made his strongest arguments against escape to the middling intellect, Crito, without even alluding to their application. It may be so, but it is not very likely. Nevertheless, these examples show that critics are often puzzled by the arguments the Naomi make, convinced that Socrates could not be speaking in his own unequivocal voice when the Naomi make claims of obedience to the laws of Athens which seem so absolute. Indeed, White calls the basic arguments of the Naomi “very weak indeed.”⁴³

I do not agree. Before looking at those arguments, however, I want to take a step backward and review what Socrates actually did, both in the *Crito* and as reported by him in the *Apology*. This is to remind the reader of a good Aristotelian point. Ethics are an attempt to theorize about the good actions of a good person.⁴⁴ So what Socrates *does* is always of importance. By this statement I do not mean to minimize the arguments Socrates makes in justifying his actions, nor to divorce argument entirely from action. However, I do want to remind the reader that we often “do better than we say.”⁴⁵ Remember, Huckleberry Finn does not tell Jim's owner where Jim is even though

⁴¹ See WEISS, *supra* note 34, at 74-75.

⁴² *Crito*, *supra* note 1, at 64.

⁴³ White, *supra* note 38, at 97.

⁴⁴ ARISTOTLE, *THE NICOMACHEAN ETHICS* 65 (Terence Irwin trans., Hackett Publ'g Co. 1985) [hereinafter *NICOMACHEAN ETHICS*].

⁴⁵ This remark is a reminder to those who read case law in the common law tradition. It is clear that the decision based on the relevant facts counts as the kernel of what is the law of the case, rather than what the judge might say about his or her reasons for deciding the case the way it was decided. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2 (1949).

Huck believes what he is doing is a “sin” that will condemn him to hell.⁴⁶ Huck was a good person; but his thinking processes were not always logical.

In the *Apology*, Socrates proclaims that he “would never submit wrongly to any authority through fear of death, but would refuse at any cost—even that of my life.”⁴⁷ He makes this statement in explaining why he chose to live the “private life and leave politics alone.”⁴⁸ His first example comes from the only time he held public office. As a member of the council, he was the sole member of the executive who opposed trying together the “ten commanders who had failed to rescue the men who were lost in the naval engagement.”⁴⁹ Trying them “en bloc” was illegal, Socrates maintained, “as you all recognized later.”⁵⁰ Although he was denounced and almost arrested, he “thought that it was my duty to face it out on the side of law and justice rather than support you, through fear of prison or death, in your wrong decision.”⁵¹ This happened in the old democracy. His second example occurred when the oligarchy came to power. He was ordered “to go and fetch Leon of Salamis from his home for execution.”⁵² To Socrates this was done as a ruse, “their object being to implicate as many people as possible in their crimes.”⁵³ When others similarly summoned went to arrest Leon, Socrates went home. He maintains that he would have been sentenced to death for this refusal had the government not fallen soon afterwards.⁵⁴

On the basis of these two stories, it is easy to see why Socrates is the champion of those who prefer to die rather than perform an unjust act. On the other hand, it could be argued that these two stories also prove Socrates was preeminently a law-abiding citizen. In the first case he simply voted against doing something that “later” everyone acknowledged was “illegal.” In the second case, democrats may have believed that all the acts of the oligarchy were illegal.⁵⁵ So, arguably, Socrates would not act either unjustly or illegally in either case. Nevertheless, these stories suggest Socrates was not a law-abiding absolutist; therefore, the Socrates of the *Crito* is acting inconsistently with the Socrates of the *Apology*.⁵⁶ It is at least the case that Socrates

⁴⁶ MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* 207 (Penguin Books 1983).

⁴⁷ *Apology*, *supra* note 10, at 56.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See White, supra* note 38, at 98-99.

would defy lawful authority, which, arguably, is tantamount to disobedience to law.

The third example of the Socratic attitude toward the law comes earlier in the *Apology*, when he says he would not stop philosophizing even if it were made a condition of his acquittal.⁵⁷ Of course, it is not clear that such an offer would have been legal, even if made. Nevertheless, it does show an adamant sense of self, as one specially called by God to perform a role. I think it not far-fetched to argue that Socrates would defy a law forbidding him to teach. In older parlance, it would be said that Socrates was deeply committed to his vocation as teacher and gadfly⁵⁸ to his fellow Athenian citizens. I want to make something of this later, but before doing so, it is necessary to add the "act" of Socrates in the *Crito* to the list of acts to be considered in determining his ethical stance before the law. So far, the examples given are ambiguous, except they suggest that Socrates would not accept any authoritative order that required him to do something that he considered wrong to do, including silencing him. The situation in the *Crito* is significantly different.

Socrates had been condemned to death by a jury of his peers in a trial that was conducted in accordance with Athenian law. Imprisoned, he refused to escape, although the means were clearly at hand. Instead, he chose to accept the sentence of death, even though he thought his conviction and the sentence were unjust to him. It is this act—or refusal to act—that presents the central ethical issue. He determined he must not act contrary to the decision of the Athenian court that convicted him and sentenced him to death.

Why did Socrates refuse to escape? The critics are deeply divided on the real reasons. Writing in Plato's time, Xenophon thought Socrates was simply ready to die and chose this unorthodox judicial suicide as the handy method to do so.⁵⁹ Few agree with that extreme notion; but there have been serious scholarly efforts to explain his decision that range from capitulation to authority to paradoxical defiance. Most, however, have tried to work through the arguments given by the Naomi, assuming that they flesh out the application of the two principles Socrates announced early on in the *Crito*, as his basic reasons. Although mentioned before, I will now name them as: (1) the argument from injury; and (2) the argument from agreement. I believe they take us far in explaining Socrates' choice, but perhaps not

⁵⁷ *Crito*, *supra* note 1, at 53.

⁵⁸ See *Apology*, *supra* note 10. As Socrates says: "God has assigned me to this city, as if to a large thoroughbred horse which because of its great size is inclined to be lazy and needs the stimulation of some stinging fly." *Id.* at 54.

⁵⁹ XENOPHON, *Socrates Defense*, in CONVERSATIONS OF SOCRATES 49 (Robin Waterfield ed., Hugh Tredennick & Robin Waterfield trans., Penguin Books 1990).

all the way. After examining the arguments from injury and agreement, I will look at another category of argument, which I will call the argument from identity. I will also look at the “wordly” arguments Socrates refutes from a very practical point of view. Both lawyers and philosophers like to see what constitutes the “necessary and sufficient” conditions that will support a decision. It behooves us, however, to try to set those arguments into a real life context, where other factors, indeed, other arguments, are taken into account by the decision-maker.

A. *The Argument from Injury*

The Socratic principle, “[I]t is never right to commit injustice or return injustice or defend one’s self against injury by retaliation,”⁶⁰ is partly tautological. In short it may mean it is never right to do wrong. It is also, however, a substantive moral claim. R. E. Allen argues this substance can be understood by comparing it to two separate distinctions: (1) between injury and harm as clarified historically by their use in the common law; and (2) between retribution and rehabilitation as justifications for punishment under modern notions of the criminal law.⁶¹ Allen puts the first point this way, tracing the words etymologically under the common law:

Harm is Old English, and implies evil done or suffered. Damage derives through Norman French from Latin *damnum*, meaning any sort of hurt, harm, or loss. Injury, on the other hand, derives from *injuria*, which in turn derives from *in jus*, contrary to law or right. Thus at common law, certain harms are dismissed as *damna sine injuria*, losses which the law will refuse to shift and rather let lie where they fall.⁶²

It is for Socrates, therefore, not harm that cannot be rendered to another, but an injustice or an injury, i.e., “wrongful harm.” So far, this is just linguistic clarity. What pushes it into a substantive claim is the assertion that Socrates rejects “retribution” as a false theory of justice. The retributivist connects justice with debt. If a person does wrong, he or she owes someone something. The discharge can only take place when the debt is settled, by paying it back. This backward looking theory is replaced by a forward looking theory, which says that punishment is justified only by making the wrong-doer better, by improving the excellence of that person. Thus all action must be for the good of one’s own soul and the souls of others. The criminal act

⁶⁰ *Crito*, *supra* note 1, at 85.

⁶¹ See ALLEN, *supra* note 34, at 77-81.

⁶² *Id.* at 76-77.

is only the triggering mechanism allowing the State to adjudicate. Of course, this does not mean that a person may not be harmed (i.e., by imprisonment or even by death). A person may be so harmed, but not because the harm satisfies the debt. The harm is like medicine for the body; its aim is to cure. Clearly, Socrates believed that the purpose of punishment was to “rehabilitate” or “reform” the criminal, to increase the person’s virtue and send him or her back into the community a better citizen. Thus, transported from the criminal law analogy, the substantive claim of the Socratic principle under examination is: One ought never so act as to diminish human excellence in oneself or in another. Thus, one should never do anything that injures another, just as one should constantly be doing all he or she can to live one’s own life more virtuously. This is not quite the teaching of Jesus—love your enemies, do good to those who hate you⁶³—but it is a huge moral leap from the Greek popular moral assumption, that one should help one’s friends and harm one’s enemies.⁶⁴

Central as the “do no injury” principle is for Socrates, when it is applied in the context of the argument of the Naomi, it gathers even more power because of who the Naomi are, what they represent, and how Socrates himself is related to them. The argument initially takes the form of a powerful rhetorical question from the Naomi:

Now, Socrates, what are you proposing to do? Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?⁶⁵

On the face of it, the question could be read as arguing that breaking any law is equivalent to a wholesale assault on all the laws of the State and the State itself. In context, however, and as clarified by the third part of the question as asked, the precise equivalency is that a wholesale assault is made upon the State itself by attempting to subvert judgments judicially rendered. That is the way Allen reads the question, although others have read it more broadly, implying that the Naomi argues that all laws must be obeyed.⁶⁶ Acknowledging that later the Naomi does seem to demand that all laws are to be obeyed,

⁶³ See Luke 27:38; see also ALLEN, *supra* note 34, at 77 (discussing Socrates’ views on retribution).

⁶⁴ See MARY WHITLOCK BLUNDELL, *HELPING FRIENDS AND HARMING ENEMIES* (1989).

⁶⁵ *Crito*, *supra* note 1, at 86.

⁶⁶ ALLEN, *supra* note 34, at 86 (“The Laws of Athens, as characters in the dialogue, demand obedience to all laws.”).

Allen suggests that in a foundational sense, because the argument goes to the very destruction of the legal order, it is best to understand the claim as meaning “there is a duty *either* to obey all laws, *or* to accept the legal consequences of disobedience when imposed by a court, and even, as in Socrates’ case, to accept those consequences when there has in fact been no disobedience.”⁶⁷ Remember in the *Apology*, Socrates seems to claim that the duty to obey is not unconditional; in the *Crito*, the citizen is admonished either to do what the law determines or else persuade it that justice is on his or her side.⁶⁸ Presumably, the place to persuade is in a court of law. Moreover, Allen claims that the “fundamental duty imposed by the legal order is not blind obedience to each of its rules—some of which, after all, may be unjust—but of fidelity to the legal order itself.”⁶⁹ But Allen does argue that obedience to unjust judicial determinations is required, so why not obedience to unjust primary laws? Presumably because that may entail doing an injustice, which, for Socrates is absolutely prohibited. But if not? If to obey the primary law is merely to suffer an injustice, why would it not be similarly Socratic to obey under that circumstance? Or is one only obliged to suffer injustice when the alternative is to do an injustice? What is at issue here? Who or what exactly is it that Socrates or any citizen injures when he or she breaks a law? Or are we talking not about injury but about harm (to continue the distinction Allen makes)? For this exploration, we must examine the meaning of the personification of the Naomi in the *Crito*.

Allen argues that the personification of the laws “answers to an assumption in legal ontology.”⁷⁰ He explains in this way: “Statements about a legal order cannot be analyzed without remainder into sets of statements about individual human beings, any more than statements about that creature of law, the corporation, can be analyzed without remainder into sets of statements about its members.”⁷¹ This is to conceive the laws and the State as a juridical person. Thus, disobedience tends to the destruction of the State itself. That is a huge claim. Allen defends the claim not by suggesting that the breach of a given law may, in fact, tend to the destruction of the State; but ingeniously, by tying court judgments to authority generally, then by universalizing the argument to mean “if *this* judgment as judicially rendered is not authoritative, then *no* judgment as judicially rendered

⁶⁷ *Id.*

⁶⁸ *Crito*, *supra* note 1, at 87.

⁶⁹ ALLEN, *supra* note 34, at 86.

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 81-82.

is authoritative."⁷² It is as if a single breach of the law is equivalent to an attack on legal validity or authority, and on the legitimacy of the State itself. Maybe this is so; but what does this do to "unjust laws"? Must they also be obeyed in order to preserve the State? Possibly, though the evidence from the *Apology* is not clear. Still, the possibility is perhaps why Allen narrows the question to disobedience of a judicial determination, not to disobedience of any law. For obeying a judicial determination cannot harm one's soul nor the soul of others—clearly a Socratic concern; while obeying some unjust decree or other may cause you to commit an injustice, as arresting Leon would have been—clearly a Socratic concern as well. The result of Allen's reading is a reasonable interpretation of the text; moreover, it is completely consistent with Socratic principles. It seems, generally, to be the best reading of the *Crito*; but that is partly the case because of the way that interpretation fits into the second of the two basic Socratic principles, i.e., the principle that we must fulfill all just agreements.

B. *The Argument from Agreement*

Still to be assessed is the response to the problem of the State's injustice to Socrates, "by passing a faulty judgement at [his] trial."⁷³ The Naomi brushes that objection aside by moving to the "agreement" part of the argument. "Was there provision for this in the agreement between you and us, Socrates? Or did you undertake to abide by whatever judgements the State pronounced?"⁷⁴ This particular question ushers into western thought the complex and much discussed theory of "consent,"⁷⁵ although to take up that issue here would lead us too far afield. Rather, let us look at the agreement issue as Socrates did.

First of all, the State is a juridical person. It cannot be "analyzed without remainder into sets of statements about individual human beings."⁷⁶ It is more than the sum total of its citizens at any given time. Agreed. Nevertheless, it is at least partly those citizens as human beings who may be harmed or benefited by an individual's acts. Presumably the harm in disobedience is a weakening of the ties that bind the individuals together into a community. There are two moral points tied to this. First, one person's disobedience pulls the ship of State (if only marginally) off course. While the rest of us are heading

⁷² *Id.* at 85.

⁷³ *Critò*, *supra* note 1, at 86.

⁷⁴ *Id.*

⁷⁵ "Consent" blossomed with the classic Social Contract Theorists, Hobbes, Locke, and Rousseau. For a modern statement, see Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981).

⁷⁶ ALLEN, *supra* note 34, at 82.

in one direction, that consistent with the law, the law-breaker is working against movement in that direction. Depending on the contents of the law involved, our collective efforts are thwarted, perhaps seriously, perhaps not. Still, there is some discord, some damage in every case. The second point is seen most clearly in what has been called the duty of fair play.⁷⁷ In any cooperative scheme, one's duty is to do what others are bound to do when your turn comes. Paying taxes is the duty of all, not necessarily because it affects the amount in the coffers all that much, but because it is not fair to other taxpayers for anyone to get a "free ride." Moreover, law breaking breeds resentment on the part of those who are law-abiding. Worse, it may breed cynicism and it may breed imitation. "If they can get away with it, so can I." Still, what if the law is unjust? If it pulls citizens away from injustice, maybe breaking the law is not such a bad thing at all. It may, in fact, be the first step on the road to justice. Nevertheless, there will be resentment among those who do not see the injustice or believe disobedience is not the way to make the world more just. Fair play still has its bite here. Others may follow suit, creating chaos, rather than a more just order. So disobeying cuts both ways. Clearly if the unjust law makes you commit a wrong, then according to good Socratic principles, you must disobey; but if the law is unjust, and does *not* make you commit an injustice, perhaps you still would be justified in disobeying. However, it is clear that Socrates would not want to lead others to corrupt behavior. That would be scandal. So at the very least, Socrates might argue that it is better to "suffer an injustice" (obey an unjust law or unjust judicial determination) rather than lead others astray or create a situation where more harm than good may occur. This, in fact, was the formulation of the obligation, as worked out by Thomas Aquinas in the thirteenth century.⁷⁸ One has a duty to obey just laws because authority is necessary for both justice and good order, but no duty to obey unjust laws exists, except if scandal would thereby be given or if the action would cause great civic disturbance;⁷⁹ for it is better to suffer a wrong than to commit a wrong. Moreover, for Aquinas and for Socrates, the State can never force you to commit a moral wrong.⁸⁰

⁷⁷ H.L.A. Hart and John Rawls are credited with the formulation of this position. See H.L.A. Hart, *Are There Any Natural Rights?* 64 *PHIL. REV.* 175, 185 (1955); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (Sidney Hook ed., 1964).

⁷⁸ THOMAS AQUINAS, *TREATISE ON LAW* 95-98 (Regnery Publ'g, Inc. 1956).

⁷⁹ *Id.* at 97.

⁸⁰ *Id.* ("[L]aws may be unjust through being opposed to the Divine good . . . and laws of this kind must nowise be observed."). See also *Crito*, *supra* note 1, at 84 ("[I]n no circumstances must one do wrong.").

I believe the substance of this argument can be found in the *Crito*, although it took until the Middle Ages for a coherent theory to be developed. Nevertheless, that theory can explain the behavior of Socrates and is consistent with his accepted principles. Before explicating the Thomist theory, however, it is useful to return to the arguments of the Naomi regarding the "agreement" referred to by Socrates; for it is those arguments that scholars have historically considered, attacked, and been puzzled by. The argument from "injury" for Socrates in the *Crito* is connected inextricably to the argument from agreement. However, in order to understand the argument from agreement, it is necessary first to separate out and examine the following questions: What is the nature of the agreement that binds Socrates, and with whom was it made? Who would have been harmed by Socrates' escape? Would the harm have amounted to a wrongful injury, an injustice, and, therefore, a wrong under the Socratic principle: "[I]t is never right to commit injustice or return injustice or defend one's self against injury by retaliation"?⁸¹

In examining the nature of the agreement, the first thing to understand is that the agreement is nothing like a Social Contract, at least of the kind made famous in western thought by Hobbes, Locke, Rousseau, and Kant.⁸² Plato had Glaucon in the *Republic* mouth those kinds of arguments.⁸³ They were rejected by Socrates then; and they would be rejected by Socratic thinkers today, even in John Rawls' sophisticated neo-Kantian version.⁸⁴ This is because the premise for all Social Contract theories is at variance with the Socratic understanding of the nature of political society. Social Contractarians claim there is a pre-societal State of Nature. Individuals, qua individuals, then come together—actually or metaphorically—to agree on the formation of a formal state. The nature of the agreement differs from philosopher to philosopher, even as to who is bound by the contract and why it differs as well.⁸⁵ For Socrates, however, these details would be irrelevant. He simply would not accept the existence of individuals in a State of Nature, period. As Aquinas, following Aristotle, later put it, by nature, human beings are political and social animals.⁸⁶

⁸¹ See *Crito*, *supra* note 1, at 85.

⁸² Raz, *supra* note 75.

⁸³ PLATO, *THE REPUBLIC* 89-90 (H.D.P. Lee trans., Penguin Books 1955).

⁸⁴ See RAWLS, *supra* note 2.

⁸⁵ Famously, Hobbes claims the State is not a party, while Locke claims it is.

⁸⁶ A.P. D'Entreves, *Introduction* to AQUINAS: *SELECTED POLITICAL WRITINGS* xv (J.G. Dawson trans., Basil Blackwell 1965) (translating as "*homo naturaliter est animal politicum et sociale.*").

The key lies in understanding the difference between a political community and what we call in the modern world, a sovereign state. For Socrates, there is no such thing as an individual without a community whence he or she sprang. In Jacques Maritain's formulation, the political community or Body Politic "is the most perfect of temporal societies,"⁸⁷ and it exists necessarily and reasonably for the common good of all who comprise it. "Justice is a primary condition for the existence of the body politic," Maritain continues, "but Friendship is its very life-giving form."⁸⁸ Again, it was Aristotle who articulated both the naturalness and inevitability of "self-sufficient" political communities.⁸⁹ For Maritain, working self-consciously in the Aristotelian-Thomist tradition, the body politic is the whole of the community which nurtures each citizen, and to which the individual is bound by countless ties of gratitude and affection. The State, on the other hand, is simply a part of this political community, the part "especially concerned with the maintenance of law, the promotion of the common welfare and public order, and the administration of public affairs. The State is a part which *specializes* in the interests of the *whole*."⁹⁰ Finally, "The human person as an individual is for the body politic and the body politic is for the human person as a person. But man is by no means for the State. The State is for man."⁹¹ So the crucial idea is that Socrates owes fidelity not to the abstraction that is the State, not even to the laws passed by the State, as such, but to the political community, the whole of the assemblage of people, and the people's traditions and mores and institutions, including, of course, the State and its laws.

Thus, the first argument that the Naomi make against Socrates' hypothetical claim that he may escape because "the State is guilty of an injustice against me . . . by passing a faulty judgement at my trial"⁹² is not merely an appeal to the formal laws that enabled him to grow up well in Athens. Instead, the Naomi draw an analogy between those laws and the protection, education and nurturing of his parents—the first to whom we all owe natural duties—and argue, "compared with your mother and father and all the rest of your ancestors your country is something far more precious, more venerable, more sacred, and held in greater honor both among gods and among

⁸⁷ JACQUES MARITAIN, *MAN AND THE STATE* 10 (1951).

⁸⁸ *Id.*

⁸⁹ ARISTOTLE, *THE POLITICS* 27-28 (Betty Radice ed., T.A. Sinclair trans., Penguin Books 1962) (arguing that self-sufficiency begins as a means for securing life, but ultimately serves the ends of the State, a "perfectly natural form of association," by positioning it to secure the "good life").

⁹⁰ MARITAIN, *supra* note 87, at 12.

⁹¹ *Id.* at 13.

⁹² *Crito*, *supra* note 1, at 86.

all reasonable men.”⁹³ Although translations differ, in the much respected Tredennick-Tarrant version of the *Crito* Socrates introduces the Naomi into the dialogue in the following manner: “Suppose that while we were preparing to run away from here . . . the Laws and communal interest of Athens were to come and confront us with this question: ‘Now, Socrates, what are you proposing to do? Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well?’”⁹⁴

Although the Laws themselves are personified, they are not simply the animated formal rules of the state. They are statutes, institutions, and, importantly, the customs of the people; they are parents, relatives, and ancestors, too; and they are fellow citizens. They are, in short, the “communal interests” of the city-state that is Athens. Strictly, then, a law is only the formal rule of the city, the place where all the accumulated interconnections between and among peoples, traditions, and beliefs authoritatively come together. The agreement, in the first place, is between Socrates and the people of Athens, understood as existing over time, and as having values articulated in custom and statute and embedded in institutions and tradition. The communal interests have given Socrates so much, have contributed so much to his very identity, that, short of requiring him to damage his own soul or those of particular others, he is bound in fidelity to those countless others and myriad ties to at least not strike a blow against them by, in this case, defying the law. It would be worse than doing violence to one’s own parents. This is why the argument from agreement slides so quickly and easily in the *Crito* to what moderns have tried to make out as an independent ground of political obligation—gratitude.⁹⁵ The analogy of child to parent with citizen to state is a way of explicating the very foundation of the agreement between Socrates and the communal interests of Athens.

The above would be enough to bind Socrates as it binds all Athenians; but there is more. In addition to this communal covenant, Socrates has also implicitly agreed to be bound by the laws. Athens allows a citizen to take his property and leave whenever he likes. Socrates has not only stayed, he has expressed satisfaction with Athens by not even leaving the city temporarily, except at the State’s behest to fight in its wars, and on one other occasion—to attend a festival.⁹⁶

⁹³ *Id.* at 87.

⁹⁴ *Id.* at 86.

⁹⁵ See JOEL FEINBERG, *Civil Disobedience in the Modern World*, in FREEDOM AND FULFILLMENT 152, 161 (1992) (listing “gratitude” as one of several possible independent, though derivative, grounds upon which an obligation to obey the law may be based).

⁹⁶ *Crito*, *supra* note 1, at 89.

The most telling display of Socratic assent to remain a faithful citizen of Athens came at the trial itself, when Socrates could have proposed banishment as a penalty, but instead proclaimed that he preferred death to banishment.⁹⁷ The full power of the argument is captured by the Naomi when it says that escape will show no respect for his own earlier “profession[], and no regard for us, the Laws, whom you are trying to destroy; you are behaving like the lowest slave, trying to run away in spite of the contracts and undertakings by which you agreed to act as a member of our State.”⁹⁸

In the end Socrates is reminded that if a wrong was done to him, it was “not done by us, the Laws, but by your fellow-men.”⁹⁹ Technically speaking, Socrates had no objection to the laws of Athens. The laws were not unjust. Laws, however, are not self-executing. They must be interpreted and enforced by those who are in authority. It is sometimes possible to separate the two. When it was decided to try the ten admirals together, Socrates voted against the decision because it was contrary to “law and justice.”¹⁰⁰ Here it is possible to say the law and the decision-makers were different. In practice, however, it is not always easy to make this distinction; even if it can be made, it may make no moral difference. In the case of his escape from prison, Socrates could not simply respond to his “fellow-man” who had wronged him. He would have had to violate the law. At the end of the *Crito* it was thus perfectly correct for the Naomi to claim that the injury he would be inflicting would be on “those whom you least ought to injure—yourself, your friends, your country, and us” (the laws).¹⁰¹

C. The Argument from Identity

Naomi’s charges concerning Socrates’ personal behavior regarding consent and his refusal to suggest banishment as punishment at his trial take us into the heart of the way a person’s identity enters into any assessment of their behavior. We must now go beyond the two explicit arguments Socrates puts forth. We must now remind ourselves that the *Apology* was Socrates’ defense of the way he lived his life. The *Crito* is a continuation of that defense. These two are also dialogues of self-revelation. They are profoundly about the very identity and character of the man himself. Who was he?

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 91.

¹⁰⁰ *Apology*, *supra* note 10, at 56.

¹⁰¹ *Crito*, *supra* note 1, at 91.

Socrates was teacher, philosopher, and gadfly. These three are one thing to him. He was also husband, father, and friend; importantly, he was a citizen of Athens. It is as citizen that we see him most clearly, but he was not just an ordinary citizen. Within that role, he self-identified as one who had a special mission. How shall we understand the vocation that was uniquely Socratic? To begin with, he was sent by God to Athens to perform the task of awakening his fellow citizens from their ignorance and lethargy.¹⁰² He had been called like an Old Testament prophet to set their thoughts on the good.¹⁰³ At his trial he asks if the jury could doubt that he had "been sent to this city as a gift from God," given his neglect of his own affairs, his humiliation in "allowing my family to be neglected," and his utter poverty.¹⁰⁴ Unlike the Sophists, he takes no fee for the good advice he gives. He does not even enjoy it. He has simply been given this unique vocation by God. It makes no sense to behave as he does unless he has been given a divine mission. He believes that this is so. Moreover, from childhood he has been visited at crucial moments in his life by a daimonion, who "dissuades me from what I am proposing to do."¹⁰⁵ Although the daimonion may be thought of as the voice of conscience, Socrates himself thought this experience "supernatural." In the *Republic*, Socrates says: "Before me . . . I doubt if anyone was ever favored by a warning voice of this kind."¹⁰⁶ Surely, he himself believed it to be unique, indeed, of divine origin.

In a non-believing age, this talk of vocation and of hearing the voice of a god is apt to be translated into something non-religious or passed over completely in awkward silence. I do not do so because Socrates considered these matters inseparable from his sense of self. To have escaped from prison would have been to deny his vocation and to defy God himself.

However, I suggest that an apt comparison in today's secular world would be to one's professional identity. Roscoe Pound called a profession "a group of [persons] pursuing a learned art as a common calling in the spirit of public service."¹⁰⁷ Historically doctors, law-

¹⁰² See *Apology*, *supra* note 10, at 54 (stating that Socrates was sent as a "stinging fly" to keep Athenians from moral idleness).

¹⁰³ See ABRAHAM J. HESCHEL, *THE PROPHETS* 20-21 (1962) ("The prophet is a watchman (Hos. 9:8), a servant (Amos 3:7; Jer. 25:4; 26:5), a messenger of God (Hag. 1:13), 'an assayer and tester' of the people's ways (Jer. 6:27); 'whenever you hear a word from my mouth, you shall give them warning from Me' (Ezek. 3:17).").

¹⁰⁴ *Apology*, *supra* note 10, at 54-55.

¹⁰⁵ *Id.* at 55.

¹⁰⁶ KARL JASPERS, *SOCRATES, BUDDHA, CONFUCIUS, JESUS* 11 (Hannah Arendt ed., Ralph Manheim trans., Harcourt, Brace & World, Inc., 1957).

¹⁰⁷ ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

yers, teachers, and the clergy constituted the four great professions.¹⁰⁸ Socrates' "calling" may seem too idiosyncratic to fit that definition. Indeed, all callings seem unique to the one called, yet they often can be seen as fitting a larger pattern. A doctor's decision to stay and help during an epidemic;¹⁰⁹ the witness to a person's commitment to religious faith in the face of martyrdom;¹¹⁰ a lawyer risking all to argue on behalf of an unpopular client¹¹¹—these professional stances compare nicely with the decision of Socrates to remain who he was to the end. Moreover, these professional identities are always integral to the personality of the professional.

Even the final "worldly" arguments of the Naomi fit together consistently with the Socratic argument from identity. Earlier, in his first response to Crito's arguments, Socrates had demonstrated that the issue of "what others will think" is irrelevant to the task of pursuing the good.¹¹² Now, the Naomi quickly disposes of the other "worldly" arguments. First, harm will come to his rescuers. They risk "being banished and either losing their citizenship or having their property confiscated."¹¹³ Socrates is always concerned about the good of others. This would not be a good result. Secondly, where would he go? A well-governed state would eye him with suspicion, thinking he was a "destroyer of laws."¹¹⁴ To go to a disorderly state would not be good for his own soul, living "as the toady and slave of all the populace."¹¹⁵ Moreover, no matter where he goes, it would not be best for his children either. He counts on Athens to do well by them, and his friends will especially care for them after he is gone.¹¹⁶ Tucked into these arguments, too, is a plain fact of life: Socrates is seventy years old. There is not time to start again. It would be foolish for him to "cling so greedily to life"¹¹⁷ with not much more natural

¹⁰⁸ *Id.*

¹⁰⁹ See Matthew K. Wynla et al., *Medical Professionalism in Society*, 341 *NEW ENG. J. MED.* 1612, 1613 (1999) (arguing that heroism is a commonplace of the physician's obligation, as it, perhaps, has been since the seventeenth century). See generally Harold J. Cook, *History of Medical Ethics*, in 3 *ENCYCLOPEDIA OF BIOETHICS* 1537 (Warren Thomas Reich ed., 1995).

¹¹⁰ PETER ACKROYD, *THE LIFE OF THOMAS MORE* 400, 405 (1998) (noting that although More famously died "the King's good servant but God's first," i.e., for his faith, he also fought for his life as a consummate professional lawyer).

¹¹¹ Morris L. Ernst & Alan V. Schwartz, *The Right to Counsel and The Unpopular Cause*, 20 *U. PITT. L. REV.* 727, 728 (1959) (emphasizing the need to restore substance to the right to counsel, and discussing negative impacts that limiting the right in practice have had on clients, attorneys, and the legal system as a whole). John Adams felt the sting of public outrage when he decided to represent a British captain and his soldiers for firing on colonialists during the infamous Boston massacre. *Id.* at 728.

¹¹² *Crito*, *supra* note, 1 at 81.

¹¹³ *Id.* at 90.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 91.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 90-91.

time to go anyway. Finally, the Naomi argue that the Supreme Justice in the universe awaiting him in the “next world” would not look favorably on a man who acts so dishonorably as to escape in the circumstances in which Socrates found himself.¹¹⁸ Of course, in the *Phaedo*, Socrates elaborates on his belief that the soul is immortal,¹¹⁹ and although not altogether certain of the way it will exist in the after-life, Socrates is sure that he will receive a “kindly welcome” there.¹²⁰

In the end then, both the pragmatic and other-worldly considerations line up agreeably with the moral ones, and all enfold neatly into the Socratic identity. He was philosopher, teacher, and gadfly; he was also citizen par excellence. As the famous ending of the *Phaedo* has it, Socrates was the bravest, wisest, and most just of all men.¹²¹ Superlatives aside, since his death—and partly because of the way he died—Socrates has been one of the supreme moral exemplars in the history of western civilization.¹²² The steadfastness of his personality and his principles in obeying the law leading to his own death have had much to do with this historic assessment. Indeed, it is not superfluous to add that it would have been “scandalous” for Socrates to escape. I believe it is self-evident that we admire him because he stayed. He taught us something by his refusal to escape, by his adherence to law in the face of death. What he taught was not blind obedience to law, but how to live and die a “good” man.

D. Political Obligation: Socrates and Aquinas

To have worked through the *Apology* and the *Crito* is to see how argument and action work together in a good person’s life. Still, there is always a yearning to distill the essence of the moral activity, to establish an ethical principle or set of principles that may help others through their own moral dilemmas. That is what Aristotle did in writing the first philosophical text on ethics that we have in the West, though he reminded us, even as he began, that all we can do is to “indicate the truth roughly and in outline.”¹²³ So, in outline form, here is the Socratic Theory of political obligation. Generally, Socrates thought there was a very strong obligation to obey the law based primarily on the interrelationship between and among his three principles: injury, agreement, and identity. They do flow together. Clearly he believed violation of law injured the people of the community in

¹¹⁸ *Id.* at 91.

¹¹⁹ See PLATO, *Phaedo*, in THE LAST DAYS OF SOCRATES 93 (Hugh Tredennick & Harold Tarrant trans., Penguin Books 1993) [hereinafter *Phaedo*].

¹²⁰ *Crito*, *supra* note 1, at 91.

¹²¹ *Phaedo*, *supra* note 119, at 185.

¹²² See JASPERS, *supra* note 106, at 17-21.

¹²³ NICOMACHEAN ETHICS, *supra* note 44, at 20.

myriad ways. Law-breaking is an assault upon authority, so necessary for peace, good order, and virtue. Citizens do consent to obey the law, understood as an implied and quite natural obligation owed to others as part of a functioning community. Gratitude is also due the community, which has done so much to shape the citizen to be who he or she is. As opposed to recent concern in political and legal theory,¹²⁴ the ancients did not much worry about the ground of the obligation. That would have largely been assumed. The real question was disobedience. How could that be justified? Of course the two are interconnected. The assumption that there is a *prima facie* obligation to obey the law still provides the starting point in many discussions of political obligation.¹²⁵ Civil disobedience, for example, would be a much different idea without such an assumption. Nevertheless, recent concerns are less about the moral justification of disobedience than about the basis of the obligation to obey in the first place. It was otherwise for Socrates. The lesson of both the *Apology* and the *Crito* is straightforward; namely, there is an overriding obligation to obey the law, except in circumstances where the law would require one to commit an unjust act against another or to fail to perform an obligation one is morally bound to perform. That is the sum and substance of it.

When Aquinas came to theorize about the same subject, he incorporated much of the Socratic doctrine, but added several features. Aquinas' theory comes in that part of the *Summa Theologica*, familiarly known as his *Treatise on Law*.¹²⁶ Best known as the place to look for the most sophisticated version of natural law ever produced, the *Treatise* also treated political obligation in a sophisticated matter, but, unlike his natural law theory, Aquinas' theory of obligation to law is largely ignored today.¹²⁷ This might be because secular theorists believe it to be so tied to Thomist theology that it cannot be useful in non-theological discussions. I think that is not the case and with some changes in vocabulary, I believe the theory can be understood and applied whenever and however the issue of political obligation arises. Let me sketch the theory now without relying on theology.

First, the only ground for the obligation to obey mentioned in the *Treatise* is "authority." The most persuasive argument for the moral underpinning of "authority" as the basis for political obligation is the

¹²⁴ See DUTY TO OBEY, *supra* note 3 (collection of essays exploring the existence and basis of the obligation to obey the law).

¹²⁵ *Id.*

¹²⁶ See AQUINAS, *supra* note 78.

¹²⁷ For example, there is no mention of it in DUTY TO OBEY, *supra* note 3. Moreover, there are no selections from any neo-Thomist philosopher, such as John Finnis, either.

natural need for it.¹²⁸ In any group there is a need for coordination. This can be achieved through unanimity or authority. There is no third way.¹²⁹ This is particularly true of large groups in need of a variety of things. No matter how you conceive the full range of needs in a political group, the need for coordination is a deep-seated one. Surely this extends from the important, though mundane, matter of traffic flow and control, to the fundamental subject of protection from physical harm. Different people will have different solutions to coordination problems. So long as those in authority choose reasonable solutions, it follows that there is an obligation to abide by those choices. Thus, there is scarcely a need to argue the obligation to obey "just laws," for "just laws" are *at least* that category of reasonable solutions to coordination problems that a given moral agent will identify and defend. I am trying here to be as neutral as possible on what that word "just" may mean in a given context. The burden of this essay is to try to look at concrete situations and tease out the moral implications of choices made. In any event, Aquinas posited the moral obligation to obey "just" laws as a starting point. Socrates argued specifically that law-breaking injures the community, and one should suffer unjustly rather than injure others unjustly. However, he argued that the integrity of one's soul is so important that no authority should be able to force a person to "do wrong," no matter the circumstances. Aquinas argued similarly, although he did not put as much weight as did Socrates upon the injury to the community that may occur with every failure to obey an unjust law. Therefore, the Thomist formulation goes like this: There is an obligation to obey just laws, but no obligation to obey unjust laws, except for the sake of avoiding scandal or causing a civic disturbance. Both of these exceptions can be enfolded into the Socratic position that it is better to suffer an injustice than to harm others unjustly. Scandal means that an innocent person is led to do something wrong. The charge to avoid causing a civic disturbance is a shorthand way of discouraging riots or other

¹²⁸ The issue is discussed frequently in DUTY TO OBEY, *supra* note 3. See, e.g., Kent Greenawalt, *Legitimate Authority and the Duty to Obey*, in DUTY TO OBEY, *supra* note 3, at 177, 179 (stating that life would be impossible without government); Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, in DUTY TO OBEY, *supra* note 3, at 319, 321 (listing the natural duty of justice among the principles of political authority); Rolf Sartorius, *Political Authority and Political Obligation*, in DUTY TO OBEY, *supra* note 3, at 143, 144-49 (analogizing political authority to parental authority); Philip Soper, *Legal Theory and the Claim of Authority*, in DUTY TO OBEY, *supra* note 3, at 213, 213 ("[T]here is a necessary connection between law and morality.").

¹²⁹ See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 232 (H.L.A. Hart ed., 1988) ("There must be either unanimity, or authority. There are no other possibilities."). I take much of what follows from Finnis, the foremost neo-Thomist legal and political philosopher of our time.

disorderly exhibitions, where people may be physically injured or placed in fear of injury.

Finally, for Aquinas there is an absolute obligation to disobey any law that would force one to do something that is forbidden by "divine law."¹³⁰ Here is a place where the Thomist vocabulary must yield, although the impulse and meaning is not different from the Socratic position. Aquinas simply means you must disobey if the law requires you "to do wrong." Aquinas understands the duty to disobey in a religious as opposed to a secular way. Now, I am not denying that the particulars of what it means to do wrong may differ from the religious to the secular, but they may also differ from religion to religion and secular to secular, depending upon the conscience and the reasoning of the individual citizen.¹³¹ The theory does not depend upon the concrete answer given to a particular question concerning the justice or injustice of a given law, or the injury involved in that law. Conscience is the reason why. It is the basis of the moral life. The prime value of civil disobedience as a method of law-breaking rests upon the idea that different people may and often do come to different moral conclusions regarding these matters. Civil disobedience, however, is a larger subject, one discussed later in this essay.¹³² Before doing that, let us turn to an important precursor of the modern theory of civil disobedience, examining as we go the application of the Thomist theory just described, and never forgetting the Socratic exemplar.

II. ANTIGONE

On the surface, no two people seem more dissimilar than the Socrates of Plato's *Crito* and the heroine of Sophocles' masterpiece, *Antigone*. The contrast is striking. On the one hand there is the calm and reflective old man, quietly defending the position that requires him not to escape his imprisonment, to obey the law, to drink the hemlock, and finally die. On the other, there is the fiery young woman, full of defiance, deliberately and openly breaking the law, willing to accept death as a result. What binds them together as clas-

¹³⁰ AQUINAS, *supra* note 78, at 97.

¹³¹ This is simply another way of stating the old law school maxim, "reasonable minds may differ." Within the Thomist tradition, there has been a decided difference of opinion about some of Aquinas' ideas between, for example, Finnis and philosopher Russell Hittinger. See RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* 49 (1987) (discussing weaknesses in Finnis' position on natural law). In fact, there are wide-ranging differences between several modern authors working in the neo-Thomist tradition. See, e.g., ANTHONY J. LISSKA, *AQUINAS'S THEORY OF NATURAL LAW* 27-43 (1996) (discussing the views of Maritain, Simon, Golding, Veatch, Finnis, and Adler).

¹³² See discussion *infra*. Parts III.A-B and notes 217-316 (discussing the theories and practices of civil disobedience used by Henry David Thoreau and Martin Luther King, Jr.).

sic examples of moral heroism? And make no mistake about it, they are the great moral exemplars of antiquity. Socrates is not just the father of philosophy. He is the model of impeccable moral behavior.¹³³ And Antigone? Her popularity throughout the centuries has been immense. She and Creon are Hegel's sub-text in his *Phenomenology of Spirit*. George Steiner says that there is no other literary work that engaged philosophers and poets of the eighteenth and nineteenth centuries like *Antigone*.¹³⁴ Peter Levi sums up the general attitude of many when he states: "If there was one supreme hour in the fifth century B.C., perhaps it was that of the *Antigone* of Sophocles, which was composed while the Parthenon was being built."¹³⁵ Of course, much of the reason for this kind of high praise is due to the masterful artistic achievement of Sophocles. Nevertheless, it is the conflict between State and conscience that has kept *Antigone* alive for many peoples and groups throughout the ages,¹³⁶ even in unsuspected places. Theodore Ziolkowski reports that Sophocles' "*Antigone* was performed some 150 times in Nazi Germany in sixteen different productions between 1939 and 1944."¹³⁷ As we shall see, Jean Anouilh produced his "modernized" version of the play in Paris in 1944. Moreover, Anouilh's *Antigone* was "tolerated by the Nazis, despite a heroine who clearly was meant to represent the French resistance, because the figure of Creon just as clearly exemplified the tragic dilemma of the German occupation authorities."¹³⁸

But to return to the question: What binds Socrates and Antigone together as moral exemplars? Despite their differences in age, sex, style, temperament, and circumstances, they both adhere to the principle that no person, nor any law, may obligate them to commit an immoral act, or what is the same thing, to prevent them from doing what is right. Socrates walked away when ordered to arrest Leon of Salamis, for he would not do wrong. He drank the hemlock because he only had to suffer a wrong; he did not have to do wrong by his obedience. Antigone had to disobey Creon's decree, or else fail in her moral duty to bury her brother. We have already analyzed the Socratic decision. It is time to turn to Antigone's defiant choice.

¹³³ See JASPERS, *supra* note 106, at 17-22 (discussing the various perceptions of Socrates).

¹³⁴ THEODORE ZIOLKOWSKI, *THE MIRROR OF JUSTICE* 144-45 (1997).

¹³⁵ Peter Levi, *Greek Drama*, in *THE OXFORD HISTORY OF THE CLASSICAL WORLD* 156 (John Boardman et al. eds., 1986).

¹³⁶ ZIOLKOWSKI, *supra* note 134, at 145 ("The preoccupation with Sophocles' drama has continued unabated into the late twentieth century, wherein it has become par excellence exemplary for the resistance to tyranny.")

¹³⁷ *Id.* at 145.

¹³⁸ *Id.*

A. Sophocles' Antigone

Sophocles' play itself is wonderful in so many ways, but its economy is breathtaking. It opens with Antigone's announcement to her sister, Ismene, of a "new decree of our King Creon."¹³⁹ She alludes to their present situation, which would be well-known to an Athenian audience. Their father, King Oedipus, unknowingly killed his own father and married his mother. The two sisters, together with their two brothers, Eteocles and Polyneices, are the offspring of that incestuous union. All manner of evil has been visited upon the family and their homeland, Thebes, because of Oedipus' offense. Finally, Polyneices made war on the city, where his brother ruled, because Eteocles would not relinquish power to Polyneices as agreed upon. Each brother slew the other in combat. Thebes was successfully defended and the children's maternal uncle, Creon, came to rule as a result of the death of the two brothers. Creon immediately decreed that the body of Polyneices would not be buried because he was a traitor. Anyone who tried to bury him would suffer "[s]toning to death in the public square."¹⁴⁰ All the background is stated briefly, and the following colloquy ensues:

ANTIGONE: Ismene, I am going to bury him. Will you come?

ISMENE: Bury him! You have just said the new law forbids it.

ANTIGONE: He is my brother. And he is your brother, too.

ISMENE: But think of the danger! Think what Creon will do!

ANTIGONE: Creon is not strong enough to stand in my way.¹⁴¹

After Ismene offers the excuse that they are "only women,"¹⁴² Antigone shows utter disdain for her sister, and offers briefly the major justification for her action, that "this crime is holy."¹⁴³ The laws

¹³⁹ SOPHOCLES, *Antigone*, in THE OEDIPUS CYCLE 183, 186 (Dudley Fitts & Robert Fitzgerald trans., 1949) [hereinafter *Antigone*].

¹⁴⁰ *Id.* at 186.

¹⁴¹ *Id.* at 187.

¹⁴² *Id.*

¹⁴³ *Id.* at 188.

of the gods must be obeyed as against mere human laws. Ismene offers one last response. Although the laws of the gods mean much to her, she has “no strength [t]o break laws that were made for the public good.”¹⁴⁴ The sisters part with Antigone defiant and angry that Ismene will not help. A resigned Ismene says: “Go then, if you feel that you must. You are unwise, [b]ut a loyal friend indeed to those who love you.”¹⁴⁵

All that is prologue, and prepares us for Creon’s arrival. Immediately he announces the principles upon which he will rule. He will do what he thinks is “best for the State,” and will condemn anyone who “sets private friendship above public welfare.”¹⁴⁶ Then he states his “command” as the new king of Thebes. Eteocles will be buried with full military honors; Polyneices is to have no burial. He goes on, “No man is to touch him or say the least prayer for him; he shall lie on the plain, unburied; and the birds and the scavenging dogs can do with him whatever they like.”¹⁴⁷ His justification is simple; “no traitor is going to be honored with the loyal man.”¹⁴⁸ He admonishes the public to “give no support to whoever breaks this law.”¹⁴⁹ The spokesperson for the public, Choragos, expresses his understanding that death will follow disobedience.

A sentry interrupts to tell Creon that someone attempted to bury Polyneices by sprinkling dust on the body. He does not know who, however. Creon is outraged. He accuses the sentry of the deed, and suggests that a bribe is at the root of the problem. Although the sentry is a buffoon in some respects, and clearly fears Creon’s arbitrary use of power, he does talk boldly to the king when the latter tells him his very voice “distresses” him. The sentry replies: “Are you sure that it is my voice, and not your conscience?” Just before leaving he continues: “How dreadful it is when the right judge judges wrong!”¹⁵⁰

Clearly Sophocles is stacking the deck. Creon is hot-headed, rigid, and fearful lest he lose control of the ship of state. His decree is ill-considered. The choral ode that follows—the famous “Ode to Man”—puts the matter in a different perspective:

When the laws are kept, how proudly his city stands!
When the laws are broken, what of his city then?¹⁵¹

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 190.

¹⁴⁶ *Id.* at 192-93.

¹⁴⁷ *Id.* at 193.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 194.

¹⁵⁰ *Id.* at 197-98.

¹⁵¹ *Id.* at 199.

It is the Naomi of the *Crito*, arguing that to break the law is to do violence against the state. However, the word “laws” is ambiguous here. Other translations capture the meaning more clearly, suggesting that it is the interweaving of law and justice that make the city great, or as Robert Fagles translates, “the laws of the land, and the justice of the gods.”¹⁵² This sets the stage for the great confrontation between Creon and Antigone. The sentry brings the woman in and she readily confesses to knowing the law and defying it. She says:

I dared.
 It was not God’s proclamation. That final Justice
 That rules the world below makes no such laws.
 Your edict, King, was strong,
 But all your strength is weakness itself against
 The immortal unrecorded laws of God.
 They are not merely now: they were, and shall be,
 Operative for ever, beyond man utterly.¹⁵³

Taking this as an attack on his manhood, and not for its meaning, Creon retorts:

This girl is guilty of a double insolence,
 Breaking the given laws and boasting of it.
 Who is the man here,
 She or I, if this crime goes unpunished?¹⁵⁴

Antigone responds:

I should have praise and honor for what I have done.
 All these men here would praise me
 Were their lips not frozen shut with fear of you.
 [Bitterly]
 Ah the good fortune of kings,
 Licensed to say and do whatever they please!¹⁵⁵

They continue to spar until Creon accuses Antigone of insulting the memory of Eteocles, the patriot. Antigone softens then:

ANTIGONE: The dead man would not say that I insult it.

¹⁵² SOPHOCLES, *Antigone*, in SOPHOCLES: THE THREE THEBAN PLAYS 55, 77 (Robert Fagles trans., 1982) [hereinafter Fagles].

¹⁵³ *Antigone*, *supra* note 139, at 203.

¹⁵⁴ *Id.* at 204.

¹⁵⁵ *Id.*

CREON: He would: for you honor a traitor as much as him.

ANTIGONE: His own brother, traitor or not, and equal in blood.

CREON: He made war on his country. Eteocles defended it.

ANTIGONE: Nevertheless, there are honors due all the dead.

CREON: But not the same for the wicked as for the just.

ANTIGONE: Ah Creon, Creon, which of us can say what the gods hold wicked?

CREON: An enemy is an enemy, even dead.

ANTIGONE: It is my nature to join in love, not hate.¹⁵⁶

Although haughty and defiant, Antigone shows a meditative and loving side as well. She loves her brother. As Mary Whitlock Blundell points out in her treatment of the ordinary morality of ancient Greece, *Helping Friends and Harming Enemies*,¹⁵⁷ Antigone is “*philia*,” meaning she has “kinship” love for him. This implies loyalty and obligation, reaching beyond affection to embrace the whole of her family.¹⁵⁸ And love for her brother and piety toward the gods sometimes demands something different from harming enemies, which would have been the normal Greek way. Blundell claims that “Antigone is the only character in Sophocles who explicitly purports to value *philia* above hatred.”¹⁵⁹ Antigone does not deny that Polyneices was wrong in attacking the city (though query what should be the moral judgment upon Eteocles, who refused to turn over the realm to his brother pursuant to their agreement to share rule on a year-only basis?). Nevertheless, whether Polyneices was right or wrong, Antigone must do the right thing, i.e., bury her brother. As Ziolkowski says, “Few of the unwritten laws of Greek antiquity match in urgency the sacred commandment to bury the dead.”¹⁶⁰ Even the anger of

¹⁵⁶ *Id.* at 205-06.

¹⁵⁷ BLUNDELL, *supra* note 64.

¹⁵⁸ *Id.* at 106-09.

¹⁵⁹ *Id.* at 106.

¹⁶⁰ ZIOLKOWSKI, *supra* note 134, at 146.

Achilles abates sufficiently for him to turn over the dead body of Hector, his bitter enemy, to Hector's father, Priam, for burial.¹⁶¹

Under Athenian law as it developed in the fifth century, although the worst of executed criminals were not officially buried, their corpses were thrown outside the city walls so that the families could bury them elsewhere.¹⁶² Within the play, the unwritten law of the gods that bodies should be buried was emphasized not only by Antigone, but by Creon's son, Haimon, and by the religious seer, Tiresias. Antigone's early statement that the people of the city supported her position is echoed by Haimon later, thus suggesting the rule to bury was also a matter of customary ancient religious law.¹⁶³ The contrast between the rightness of Antigone's actions and the wrong-headedness of Creon's is evident throughout. This is an important point because Creon has had his defenders; moreover, among those who admit Creon's tyrannous nature, there are some who think Creon had "worthy principles," but simply failed "to apply them appropriately to the case in hand."¹⁶⁴ Nevertheless, even the chorus, which seems to side with Creon until the end, early on proclaims that the best ruler is the one who honors the laws of the land *and* the justice of the gods.¹⁶⁵

This is not to deny that, from a psychological and dramatic point of view, the clash between Creon and Antigone is unworthy. Quite the contrary is true. Otherwise the play would not continue to elicit the regard it does. Still, it was Aristotle, writing a mere century after the play's first performance, who identified it philosophically as the place par excellence where one could witness the clash between human "particular" law and the law of nature or "universal law." In *On Rhetoric*, he says:

[F]or there is in nature a common principle of the just and unjust that all people in some way divine, even if they have no association or commerce with each other, for example, what Antigone in Sophocles' play seems to speak of when

¹⁶¹ See HOMER, *THE ILIAD* 587 (Robert Fitzgerald trans., Anchor Books 1975). After much anger and delay, but at the behest of the gods, Achilles says to the slain man's father: "As you wished, sir, the body of your son is now set free. He lies in state. At the first sight of Dawn you shall take charge of him yourself and see him." *Id.*

¹⁶² ZIOLKOWSKI, *supra* note 134, at 146. These problems are enduring. See Norimitsu Onishi, *Not for a Nigerian Hero the Peace of the Grave*, N.Y. TIMES, Mar. 22, 2000, at A3 (discussing the trouble a famous African writer's ninety-four year-old father has had in burying his son, a victim of political warfare).

¹⁶³ ZIOLKOWSKI, *supra* note 134, at 147.

¹⁶⁴ BLUNDELL, *supra* note 64, at 116-17.

¹⁶⁵ ZIOLKOWSKI, *supra* note 134, at 149. See also Fagles, *supra* note 152, at 77 ("When he weaves in the laws of the land, and the justice of the gods that binds his oaths together he and his city rise high.").

she says that though forbidden, it is just to bury Polyneices, since this is just by nature¹⁶⁶

He then quotes lines previously quoted:

They are not merely now; they were, and shall be, operative for ever, beyond man utterly.¹⁶⁷

Though my basic intention is to point out that, morally, Antigone acted in a manner consistent with the Thomistic theory alluded to above, and with Socratic philosophy and action, it is still useful to sketch Antigone's acts in more detail. The manner is every bit as important in the moral life as the matter.

First, it should be noted that Antigone acted openly and non-violently. When Ismene says she will keep the deed secret, Antigone declares:

Oh tell it! Tell everyone!
Think how they'll hate you when it all comes out
If they learn that you knew about it all the time.¹⁶⁸

There are mixed motives here, of course. Antigone is bating her cowardly sister, but clearly Antigone defies the law for the sake of obedience to higher law. Moreover, she either wants the world to know it, or is, at least, indifferent to publicity. This is how she is described by the sentry who observed her performing the burial rites for the second time, the first having been undone by the guards:

I have seen
A mother bird come back to a stripped nest, heard
Her crying bitterly a broken note or two
For the young ones stolen. Just so, when this girl
Found the bare corpse, and all her love's work wasted,
She wept, and cried on heaven to damn the hands
That had done this thing.
And then she brought more dust
And sprinkled wine three times for her brother's ghost.¹⁶⁹

¹⁶⁶ ARISTOTLE, ON RHETORIC 102 (George A. Kennedy trans., Oxford University Press 1991) [hereinafter ON RHETORIC].

¹⁶⁷ *Antigone*, *supra* note 139, at 203. I have used the Fitts-Fitzgerald translation previously cited at note 152 for the sake of consistency. Kennedy translates the line slightly differently in his version of Aristotle's *On Rhetoric*. See ON RHETORIC, *supra* note 166, at 103.

¹⁶⁸ *Antigone*, *supra* note 139, at 189.

¹⁶⁹ *Id.* at 202.

After this speech, she is immediately arrested, but evidences no fear, and readily admits her deed. Thus, she is simply and openly performing her obligation to bury her brother. There is nothing violent or clandestine about her acts. Accompanying violence, of course, would at least be morally troublesome. She injured no one. She created no civic disorder.

Later, in her last speeches before being entombed, she shows both the fear of oncoming death and regret that she will not ever be wife or mother. Nevertheless, she continues to proclaim that she dies because she chose to obey divine rather than human law, even if her final statement of that law seems at odds with her earlier sweeping generalizations and Tiresias' traditional understanding of it.¹⁷⁰ So discordant with the rest of the play is this final statement that critics doubt its very authenticity. Some noted translators simply leave it out of the translation as a corruption of the original text.¹⁷¹ Here are the questionable lines:

[I]f I had been the mother of children
 or if my husband died, exposed and rotting—
 I'd never have taken this ordeal upon myself,
 never defied our people's will. What law,
 you ask, do I satisfy with what I say?
 A husband dead, there might have been another.
 A child by another too, if I had lost the first.
 But mother and father both lost in the halls of Death,
 no brother could ever spring to light again.¹⁷²

This may be the last plea of a frightened girl, trying to justify herself and perhaps arouse sympathy by narrowing her statement of what the gods demand, or at least, of what she would be willing to do to satisfy the gods' demand. Her claim is that she would never have broken the law if the unburied body was that of a husband or child, rather than a father, mother or any sibling, once the parents are dead. Surely the ancient law concerning burial of the dead made no such distinctions. The gods decreed that bodies should be buried, else not be admitted to the nether world. It seems odd that her duty to husband or child would be less because they are replaceable in a given

¹⁷⁰ *Antigone*, *supra* note 139, at 228 (referring to the lack of burial for Polyneices, Tiresias says: "You have kept from the gods below the child that is theirs").

¹⁷¹ The Fitts-Fitzgerald translation leaves it out. See ZIOLKOWSKI, *supra* note 134, at 150 (citing proponents on both sides).

¹⁷² Fagles, *supra* note 152, at 105.

person's life. This personalizes the rule too much, and undercuts its basic purpose, i.e., to ready the body for its reception in the afterlife.

It is also curious that the law Antigone defies is spoken of as "our people's will" rather than the will of Creon, a man seemingly blind to or obtuse concerning the will of the citizenry. This language may reflect a belief in the communal dimension of law, whatever its origins. However, "our people's will" does seem to be a phrase Sophocles' Antigone would not use. She clearly attributes this law to Creon, as *against* the will of the people. It is one of the fundamental tensions of the play that Creon asserts his will and power to make law in a manner which violates the custom and will of Thebes.

I side with those who think the speech so inconsistent with the rest of the text of the play that I would eliminate it as inauthentic.¹⁷³ On the other hand, the moral point remains the same whether or not the speech is authentic. If not burying traitors like Polyneices was a law voted upon in good democratic fashion by the citizens of Thebes, Antigone would still be justified in disobeying it because *at least* the divine law encompassed the burial of an orphaned brother. Thus, Antigone would still have a higher obligation to perform these burial rites than to refrain because of the dictates of the law.

This higher obligation may be thought of either as a universal moral rule as opposed to a particular enacted law, as Aristotle had it, or it may be thought of as a matter of conscience, in keeping with the Socratic dictate that in the moral life, conscience is the final arbiter. Because there will be disagreement over the moral rightness of any law-defying act, it is important that arguments over the manner be assessed carefully. That is why justifications for civil disobedience focus equally on manner as well as matter. Antigone is a forerunner but not an example of civil disobedience. She simply had a higher duty to bury her brother. In terms of the play itself, it seems to me that Antigone, had she the wherewithal, could have removed the body of Polyneices and buried it in a clandestine way because the decree of Creon violated a higher law obligation or because it was starkly inconsistent with the customary law of the people of Thebes. More importantly, it would have forced her to do wrong, or at least not to do what she believed to be the right thing. As Aquinas would have it, Creon's decree is not binding because it is unjust; to disobey it would neither cause scandal (the people believe the body should be buried), nor otherwise cause a public disturbance where greater harm en-

¹⁷³ Another good reason for believing the lines to be bogus is the poetry itself, which Robert Fitzgerald says is "a series of limping verses whose sense is as discordant as their sound." *Antigone*, *supra* note 139, at 240.

sues.¹⁷⁴ Although Socrates never went as far as Aquinas when saying “unjust laws do not bind in conscience, except to avoid scandal or a greater disturbance,” the Thomist position is consistent with Socrates’ decision not to escape prison, because to do so would give “scandal,” i.e., it would teach the wrong lesson. Moreover, as with Socrates, the distinction between aspiration and obligation dissolves. Antigone believed herself under a moral obligation to bury her brother. Could that obligation be morally excused because she would have to suffer death to fulfill it? To focus the question better, is Ismene guilty of a moral fault because she had not Antigone’s courage to bury the body come what may? Maybe Antigone was not courageous but foolhardy.¹⁷⁵ Surely Ismene thought so originally, although later she changed her mind and wanted to stand with Antigone in accepting punishment for the burial, even though she had refused to help perform the act.¹⁷⁶ The point here is not to assess Ismene’s moral guilt, but to show how difficult it is in practice to separate the narrow notion of obligation from the ideal of virtue, expressed both in Socrates’ refusal to escape prison and in Antigone’s determination to obey divine law even if that meant defiance of a human law.

It should also be pointed out that, in assessing Antigone’s moral behavior, it makes no difference that Creon is portrayed as unsympathetically as he is. Although there are some who see strong leadership qualities in this king, as I have pointed out, Sophocles stacks the deck against him. He may, in fact, be a true Sophoclean tragic figure achieving wisdom through suffering,¹⁷⁷ but he is also a man of large faults, all of which contribute to the deaths of three people and to a blight upon the state he governs.¹⁷⁸ He is almost pathologically suspicious, accusing the sentry¹⁷⁹ and Tiresias¹⁸⁰ directly of bribe-taking, even though, in the latter’s case, the old blind seer had always given him sound counsel, and even helped him ascend to the throne.¹⁸¹ Creon is also hot-tempered and seems to have a deaf ear to any argu-

¹⁷⁴ For Aquinas an “unjust” law does not obligate on its own because it “seems to be no law at all.” AQUINAS, *supra* note 78, at 97. This follows from his definition of law: “[A]n ordinance of reason for the common good, made by him who has care of the community, and promulgated.” *Id.* at 10-11. Creon’s decree was not reasonable, nor directed at the common good.

¹⁷⁵ See NICOMACHEAN ETHICS, *supra* note 44, at 74 (stating the Aristotelian belief that courage is the mean between cowardice and rash behavior).

¹⁷⁶ *Antigone*, *supra* note 139, at 206-07.

¹⁷⁷ See ZIOLKOWSKI, *supra* note 134, at 152 n.23.

¹⁷⁸ Tiresias attributes the calamities falling on Thebes to Creon’s prideful conduct. See *Antigone*, *supra* note 139, at 225-26. Creon himself says at the end of the play, “I alone am guilty.” *Id.* at 237.

¹⁷⁹ *Id.* at 197.

¹⁸⁰ *Id.* at 226.

¹⁸¹ *Id.* at 227.

ment but his own. This makes him extremely egocentric or scarily obtuse. He is also a misogynist. Throughout the play, he disparages women, and assesses all weakness as womanish, even a man's.¹⁸² Ziolkowski says Creon's misogyny is "so pronounced that modern analysts might suspect an underlying feeling of sexual inadequacy."¹⁸³ At the end of the play, of course, he has grown as a character. He clearly acknowledges that "I alone am guilty,"¹⁸⁴ for the deaths of Antigone, and both Haimon, his son, and his own wife, Eurydice. Haimon committed suicide over the loss of Antigone, his bride-to-be. Eurydice did the same over the loss of her son. There is also a credible argument that Creon is himself a law-breaker. There are at least three instances that can be cited. Each involves examples of the "higher law" of the gods or of the customary law of the people, another form of higher law.¹⁸⁵ First, the decree that Polyneices may not be buried is against the will of the gods, and Thebeian custom. Second, the gods are also offended by Creon's decision to bury Antigone alive beneath the earth. Creon actually changed the penalty for her offense from stoning to burial alive because he did not want the state to be polluted by the blood.¹⁸⁶ By this he showed some nervousness over what the gods might do. For these two crimes against the gods' laws, Tiresias prophesies that "the Furies and the dark gods of Hell [a]re swift with terrible punishment for you."¹⁸⁷ Third, there is a good argument that Creon deprived his son of Haimon's marital right. Although oblique in the text, there is authority to support the proposition that custom would have had Creon allow the husband to deal with his misguided wife (or betrothed). Ismene says at one point, "Haimon, how your father wrongs you!"¹⁸⁸ And Choragos, the leader of the chorus, comes closer to claiming a legal violation, when he says to Creon: "Do you really intend to steal this girl from your son?"¹⁸⁹

So laden with faults is Creon that he risks being a stock figure. Indeed, Robert Fitzgerald suggests that if masks are used in the performance of the play, Creon should be masked as one of those "depersonalized by official position," although, "[i]f Creon is masked, we see no objection, in art or feeling, to the symbolic removal of his

¹⁸² *Id.*, at 204 ("Who is the man here, [s]he or I . . . ?"), and at 212 ("If we must lose, [l]et's lose to a man at least! Is a woman stronger than we?").

¹⁸³ ZIOLKOWSKI, *supra* note 134, at 153.

¹⁸⁴ *Antigone*, *supra* note 139, at 237.

¹⁸⁵ Customary law was basic law in ancient Greece, just as it was for so many societies until modern times. Aquinas said that "custom has the force of a law, abolishes law, and is the interpreter of law." AQUINAS, *supra* note 78, at 112.

¹⁸⁶ *Antigone*, *supra* note 139, at 218.

¹⁸⁷ *Id.* at 228.

¹⁸⁸ *Id.* at 208.

¹⁸⁹ *Id.* at 209.

mask before he returns with the dead body of his son.”¹⁹⁰ Nevertheless, even if Creon is given a more human dimension, or better arguments, the moral analysis remains the same. The issue is not the good-faith or decency of the law-maker, but the impact of the laws upon the law-breaker. In Socratic or Thomist terms, is the law forcing the citizen to do something unjust or requiring the citizen to refrain from performing his or her moral obligation?¹⁹¹ For Antigone, clearly, it was the latter situation.¹⁹²

If the focus is on the law-breaker, what result if the same set of circumstances faces a different kind of Antigone? What if she is less mature and less certain of the moral claim the burial of her brother has upon her? Is the moral analysis the same? To examine the question concretely, I turn now to look at Jean Anouilh’s 1944 re-writing of *Antigone*.

B. Anouilh’s Antigone

Although Jean Anouilh read and re-read Sophocles’ *Antigone*, and knew the play “by heart forever,”¹⁹³ when he came to write his own version, he produced something “dramatically different in form, content, and language from Sophocles’s play.”¹⁹⁴ The main characters are transformed into very different people. Creon is the world-weary bureaucrat, thrust into leadership by events, and wanting nothing more than to do his job. Of course the job, as he conceives it, requires him to be tough, cruel, and duplicitous. He does not seem power-hungry, as he does in the Sophoclean version. But he is deeply cynical. He would gladly save Antigone, whom he has always been “fond of,”¹⁹⁵ if she will just keep her mouth shut about the burial, and get on with things. He will otherwise be forced to execute her, he explains, because once the people know she is a law-breaker, he will have no choice.¹⁹⁶ Obviously, he thinks the people need to be ruled with an uncompromising iron hand. That aspect of his character, of course, is consistent with the Sophoclean version. On the subject of

¹⁹⁰ *Id.* at 243.

¹⁹¹ Socrates says: “I would never submit wrongly to any authority through fear of death, but would refuse at any cost—even that of my life.” *Apology*, *supra* note 10, at 56. Aquinas writes: “[L]aws may be unjust through being opposed to the Divine good . . . and laws of this kind must nowise be observed.” AQUINAS, *supra* note 78, at 97.

¹⁹² In this case, act and omission to act are the same, culpable. This distinction is alive in modern criminal codes, where omissions are culpable if the actor is under an obligation to perform. *See, e.g.*, MODEL PENAL CODE § 2.01(3)(b) (1962).

¹⁹³ Susan W. Tiefenbrun, *On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh*, 11 CARDOZO STUD. L. & LITERATURE 35, 43 (1999).

¹⁹⁴ *Id.*

¹⁹⁵ JEAN ANOUILH, *Antigone*, in FIVE PLAYS 1, 31 (Lewis Galantieri trans., Hill & Wang, Inc. 1958).

¹⁹⁶ *Id.*

the burial itself, however, he is not wedded to either his own decree or his own will to power. In fact, he thinks the whole idea of leaving bodies unburied is "monstrously stupid."¹⁹⁷ If it were up to him, he tells Antigone, he would bury the body for the sake of "public hygiene." He hates the smell of it. But since he has just put down a revolution, "that stench has got to fill the town for a month," so that the "featherheaded rabble" he governs are subdued and quiescent.¹⁹⁸ At the end of the play, he not only remains *unchanged* by the deaths of his son and his wife, but immediately after hearing of his queen's suicide, he saunters off to a late afternoon cabinet meeting.¹⁹⁹ Surely this is parody. Whatever else it is, it is not Sophocles' Creon.

When it comes to Antigone, the change in character is equally pronounced. Instead of a mature woman, sure of her beliefs, Anouilh gives us a flighty, immature girl, who says at her end that she does not even know what she is dying for.²⁰⁰ On the other hand, Anouilh does drop contradictory hints about her reasons and motives. For example, when Creon first asks her point blank why she disobeyed the decree and buried her brother, she says, "I owed it to him. Those who are not buried wander eternally and find no rest."²⁰¹ This is a cryptic version of the original reason given by Sophocles' Antigone, and underscored by Tiresias,²⁰² who, by the way, is noticeably absent from Anouilh's play. It is divine law for the benefit of the dead. Later, under cross-examination by Creon, she seems to admit that she does not believe in the religious notions underpinning burial of the dead, agreeing that at least the priestly "jibber-jabber" is "absurd."²⁰³ The colloquy continues:

CREON: Then why, Antigone, why? For whose sake? For the sake of them that believe in it? To raise them against me?

ANTIGONE: No.

CREON: For whom then if not for them and not for Polynices either?

¹⁹⁷ *Id.* at 34.

¹⁹⁸ *Id.* at 34-35.

¹⁹⁹ *Id.* at 52.

²⁰⁰ *Id.* at 50.

²⁰¹ *Id.* at 29.

²⁰² *Antigone*, *supra* note 139, at 228.

²⁰³ ANOUILH, *supra* note 195, at 32. Like many moderns, she may reject the "shuffling, mumbling ministrations of the priests," but not the underlying belief. The text is ambiguous—deliberately, I think.

ANTIGONE: For nobody. For myself.²⁰⁴

The idea that it is all “absurd,” and yet Antigone still chooses to do it as an act of absurdist freedom is pure mid-century French existentialist ideology. It could have been lifted straight from the pages of Camus or Sartre.²⁰⁵

The Sisyphusian theme is sounded when Creon tells Antigone how futile her act will be:

What good will it do? You know that there are other men standing guard over Polynices. And even if you did cover him over with earth again, the earth would again be removed.²⁰⁶

Antigone replies in words reminiscent of Sisyphus pushing the rock up the hill, knowing, of course, that it will roll down again.

I know all that. I know it. But that much, at least, I can do. And what a person can do, a person ought to do.²⁰⁷

Possible also, of course, is the idea that the absurd gesture will have positive consequences. When Ismene tries to stand with her sister and tells her, in Creon’s presence, that she will bury their brother that very night, Antigone breathlessly turns toward the King and says:

You hear that, Creon? The thing is catching! Who knows but that lots of people will catch the disease from me!²⁰⁸

However, immediately afterwards, she dares Creon once again to call the guards and begin the process of her execution. So, does she have a death wish? Remember, Xenophon thought Socrates might harbor such a wish, too. I think not. The Antigone of Anouilh’s play is very much a lover of sensuous life.²⁰⁹ There is a difference between resignation or martyrdom for moral ends, and a wish to be dead because life is unbearable. Actually the Creon of both plays seems a more likely candidate for entertaining a death-wish than either of the Antigones. The reason behind Antigone’s possible death-wish might be youthful idealism. Antigone cannot bear to live in a world where people like Creon rule, and inevitably must rule. In a bitter retort to

²⁰⁴ *Id.* at 32-33.

²⁰⁵ The classic texts are ALBERT CAMUS, *THE MYTH OF SISYPHUS* (Justin O’Brien trans., Vintage Books 1955); JEAN PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel E. Barnes trans., Washington Square Press, Inc. 1966).

²⁰⁶ ANOUILH, *supra* note 195, at 32.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 44.

²⁰⁹ *See id.* at 6-7.

Creon's suggestion that "Life is nothing more than the happiness that you get out of it,"²¹⁰ Antigone says:

What kind of happiness do you foresee for me? Paint me the picture of your happy Antigone. What are the unimportant little sins that I shall have to commit before I am allowed to sink my teeth into life and tear happiness from it? Tell me: to whom shall I have to lie? Upon whom shall I have to fawn? To whom must I sell myself? Whom do you want me to leave dying, while I turn away my eyes?²¹¹

Yet another possible explanation for Antigone's actions may be found in the text—an adolescent power play. Here is evidence of that possibility:

CREON: [*takes a step toward her*]. I want to save you, Antigone.

ANTIGONE: You are the king, and you are all-powerful. But that you cannot do.

CREON: You think not?

ANTIGONE: Neither save me nor stop me.

CREON: Prideful Antigone! Little Oedipus!

ANTIGONE: Only this can you do: have me put to death.²¹²

At one point, Creon loses his temper and actually grabs Antigone, twisting her arm to cause her physical pain. In exasperation, he says:

What fun for you, eh? To be able to spit in the face of a king who has all the power in the world; a man who has done his own killing in his day; who has killed people just as pitiable as you are—and who is still soft enough to go to all this trouble in order to keep you from being killed.²¹³

Whatever the mix of motive and reason leading to Antigone's confusion at the end of the play, it is hard not to see her willingness to die as a moral decision. Anouilh has her say: "I can say no to any-

²¹⁰ *Id.* at 41.

²¹¹ *Id.*

²¹² *Id.* at 33.

²¹³ *Id.* at 34.

thing I think vile," and "I don't have to do things that I think are wrong."²¹⁴ These are not reasons but conclusions. Still, they sound like conclusions of conscience, even if Antigone cannot articulate the reasons why her conscience tells her that it would be wrong for her not to bury her brother. I surely have known people who have lost their faith in a religious belief system and deny that "God's will" is a meaningful statement, but will keep the moral positions of that earlier faith, just feeling somehow it is the right thing to do. Ethics is an attempt to put consistent reasoning and argumentation behind moral judgments and actions. Nevertheless, I do not think it is appropriate to call actions immoral or moral simply because a person's underlying reasoning is confused or flawed or even non-existent. Remember, James Boyd White thought Socrates' arguments against escaping from prison in the *Crito* "very weak indeed."²¹⁵ Of course, T. S. Eliot puts the following words in Beckett's mouth, as the saint examines his own conscience in the face of death: "The last temptation is the greatest treason: To do the right deed for the wrong reason."²¹⁶ But Beckett's "wrong reason" was pride, a deadly sin. It was not confusion over reasons or the making of bad arguments. So long as good conscience is the moving consideration, the deed may be justifiable morally for the person who is acting. This is not to say it is justifiable ethically. And it is that tension—between moral justification and ethical justification—that leads to something like civil disobedience as an important component of any theory of political obligation.

The argument goes like this. If we say (1) that unjust laws do not obligate except to avoid scandal or disturbance, and (2) that one must always disobey a law or order commanding the individual to do wrong, then the individual is left to determine what constitutes an unjust law, and further, whether any of the exceptions apply in the case at hand. If we generally subscribe to the idea that, in public matters, a person should not be the judge in his or her own case, with myopia, prejudice, and selfishness being endemic to the human personality, then it would be helpful to have a way to appeal to the conscience or sense of justice of the wider community in connection with the commission of an illegal act. Clearly, sometimes that will be impossible. Suppose, for example, you came across a fugitive slave hiding in your barn during the ante-bellum period. To assist that fugitive to escape is the right thing to do. If ever laws were unjust, those establishing slavery and keeping slaves in bondage are prime examples. More-

²¹⁴ *Id.* at 35.

²¹⁵ White, *supra* note 38, at 97.

²¹⁶ T.S. ELIOT, *Murder in the Cathedral*, in *THE COMPLETE POEMS AND PLAYS* 173, 196 (1971).

over, to alert the authorities to the slave's whereabouts means you are, arguably, doing something wrong in and of itself—you are helping the slaveholder to continue to deprive the slave of his or her right to be free.

Now, the only way to assist the slave to escape is to do so clandestinely. Otherwise the slave may be caught and returned to the ostensible "owner." Even here, there is need for some thought and perhaps discussion, too, with other good people, lest the conscience be formed too hastily. Still, the example given seems easy enough to defend as having to be done non-publicly. It should also be easy to see why clandestine law-breaking presents such a huge moral problem both for the law-breaker as well as for the body politic. Suppose I object to the tax system. I deeply believe that a flat income tax is immoral, that only a graduated income tax passes moral muster. Although not convincing to the majority, there are plausible moral arguments supporting this position. Suppose a flat tax is passed. Am I justified in withholding my legally ordained share because I consider the law immoral? And may I do so by filing a fraudulent return? No citizen should take comfort in affirmative answers to those questions. It is precisely these kinds of biting questions that lead some to argue that no law-breaking can be justified, lest the body politic be irreparably weakened. This is the Naomi again at her insistent best. Socrates proclaimed that one should either obey or convince the citizenry that the law is unjust. That proclamation seems to demand "public" disobedience. Nevertheless, at least in the ante-bellum fugitive slave case, quiet resistance seems morally worthy. Still, the problem of one's larger obligation to the community persists. The individual may be wrong. Even if the individual is not wrong, the community may think so, and "fair play" argues for obedience or at least submission to the penalty. Antigone is the example of a case where conscience demanded disobedience, but obligations to the community led to publicity, non-violence, and a willingness to accept punishment. That takes us a long way toward civil disobedience as it has been classically understood. Let us examine that phenomenon now.

III. CIVIL DISOBEDIENCE

A. Henry David Thoreau

From 1842 to 1846, Henry David Thoreau quietly refused to pay the Massachusetts poll tax.²¹⁷ In July 1846 he was arrested for this

²¹⁷ See HENRY DAVID THOREAU, *THE VARIORUM CIVIL DISOBEDIENCE* 11-27 (1967) [hereinafter *VARIORUM*].

offense, spent one night in jail, and was released the next day because an anonymous person paid the tax for him. In January 1848, he spoke to the Concord Lyceum about this matter, publishing a version of that speech in 1849, under the title *Resistance to Civil Government*.²¹⁸ A slightly revised version, published in 1866, four years after Thoreau's death, was called *Civil Disobedience*.²¹⁹ It is the revised version that virtually every student in America reads. Gandhi read it too, and was influenced by it, attributing the coinage of the term "civil disobedience" to Thoreau.²²⁰ The rest of the world seems to have accepted the attribution. I mention this history to point out that the modern understanding of the term is different from what we can fairly attribute to Thoreau,²²¹ and that Thoreau himself had more a writerly than philosophical interest in the phrase that has since lived—particularly in America—such a rich and independent life.

The essay itself was probably most accurately titled when it was first given as a speech at the Lyceum. It was then called, *On the Relation of the Individual to the State*. In each of the versions, we find an honest man sorting out his own moral relationship with the impersonal State. Its relevance to the subject at hand is crystal clear, even as its meaning is both ambiguous and its educational value, equivocal. The essay opens and closes with remarks that can best be described as "utopian."²²² For Thoreau envisions the best government as the one "which governs not at all,"²²³ but leaves the individual alone to pursue his own way.²²⁴ In between, though he never quite forgets his utopianism, the author tries to speak "practically and as a citizen."²²⁵ Thoreau's first point is the thoroughly Socratic one that a

²¹⁸ Because this version of the essay was published during Thoreau's lifetime, and because there is no evidence that Thoreau revised it in the version published posthumously under the title, *Civil Disobedience*, the Norton Critical Edition of the essay reproduces the originally published version. See HENRY DAVID THOREAU, *WALDEN AND RESISTANCE TO CIVIL GOVERNMENT* 226-45 (William Rossi ed., W.W. Norton & Company 2d ed. 1992) (1849) [hereinafter Norton]. Other scholars not only accept the fact that Thoreau approved the later text, but also argue that the ambiguity of the word "civil" was deliberately chosen "to tease the reader." CIVIL DISOBEDIENCE: THEORY AND PRACTICE 15-26 (Hugo Adam Bedau ed., 1969) [hereinafter Bedau]. It matters little, for the two versions are nearly identical.

²¹⁹ VARIORUM, *supra* note 217, at 27.

²²⁰ See Bedau, *supra* note 218, at 16 n.4; *infra* note 317 and accompanying text.

²²¹ See RAWLS, *supra* note 2, at 363-66 (defining civil disobedience "as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government").

²²² Of course, it could be called "anarchistic" too, but that seems far-fetched. See Bedau, *supra* note 218, at 21 (stating that Thoreau's "vision is not of men ruled by no law at all . . . but of a life in which the claims of government have little significance in the day-to-day activities of the individual. Thoreau is not so much opposed to government as he is unimpressed by and uninterested in it").

²²³ VARIORUM, *supra* note 217, at 31.

²²⁴ See *id.* at 55.

²²⁵ *Id.* at 32.

person must follow his conscience, and not give it up to anyone, not even to majority rule.²²⁶ Nevertheless, the context in which the paean to conscience is sung is most un-Socratic. It amounts to an attack on the value of the State per se. He says, "Law never made men a whit more just."²²⁷ The result of "an undue respect for law"²²⁸ is the citizenry marching to war against conscience and common sense. Most serve the State with their bodies, says Thoreau, though a "very few . . . serve the State with their consciences also, and so necessarily resist it for the most part."²²⁹ Pointing to the existence of slavery and to what he considers the waging of an unjust war with Mexico, Thoreau—in moral anguish—says, "it is not too soon for honest men to rebel and revolutionize."²³⁰ He calls the argument to submit to law a mere "expediency," and would instead have "justice, cost what it may."²³¹ He does seem to mean the Union itself should dissolve, for he says, "This people must cease holding slaves, and to make war on Mexico, though it cost them their existence as a people."²³²

So far, Thoreau seems to be saying two things. First, he thinks government is, at best, a necessary evil. He thinks people accomplish things. Government just gets in the way. This is a very American impulse, seen in the early Constitutional debates to have "limited" government,²³³ and seen today in its clearest form in Ronald Reagan's ascendancy to the Presidency and his legacy not just in conservative Republican thinking, but in much of the Clinton administration's positions as well.²³⁴ Seen as a healthy suspicion of those who seek power or as a political principle embodied in such ideas as "subsidiar-

²²⁶ See *id.* at 32-33.

²²⁷ *Id.* at 33.

²²⁸ *Id.*

²²⁹ *Id.* at 34.

²³⁰ *Id.* at 35.

²³¹ *Id.*

²³² *Id.* It should be noted that Thoreau was present when the abolitionist, William Lloyd Garrison, burned the Constitution. Not only present, Thoreau was part of the program. See Norton, *supra* note 218, at 425 n.1 (noting that Thoreau read his *Slavery in Massachusetts* on the occasion). His sympathies with the rebel, John Brown, are also well-known. See also HENRY DAVID THOREAU, *The Last Days of John Brown*, in *THE PORTABLE THOREAU* 676 (Carl Bode ed., 1982) [hereinafter *PORTABLE THOREAU*].

²³³ See JAMES MACGREGOR BURNS & JACK WALTER PELTASON, *GOVERNMENT BY THE PEOPLE*, 61 (Prentice-Hall, Inc. 5th ed. 1963) ("The framers' work became part of the American creed; it stood for liberty, equality before the law, limited government . . .").

²³⁴ Gary Wills claims Reagan's legacy was to turn American suspicion of politics into contempt for all government. Gary Wills, *Reagan's Legacy; It's His Party*, N.Y. TIMES, Aug. 11, 1996, § 6, at 30, 55 ("Americans have always harbored a healthy suspicion toward politics and politicians. But something different has been growing over the last 15 years—a positive contempt for government."). I find that same "contempt" in Thoreau.

ity,²³⁵ the impulse toward limited government may be salutary. However, the tendency to distrust government can lead to utopian fantasy, or worse, practical naiveté. We are political and social animals, as the ancients taught us. We need each other. In fact, we cannot do without one another. This is true not just in the minimal sense of needing some joint protection from adversaries,²³⁶ but also in our need to have an organization coordinating the myriad activities of any group. Thoreau is symptomatic of the problem. He refuses to pay the poll tax because he considers it an “allegiance” tax, one that binds him to the state. However, he “never declined paying the highway tax,” as he viewed paying that tax as demonstrating him to be a “good neighbor.”²³⁷ But surely he did not pay money directly to his neighbors to see that the roads were built and maintained. He paid the money to the State. As was suggested before, the State is simply the mechanism whereby the body politic operates.²³⁸ And the body politic is our “neighbors.” Here is a compelling example of where the anti-State rhetoric spins out of control. The State is not the community; but the community needs to act in important ways through the mechanism of the State. If the State is destroyed, another State will be built. There is no other way. Of course, that does not mean that certain forms of government should not be overturned, or at least that some non-cooperation is not warranted. It just means we ought to understand what we are doing when we “rebel and revolutionize.” It seems to me allegiance to a State is more complicated than allegiance to governmental leaders or to their laws and policies. It always entails some allegiance to the body politic, to our “neighbors,” if you will. We damage them when we damage the State. Again, this does not mean it cannot or should not be done. It only means we ought to be aware of what we are doing, whom we are injuring, and how we are injuring them. Remember the Naomi’s final point to Socrates: If you break the law—especially one the lawbreaker does not consider unjust—you injure “yourself, your friends, your country, and us.”²³⁹

It is Thoreau’s second point that really seems to be the problem, as it was at times for Socrates, Antigone, and often for citizens of any

²³⁵ “Subsidiarity” means letting the smallest unit within a larger organization perform all tasks it is equipped to perform before pushing the problem upward to a larger unit. See FINNIS, *supra* note 129, at 146-47.

²³⁶ Justification for a “minimal state” was all Robert Nozick could do in his famous modern book. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

²³⁷ VARIORUM, *supra* note 217, at 50.

²³⁸ See ARISTOTLE, *supra* note 89, at 29 (arguing that the “state has priority over the household and over any individual among us”); MARITAIN, *supra* note 87, at 10 (“The Body Politic or the Political Society is the whole. The state is a part—the topmost part of this whole.”).

²³⁹ *Crito*, *supra* note 1, at 91.

State. The citizen believes the State's laws and policies are unjust. What should be done? Thoreau withholds the poll tax. He does so for years, and it becomes a public matter only when he is arrested, and thrown into jail for it. Is the poll tax itself unjust? Thoreau does not say so. Indeed, there is no evidence he thought so. His concern was "allegiance" to a government which allowed the holding of slaves and which was waging war on Mexico. That State was both the United States of America, and the Commonwealth of Massachusetts, the latter part of the former, but both responsible for the named injustices.

"Unjust laws exist," proclaims Thoreau, "shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?"²⁴⁰ Here, of course, is the crucial question. Thoreau's answer, abstractly, is rather Socratic:

If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth,— . . . certainly the machine will wear out. If the injustice has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.²⁴¹

The last sentence echoes Socrates, Antigone, and Aquinas: the State may not force me to do wrong. The difficulty is that I, at least, do not see the connection between this sentiment and Thoreau's action. Nor, it seems to me, does Thoreau. He says:

It is for no particular item in the tax-bill that I refuse to pay it. I simply wish to refuse allegiance to the State, to withdraw and stand aloof from it effectually. I do not care to trace the course of my dollar, if I could, till it buys a man or a musket to shoot one with—the dollar is innocent—but I am concerned to trace the effects of my allegiance.²⁴²

Unlike Socrates, who maintained a strong allegiance to the State, despite its injustices, Thoreau cannot imagine a way to distinguish

²⁴⁰ VARIORUM, *supra* note 217, at 39.

²⁴¹ *Id.* at 40.

²⁴² *Id.* at 50.

between the State's injustice, and his participation in it as a citizen. The only way he can disavow his connection with the State that condones slavery and wages an unjust war against Mexico is for him to disengage completely, to de-pledge allegiance, although he has never really pledged allegiance in the first place. In refusing to pay an earlier State assessment, one to support the Church, Thoreau had the following statement filed with the town clerk: "Know all men by these presents, that I, Henry Thoreau, do not wish to be regarded as a member of any incorporated society which I have not joined."²⁴³ By this he meant the church, of course. Tellingly, he adds, "If I had known how to name them, I should then have signed off in detail from all the societies which I never signed on to; but I did not know where to find a complete list."²⁴⁴ It is surely possible that one of those unnamed "societies" was that of the State. At least he is clear that he considers no duties to the State as his own. For example, he thinks "[a]ll voting is a sort of gaming," and its "obligation" no more than "expediency."²⁴⁵ Moreover, he finds there to be no duty to engage in any political activity, which the State provides for remedying evil laws or policies. He says, "I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to. I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad."²⁴⁶ And further, "It is not my business to be petitioning the Governor or the Legislature any more than it is theirs to petition me; and, if they should hear not my petition, what should I do then? But in this case the State has provided no way: its very Constitution is the evil."²⁴⁷ And finally, "I am not responsible for the successful working of the machinery of society."²⁴⁸

Having no duties to the State and believing the very Constitution is evil, Thoreau declares "war with the State," but he does so after his own "fashion"; moreover, he "will still make what use and get what advantage of her I can, as is usual in such cases."²⁴⁹ These sentiments exhibit very grave defects in Thoreau's theory and practice of what he calls civil disobedience. Surely there are duties each person has, if not to the State as such, at least to his or her neighbors, as members of the body politic. Thoreau's payment of the "highway tax" indicates he believed in some such obligation, but his thinking was none too clear about it. If the Constitution had a grave defect in it, it did so

²⁴³ *Id.* at 45.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 36-37.

²⁴⁶ *Id.* at 40.

²⁴⁷ *Id.* at 40-41.

²⁴⁸ *Id.* at 46-47.

²⁴⁹ *Id.* at 50.

from the beginning in which there was formed a union of states, half-free and half-slave. Does that justify a revolution against the free State of Massachusetts because it belongs to such a union? Thoreau does not even attempt to make the case. Surely slavery is a great moral evil, but on the issue of the war against Mexico, some historians have questioned whether the war amounted to "unjust aggression."²⁵⁰ Again, the case needs to be made. Even granted it could be made, is revolution justified? What means to that end are justified? Assuming some unjust laws and policies involving slavery and the Mexican War, is the withholding of taxes the appropriate response?

It can be argued that the withholding of taxes is a truly revolutionary act, one that does strike at the heart of government insofar as a citizen can do so without actually taking up arms. For Hugo Bedau, "tax resistance undercuts the possibility of any government; Hobbes did not exaggerate when he spoke of revenues as 'the sanguinification of the commonwealth.'"²⁵¹

Moreover, Gandhi thought the non-payment of taxes a last resort in non-cooperation with the State.²⁵² Unlike Thoreau, Gandhi truly was a revolutionary; he wanted British government overturned and self-rule for the Indians to prevail. I say this is unlike Thoreau, because Thoreau does not really want to "overthrow" the government, despite his high rhetoric. He just wants it to change its unjust laws and policies, though, admittedly, in his utopian moments, he wants it to eventually wither away. But consider how he talks toward the end of his essay:

I do not wish to quarrel with any man or nation. I do not wish to split hairs, to make fine distinctions, or set myself up as better than my neighbors. I seek rather, I may say, even an excuse for conforming to the laws of the land. I am but too ready to conform to them. Indeed, I have reason to suspect myself on this head; and each year, as the tax-gatherer comes round, I find myself disposed to review the acts and position of the general and State governments, and the spirit of the people, to discover a pretext for conformity.²⁵³

And later:

Seen from a lower point of view, the Constitution, with all its faults, is very good; the law and the courts are very respectable; even this State and this American government are, in

²⁵⁰ See ALLAN NEVINS & HENRY STEELE COMMAGER, *AMERICA* 199 (3d ed. 1966).

²⁵¹ Bedau, *supra* note 218, at 22.

²⁵² *Id.*

²⁵³ VARIORUM, *supra* note 217, at 51-52.

many respects, very admirable and rare things, to be thankful for, such as a great many have described them.²⁵⁴

In the end, he slips back into his idealistic, utopian mode. After giving grudging support to the Constitution, he moves away, saying that from the highest standpoint, the Constitution is not worth thinking about at all.²⁵⁵ For he envisions a State which is no State, but has dissolved into a glorious group of individual, self-reliant men. He ends his essay this way:

I please myself with imagining a State at last which can afford to be just to all men, and to treat the individual with respect as a neighbor; which even would not think it inconsistent with its own repose, if a few were to live aloof from it, not meddling with it, nor embraced by it, who fulfilled all the duties of neighbors and fellow-men. A State which bore this kind of fruit, and suffered it to drop off as fast as it ripened, would prepare the way for a still more perfect and glorious State, which also I have imagined, but not yet anywhere seen.²⁵⁶

In the end, *Civil Disobedience* is best read as a wonderful piece of "narrative art," rather than as a profound political tract. In an insightful article, Barry Wood makes this suggestion and goes on to show how the essay compares both to Dante's journey in the *Divine Comedy* and to much of Thoreau's other work, which Wood sees as moving journey-like from the real to the transcendent.²⁵⁷ As a political tract, it moves confusingly between a utopian dream of no government and a heart-felt plea for "better government." Taken as a whole, I do not read it as a call to revolution, but as the vigorous protest of a man who believes his government is deeply involved in injustices. It is the form of that protest that concerns me. Thoreau simply stopped paying one particular tax. After he was "caught" and sent to jail for a night, he went "public" with a mythic narrative polemic about the matter, emphasizing what was no doubt always his prime motive—to protest injustice and to symbolically withdraw allegiance to the State that perpetuated injustice. The protest is a mute one, however, and the symbolic disallegiance is symbolic to no one but the self, if it is not made public. Of course it was later made modestly public first by the arrest itself, then, some eighteen months later, by his speech at the

²⁵⁴ *Id.* at 52.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 55.

²⁵⁷ Barry Wood, *Thoreau's Narrative Art in "Civil Disobedience,"* in Norton, *supra* note 218, at 421-28.

Lyceum. Although Thoreau probably welcomed the arrest itself when it finally came, and as his jailer reported it made him “mad as the devil to be released”; nevertheless, Thoreau went huckleberry picking immediately afterward, and made not much mention of it until his Lyceum speech.²⁵⁸ One prominent Thoreau scholar, Carl Bode, thought the experience in jail “helped to embitter and harden Thoreau to such an extent that in the next decade he could approve of armed rebellion, of war itself. And that was what John Brown determined to wage against the United States of America.”²⁵⁹ Thoreau penned a moving tribute to Brown, and clearly saw him as a hero. This legacy of Thoreau was captured by Walt Whitman, who said what he admired most in Thoreau was his “lawlessness.”²⁶⁰ Perhaps that praise from Whitman is too harsh a condemnation from one such as myself. But what was going on? He did not pay the poll tax for four years, and made something of it only in a speech delivered eighteen months after he was arrested and jailed for non-payment. His first mention of his night in jail was an oblique one.²⁶¹ Then he published the following version in the pages on his masterpiece, *Walden*:

One afternoon, near the end of the first summer, when I went to the village to get a shoe from the cobbler's, I was seized and put into jail, because, as I have elsewhere related, I did not pay a tax to, or recognize the authority of, the state which buys and sells men, women, and children, like cattle at the door of its senate-house. I had gone down to the woods for other purposes. But, wherever a man goes, men will pursue and paw him with their dirty institutions, and, if they can, constrain him to belong to their desperate odd-fellow society. It is true, I might have resisted forcibly with more or less effect, might have run “amok” against society; but I preferred that society should run “amok” against me, it being the desperate party. However, I was released the next day, obtained my mended shoe, and returned to the woods in season to get my dinner of huckleberries on Fair-Haven Hill.²⁶²

Most telling of Thoreau's overall position is this sentence quoted above: “But, wherever a man goes, men will pursue and paw him with their dirty institutions, and, if they can, constrain him to belong

²⁵⁸ See Walter Harding, *Introduction to VARIORUM*, *supra* note 217, at 11-27.

²⁵⁹ PORTABLE THOREAU, *supra* note 232, at 692.

²⁶⁰ See Norton, *supra* note 218, at 376 n.3.

²⁶¹ The characterization was made by Barry Wood, noting a reference to the incident in Thoreau's book, *A WEEK ON THE CONCORD AND MERRIMACK RIVERS* (1849). See Wood, *supra* note 257, at 422 n.6.

²⁶² See Wood, *supra* note 257, at 422-23 (quoting HENRY DAVID THOREAU, *WALDEN* 115-16 (W.W. Norton & Co. 1992) (1854)).

to their desperate odd-fellow society.”²⁶³ This is the Thoreau who concedes no authority to the government at all, damning it as made of “dirty institutions,” and ridiculing it and membership in it as a “desperate odd-fellow society.”²⁶⁴ Presumably he will obey or disobey as he sees fit, without justification. So there is no obligation to obey even “just” laws.²⁶⁵ They can be ignored because, presumably, they emanate from “dirty institutions,” or, as he maintains in *Civil Disobedience*, because he did not recognize nor consent to state authority. Does he mean he did not consent to the authority of the government in question? Or to the poll tax as such? Or to any tax? Thoreau does not say. Thus, it is no wonder that Whitman sees him as a type of lawless man. Remember, this is not a case where the broken law itself is “unjust,” like the fugitive slave law, but a case where the government is involved in slavery and in fighting an arguably unjust war. This is not a case where the only way to break the law and reach the moral good end is clandestinely. Here, secret lawbreaking looks like, well, simply lawbreaking. As Hugo Bedau says:

[Thoreau] is at his most vexing when he remarks, for instance, “I quietly declare war with the State, after my fashion, though I will still make what use and get what advantage of her I can, as is usual in such cases.” Is this the flippant aside of one who judges the State so corrupt that there is no moral taint in gaining selfish advantage from it where and when he can? Or is it the somewhat embarrassed confession of a cheat, of one who cannot deny (but refuses to acknowledge) the indispensable benefits provided even by a government which tolerates slave-holding and sporadic outbursts of expansionist warfare? One cannot be certain.²⁶⁶

If the burdens argument from “fair play”²⁶⁷ has any bite, it is here. Thoreau wants it both ways, or, actually, he simply wants it his own way, as if he were not responsible at all for his neighbors. That seems to me to be an unethical stance, though, of course, I doubt not for one minute Thoreau’s sincerity, honesty, or his conscientious integrity. It is for people like Thoreau and those potentially influenced by such a good man that civil disobedience—in the sense lived by Martin Luther King, Jr., and written about so coherently by John Rawls and

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Bedau, *supra* note 218, at 21.

²⁶⁷ See Rawls, *supra* note 77.

others²⁶⁸—could be and should be a clarion call for better politically and morally responsible action.

B. Letter from Birmingham City Jail

Although Martin Luther King, Jr. respected Thoreau's contribution to the theory and practice of civil disobedience,²⁶⁹ it was from Mahatma Gandhi's life-long pursuit of *satyagraha*, a complex technique of social and political action, that King derived his own version of civil disobedience in America. King's version was also deeply rooted in the Christian gospels. As a young seminarian, King believed that Jesus' admonition to "turn the other cheek," and "love your enemies" was valid only in conflicts between individuals.²⁷⁰ "When racial groups and nations are in conflict," he said, "a more realistic approach is necessary."²⁷¹ Then he encountered Gandhi, and King's "skepticism concerning the power of love gradually diminished."²⁷² For Gandhi, *satyagraha* is comprised of three principles: truth, non-violence, and self-sacrifice.²⁷³ In turn, these three generate immensely complicated ideas, not easily unpacked. Joan Bondurant has summarized them, briefly, as follows:

The truth concept as it functions in the Gandhian technique of *satyagraha* has been shown to be that of relative truth. The objective standard by which truth can be judged is a human standard expressed in terms of human needs. The proper means for discovering truth in those terms cannot, then, result in human harm or frustrate rather than fulfill human needs—for in such a procedure truth would become travesty. The discovery of truth, or the resolution of conflict arising out of differences of opinion as to what is truth, must be prosecuted through non-violent action. Action based on the refusal to do harm often requires dealing with violence that may be instigated by the opponent in a conflict. Self-suffering is this further means by which relative truth is tested.²⁷⁴

To the three fundamentals of *satyagraha* may be added certain corollary elements. Truth in *satyagraha* leads to an ethical humanism. It follows that *ahimsa* (non-violence), which includes the con-

²⁶⁸ See also Bedau, *supra* note 218 (collected essays).

²⁶⁹ *Id.* at 53-54.

²⁷⁰ THE QUIET BATTLE 240-91 (Mulford Q. Sibley ed. 1963).

²⁷¹ *Id.* at 290.

²⁷² *Id.* at 291.

²⁷³ JOAN V. BONDURANT, CONQUEST OF VIOLENCE 16 (1965).

²⁷⁴ *Id.* at 31.

cept of love, leads in turn to social service. Self-suffering—not for its own sake, but for demonstration of sincerity, and flowing from refusal to injure the opponent while at the same time holding to the truth—implies sacrifice and preparation for sacrifice, even to the death.

Such are the principles that infuse the concept of *satyagraha*. When these principles are applied to specific political and social action, the tools of civil disobedience—non-cooperation, non-violent strike, and constructive program—are devised.²⁷⁵

Thus, for Gandhi, civil disobedience is but one form of non-violent action, backed by *satyagraha*, a philosophy of conflict resolution that is morally and spiritually stringent. Painted against a larger background of protest against colonial rule, Gandhi's ideas and practices also have to be understood within a context that was truly revolutionary. His ultimate goal was independence from British rule in India. However, he originally fashioned *satyagraha* as a unique ethical strategy to resist racially discriminatory practices in South Africa.²⁷⁶ Thus, applications to King's efforts to obtain justice for blacks in America are sometimes fairly straightforward. Most importantly, Gandhi, like Socrates, was committed to an ethical stance that eschewed "injury" to others.²⁷⁷ What crucially separates both Gandhi and King from Socrates, as well as from Antigone and Thoreau, is that law-breaking by Gandhi and King was conceived and executed as part of a mass movement, not simply as the conscientious act of a single person. Presumably, other factors must be considered in making a moral analysis of group as opposed to individual actions. Moreover, the moral analysis of the acts of a leader of a mass movement or group adds another complication. Insofar as King and Gandhi need to be distinguished from each other, this may best be done within the context of commenting on King's great *Letter from Birmingham City Jail*.²⁷⁸ I turn to that now, but first offer a few preliminaries to set the stage.

In January 1963, King announced that he was going to Birmingham, Alabama to lead demonstrations until "Pharaoh lets God's people go."²⁷⁹ At that time the civil rights movement was stalled. An effort to desegregate public transportation in Albany, Georgia, had

²⁷⁵ *Id.*

²⁷⁶ See THE ESSENTIAL GANDHI 84-111 (Louis Fischer ed. 1962).

²⁷⁷ *Id.* at 88 (stating that "in Satyagraha, physical force is forbidden, even in the most favorable circumstances").

²⁷⁸ Martin Luther King, Jr., *Letter from Birmingham City Jail*, reprinted in Bedau, *supra* note 218, at 72-89 [hereinafter *Letter*].

²⁷⁹ STEPHEN B. OATES, LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR. 205 (1982).

met with disaster. King's personal crusade to convince President Kennedy to act boldly in the cause of civil rights was a failure. The movement needed to be re-charged. In King's own view, Birmingham was "the most thoroughly segregated city in the country."²⁸⁰ There was a constant threat of violence, with Police Commissioner "Bull" Connor promising there would be blood in the streets before Birmingham would desegregate. Connor hurled epithets at the Supreme Court after its decision in *Brown v. Board of Education*,²⁸¹ and even offered to fight the Attorney General of the United States.²⁸² Black leadership in the city had been urging King's help for some time. King particularly admired Fred Shuttlesworth, head of the local affiliate to King's Southern Christian Leadership Conference, who had been struggling to desegregate the city's public facilities, only to be harassed and jailed by Connor.²⁸³ Gangs of whites bombed the homes of blacks regularly. Birmingham was a dangerous place, a sewer of racial hatred and intolerance. King knew this, and planned carefully around this reality, while remaining in the midst of it.²⁸⁴ He believed Connor would lose his temper, and the careful plan he put together was, perhaps, aimed at provoking that temper.²⁸⁵ Nevertheless, non-violence was at the core of the effort even as he welcomed the "creative tension" that loomed ahead. However, just before the boycotts, marches, and demonstrations could be mounted, Birmingham decided to change its form of city government from a city-commission system to a mayor-council system. Bull Connor ran for mayor against several others, including a more mild-manned but still racist candidate, Albert Boutwell.²⁸⁶ King postponed plans for massive acts of civil disobedience in order not to have the election marred by rhetoric on that score. After a runoff election between Connor and Boutwell became necessary, King postponed the campaign yet again.²⁸⁷ Though Boutwell was declared the winner of the election, Connor contended that he had previously been elected to serve as Police Commissioner until 1965, resulting in rival city governments and a long court battle to come.²⁸⁸ Meanwhile, despite divisions even in the black community about whether Boutwell ought to be given a chance to change things, King proceeded to launch his non-violent

²⁸⁰ *Id.* at 202.

²⁸¹ 349 U.S. 294 (1955).

²⁸² OATES, *supra* note 279, at 204.

²⁸³ *Id.* at 201.

²⁸⁴ *Id.* at 204-05.

²⁸⁵ *Id.* at 204.

²⁸⁶ *Id.* at 207.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 208.

campaign.²⁸⁹ King believed Boutwell to be “just a dignified Bull Connor,” pointing out that as a state senator he had authored legislation thwarting the historic *Brown v. Board of Education* decision.²⁹⁰ After but a few days of marches and protests, a state-court injunction issued, forbidding King and the others from “conducting demonstrations.”²⁹¹ Earlier King had been resigned to go to jail himself in Birmingham. Now he determined to do so by violating the injunction, symbolically for a Christian, on Good Friday. Despite a lack of funds for bail money, King was as good as his word. He marched without a permit to do so, was arrested and immediately thrown into solitary confinement.²⁹² Several days later, after a phone call from President Kennedy to the Birmingham authorities had rendered his confinement more comfortable,²⁹³ King read a statement in the local paper from eight white Christian and Jewish clergymen of Alabama, which “rehearsed the standard objection to the protests (they were unwise and untimely and run in part by “outsiders”), praised the Birmingham police for their restraint, and urged local Negroes to shun the disturbances and press their case in the courts rather than the streets.”²⁹⁴ What happened next is well-expressed by one of King’s biographers, Stephen Oates:

As King read over their statement, he had an inspiration. He was going to compose a rebuttal to those clergymen in the form of an open letter, a letter such as Paul might have sent them. He sensed a historic opportunity here, a chance not only to address the moral voice of the white South, but also to produce a defense of the movement with profound symbolic import. Would not all America be stirred by a calm and reasonable disquisition on nonviolence, written by a Christian minister held in jail in the most segregated city in the country?²⁹⁵

Addressed to “My Dear Fellow Clergymen,” King began by saying he wanted to answer the charges put forth in the statement because, “I feel you are men of genuine goodwill and your criticisms are sincerely set forth.”²⁹⁶ He denied being an “outsider.” He was invited to come to Birmingham by members of a local organization tied

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 211.

²⁹² *Id.* at 213.

²⁹³ *Id.* at 214.

²⁹⁴ *Id.* at 215.

²⁹⁵ *Id.*

²⁹⁶ *Letter, supra* note 278, at 72.

to his own national organization; but most importantly, there was "injustice" in the city, and that was a threat to people everywhere, as all communities and states in the union are interrelated. He began then to articulate his position.

First King laid out the "four basic steps" in a non-violent campaign. These are both tactical and justifying, clearly Gandhian in origin.

(1) **Make a factual determination as to whether "injustices are alive."** Birmingham was the most thoroughly segregated city in the United States. It had a clear and ugly history of police brutality and unjust treatment of blacks. Injustices were rampant in the city.²⁹⁷

(2) **Negotiate.** This had been tried and resulted in agreements and promises made by local business leaders that were ultimately broken. Local political leaders "refused to engage in good faith negotiation."²⁹⁸

(3) **Engage in self-purification.** Workshops on non-violence were held to help those involved in demonstrations to "accept blows without retaliating" and "to endure the ordeals of jail."²⁹⁹

(4) **Engage in direct action.** Because of the local elections, client action was postponed "to aid in this community need."³⁰⁰ Such deference shows a sense of responsibility to mitigate disruption and harm. Nevertheless, direct action was needed if changes were ever to come about.

Carefully King explains how these four points are to be understood. Yes, it is true non-violent direct action "seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue."³⁰¹ But violent tension is eschewed. The implication is that violence would amount to a moral wrong, thereby violating the basic Socratic dictum that it is better to suffer injury than to commit any wrongful injury. King actually invokes Socrates as the exemplar of a moral gadfly who sought "to create a tension in the mind," whereby opponents could be brought to a "creative analysis and objective appraisal"³⁰² of the moral situation in which they are immersed.

To the question, "Why didn't you give the new administration time to act?," King replies that neither Mayor Boutwell nor the rest of the white leadership will change voluntarily. Invoking Reinhold Niebuhr for the proposition that "groups are more immoral than individu-

²⁹⁷ *Id.* at 73.

²⁹⁸ *Id.* at 73-74.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 75.

³⁰¹ *Id.*

³⁰² *Id.*

als," King recounts the painful experience of the civil rights movement, emphasizing that groups do not give up oppressive ways without some pressure being applied.³⁰³ Moreover, blacks have been so brutalized and humiliated that further endurance and patience cannot be expected by fair-minded people.

It is at this juncture that King tackles the central issue—that of the protestors' "willingness to break the laws." Invoking the teachings of Augustine and Aquinas, King reminds his fellow clergymen of the distinction between a just and an unjust 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."³⁰⁴

Concretely, King suggests a law inflicted upon a minority not binding on the majority is unjust, and a law inflicted upon a minority in a democracy that the minority had no part in creating because they were wrongly prevented from registering to vote, is also unjust. This is the reality in Alabama. Even so, the examples King chose have the flavor of procedural due process matters rather than more substantive flaws, however much there is an implication of the latter in the former. More crucial is King's assertion that it is not only permissible to disobey unjust laws, but that it is also permissible to disobey a just law that is being applied unjustly. He is in jail at the time of the writing of the *Letter* because he had not obtained a parade permit and had marched anyway. As he said, "[T]here is nothing wrong with an ordinance which requires a permit for a parade, but when the ordinance is used to preserve segregation and to deny citizens the First Amendment privilege of peaceful assembly and peaceful protest, then it becomes unjust."³⁰⁵ This is a new idea in justifying law-breaking, one that actually can be extended beyond the boundaries of "unjust application" by those attempting to address unjust laws or policies that cannot be violated directly. For example, Thoreau's refusal to pay the poll tax could have been a way to protest the Mexican War and the existence of lawful slavery if it had been done as King's protest had been done, in a way that simultaneously thwarts the law and yet expresses "the very highest respect for law."³⁰⁶ What characterizes that kind of law-breaking? In King's words it must be done, "*openly, lovingly . . . and with a willingness to accept the penalty.*"³⁰⁷ One might even break a just law if the object is to protest injustice and the man-

³⁰³ *Id.* at 75-77.

³⁰⁴ *Id.* at 77.

³⁰⁵ *Id.* at 79.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 78.

ner of the protest is civil, respectful, and marked by self-sacrifice and love for the community. At least this is the civilly disobedient way—the way to conduct disobedience within a tradition that simultaneously expresses respect for law.

In addition to Augustine and Aquinas, King cites Martin Buber and Paul Tillich to underscore how segregation—separation from the community—is a sin.³⁰⁸ He also invokes examples from both the Hebrew Bible and Christian scripture for examples of law defiance in obedience to higher law.³⁰⁹

King calls these acts of law-breaking “civil disobedience,” but clearly they are simply acts of resistance to law by those who would not do anything that is forbidden by God. The Hebrew Bible story to which King refers is the refusal by Shadrach, Meshack, and Abednego to obey Nebuchadnezzar’s decree to worship a golden idol.³¹⁰ Although non-specific, King’s reference to “early Christians” who were willing to die rather than submit to unjust Roman laws is similar.³¹¹ King also credits Socrates with practicing civil disobedience, but his example must be with reference to Socrates’ statement in the *Apology* that if the State agreed to free him on condition that he would cease teaching, Socrates would refuse. Perhaps this is hypothetical civil disobedience.³¹² The relevance of these examples is not that King’s scholarship was inexact, but that the law-defiance his followers practiced was not conceived of in academic terms. Following Gandhi and his own Christian tradition, King wanted to offer a moral witness in a wholly non-violent and loving way which acknowledged his moral responsibility before the law, but his responsibility to justice first. So he emphasized three characteristics of his law-breaking. It was to be performed “openly,” not secretly. It was to be “lovingly” done, showing the utmost respect for others, i.e., acting both non-violently but also in a way that minimizes harm to others. Finally, acceptance of the penalty evinces the utmost sincerity as well as fidelity to law. As the Naomi proclaimed through Socrates: “[Y]ou must either persuade your country or do whatever it orders, and patiently submit to any punishment that it imposes.”³¹³ Here is the crux of the argument for civil disobedience—persuade or submit to the

³⁰⁸ *Id.* at 77-78.

³⁰⁹ *Id.* at 79.

³¹⁰ *See id.*; *Daniel* 3:14-19.

³¹¹ Perhaps one of the stories King had in mind is that of the Christian Maximilianus, who refused to do war-service for the Roman Proconsul, Dion. *See THE QUIET BATTLE, supra* note 270, at 17.

³¹² *Apology, supra* note 10, at 53. Actually, to make the hypothetical exact, Socrates would have had to be forbidden to “philosophize,” then he would have had to deliberately defied the decree.

³¹³ *Crito, supra* note 1, at 87.

penalty. As we have seen throughout the examination of justified law-breaking, it too has Socratic roots.

Academics have taken the raw material of the civil rights experiences and have concluded that Martin Luther King, Jr., and others were practicing a unique type of law-breaking called "civil disobedience." In the 1960s and 1970s, there was a virtual cottage industry of articles and books written on the subject.³¹⁴ One of the most sophisticated efforts to give academic coherence to this new movement came from the pen of America's foremost political theorist, John Rawls.

Although Rawls seemed to want to capture the core of King's practice of civil disobedience, his theoretical stance may have circumscribed it instead—for Rawls wants to establish a "constitutional theory of civil disobedience" that (1) "defines this kind of dissent and separates it from other forms of opposition to democratic authority"; (2) "sets out the grounds of civil disobedience and the conditions under which such action is justified in a (more or less) democratic regime"; and (3) explains "the role of civil disobedience within a constitutional system."³¹⁵ King had no such objectives in mind. Because King's ideas are rooted in Gandhian *satyagraha* and King's own Christian tradition, his theory and practice is broader than Rawls' theory allows. The difference lies primarily in Rawls' determination to keep civil disobedience within the framework of his own *Theory of Justice*, even as he admits civil disobedience is not the only "form of dissent . . . justified in a democratic state."³¹⁶ Let us look closely at Rawls' theory. Firstly, echoing Hugo Bedau, Rawls defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."³¹⁷ Then he offers two glosses on the definition. First, civil disobedience "does not require that the civilly disobedient act breach the same law that is being protested."³¹⁸ This allows for marching without a permit to protest desegregation. Second, "the civilly disobedient act is indeed thought to be contrary to law . . . not simply presenting a test case for a constitutional decision."³¹⁹ In other words, the civilly disobedient person is "not prepared to desist should the courts eventually" hold the act truly illegal.³²⁰

³¹⁴ See, e.g., Bedau, *supra* note 218; THE QUIET BATTLE, *supra* note 270.

³¹⁵ RAWLS, *supra* note 2, at 363-64.

³¹⁶ *Id.* at 364 n.19.

³¹⁷ *Id.* at 364.

³¹⁸ *Id.*

³¹⁹ *Id.* at 365.

³²⁰ *Id.*

After defining civil disobedience, Rawls then offers a justification for its use. First, only serious injustices qualify as appropriate objects of civil disobedience, because the whole idea behind this kind of law-breaking is that it is "a political act addressed to the sense of justice of the community."³²¹ So it is important to be clear in making one's statement. Only "substantial and clear" injustices would qualify. Tax laws are too complicated to be clear; they need theory and speculation and "a wealth of statistical . . . information" to be understood.³²² Second, civil disobedience must be a last resort, meaning legal means to accomplish change must be exhausted or be reasonably thought fruitless.³²³ Presumably this is required because in maintaining fidelity to law, the law-breaker must demonstrate that all legal means were tried and the system failed to correct the injustice. Third, a certain restraint may be necessary if more than one group has equal cause to engage in civil disobedience. The possibility of "serious disorder" ensuing requires prudence if one is serious about wishing no harm to the community, an idea built into the term "non-violence."³²⁴

For Rawls, although there are other obligations that tie people in a community to one another, there is one principle that "is the primary basis of our political ties to a constitutional regime."³²⁵ That principle is the fundamental, natural duty of justice. "This duty requires us to support and to comply with just institutions that exist and apply to us," and is "derived from a Contractarian point of view."³²⁶ Nevertheless, it is wholly compatible with the Aristotelian-Thomist tradition. There is a natural duty placed upon us as members of political communities (the Body Politic). It is not an obligation dependent upon our consent in any way. For Aristotle, the natural duty comes from the nature of human beings: we are social/political animals that need each other to survive and to thrive. Obedience to law is one important way that necessary cooperation is achieved.

In elaborating his theory of civil disobedience, Rawls took account of much that was central to King's thought and practice. Both acknowledged that the law-breaking must be "open" or "public." Both acknowledged that the act must be non-violent and civil. This entailed accepting punishment as a demonstration of sincerity in conscientiousness. Although Rawls claimed he was justifying civil disobedience in a matter that was disentangled from defining it, he

³²¹ *Id.* at 372.

³²² *Id.* at 371-72.

³²³ *Id.* at 373.

³²⁴ *Id.* at 373-74.

³²⁵ *Id.* at 376.

³²⁶ *Id.* at 115.

clearly used justifying language in his definition.³²⁷ King made no distinction between definition and justification, obviously arguing for his non-violent campaign as an organic whole, and appealing to people of goodwill to assent to the moral propriety of his approach in challenging an unjustly segregated and cruelly discriminatory America. Still, the characteristics that Rawls pointed to as “justifying” were also part of King’s campaign that civil disobedience is only a last resort. Black Americans had been almost too patient in their acceptance of the suggestion they “wait.”³²⁸ And without pressure, nothing changed. *Brown* was on the books, but Birmingham was a terribly segregated and discriminatory city. Rawls argued that another justifying trait was that the protestor was to be morally prudent in terms of timing and tactics. Other groups might have equal cause to engage in similar civilly disobedient conduct. To be too disruptive would obscure the message and might be otherwise harmful to the larger society.³²⁹ King would not have disagreed. Twice he called off his protest campaign because of the concern that it inappropriately interfered with the civil election process. Finally, Rawls wanted civil disobedience to be conducted against clear violations of basic principles of justice because, again, the message would not be clear if the protest was made against something as complicated as alleged unjust taxation laws.³³⁰ Although King did not speak to this issue directly, there is no reason to think he would not have agreed. Clearly, the injustices he was fighting against were basic and blatant. There is only one area where a difference between King and Rawls would amount to something other than one of tone or emphasis. Rawls defines civil disobedience, in part, as a “political act,” by which he means, “an act guided and justified by political principles, that is, by principles of justice which regulate the Constitution and social institutions generally.”³³¹ Although King’s ideas are easily assimilated into “principles of justice” diffuse throughout the community, there is no question they are much more rooted in Gandhian and Christian principles and practices. Rawls clarifies his position by saying; “[i]n justifying civil disobedience one does not appeal to principles of personal

³²⁷ *Id.* at 365. For example, in discussing that part of the definition dealing with the political nature of the act, Rawls says: “In justifying civil disobedience one does not appeal to principles of personal morality . . . and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest.” *Id.*

³²⁸ *Letter, supra* note 278, at 76.

³²⁹ RAWLS, *supra* note 2, at 373-76 (describing how the right to dissent is limited when many groups share an equally sound case for civil disobedience). This is clearly a point allied to Aquinas’ position that the threat of civic disturbance requires a citizen to obey an unjust law. AQUINAS, *supra* note 78, at 97.

³³⁰ RAWLS, *supra* note 2, at 372.

³³¹ *Id.* at 365.

morality or to religious doctrine, though these may coincide with and support one's claim."³³² Rawls was trying hard to fit his theory of civil disobedience into his larger theory of justice. That larger theory is not compatible with religious discussion. Hence his dictum on the necessity for a justification that stayed clear of personal morality or religious doctrines. On the other hand, it is important to remember that Martin Luther King, Jr.'s *Letter* was addressed to fellow clergymen,³³³ even though it was meant to persuade all Americans. King decried the very idea that the questions at hand were "social issues with which the gospel [had] no real concern."³³⁴ He said instead: "I have longed to hear white ministers say, 'Follow this decree because integration is morally *right* and the Negro is your brother.'"³³⁵ For King, the moral rightness does not come from a secular notion of justice, but from a richer, deeper, broader political tradition, rooted in Socrates and Aquinas, in ancient Greece and in Christianity. Let me end by recapitulating that tradition, as I have sketched it throughout this essay.

CONCLUSION

Although the Naomi argued that there was an absolute obligation to obey the law, some ambiguity is to be found in the *Crito* by putting the argument thusly: "[Y]ou must either persuade your country or do whatever it orders, and patiently submit to any punishment that it imposes."³³⁶ And again: "[Y]ou must do whatever your city and your country commands, or else persuade it that justice is on your side; but violence against mother or father is an unholy act, and it is a far greater sin against your country."³³⁷ In the *Apology*, Socrates maintained that he would never commit an injustice against another human being regardless of the fact that the State ordered him to do so.³³⁸ Thus, we are left with two Socratic principles at the end of the day. First, breaking the law is wrong for it injures the entire community, past, present, and future by at least weakening the myriad ties that bind the Body Politic together. Second, no one should be forced to treat another unjustly, however, so disobedience is justified in those cases if the law-breaker does so openly in a true communal spirit and accepts whatever penalty the community, through the state institutions, decrees. That is the sum and substance of the Socratic doctrine. Later, Aquinas added a nuance or two that seems to me to be within

³³² *Id.*

³³³ *Letter*, *supra* note 278, at 72.

³³⁴ *Id.* at 84.

³³⁵ *Id.*

³³⁶ *Crito*, *supra* note 1, at 87.

³³⁷ *Id.* at 87-88.

³³⁸ *Apology*, *supra* note 10, at 56.

the Socratic tradition on the subject. Although Aquinas acknowledged the primacy of the common good of all over the good of the individual, he did not think that every act of law-breaking represented an act of violence against the Body Politic. For that reason, he maintained that unjust laws do not bind the conscience, except in circumstances when "scandal" might be given or where a civic disturbance might occur, "inflicting a more grievous hurt" on the community.³³⁹

All of these ideas seem compatible with the modern idea of civil disobedience. Socrates says, "persuade or obey," and the civil disobedient offers a speech act openly and non-violently, expressing sincerity by accepting the punishment decreed for his disobedience. Again, in terms of goals and methods, the civilly disobedient person will not wrongfully injure another, nor will Socrates. Aquinas adds: Obey even unjust laws, if by breaking them you give scandal or create undue disturbances. In Rawls' words, the civilly disobedient acts to maintain "fidelity to law," despite a technical breach.³⁴⁰ These are conscientious acts with political goals. Rawls says they must be first and foremost "political," but King does not think conscience need be so contained. It seems a small point within the confines of a nuanced debate over the precise definition of civil disobedience. Within the larger frame of political obligation, the disagreement wholly evaporates. Although Rawls does not much elaborate on the larger frame, he does juxtapose his remarks on civil disobedience with an elaboration of the meaning of conscientious refusal. He defines conscientious refusal as "noncompliance with a more or less direct legal injunction or administrative order."³⁴¹ He gives examples of the kind King gave in terms of religiously based "refusals," and even cites Thoreau's case, claiming that Thoreau refused to pay the poll tax "on the grounds that to do so would make him an agent of grave injustice to another."³⁴² Of course Thoreau said that, but as we have seen, a careful reading of his *Civil Disobedience* demonstrates that Thoreau's position was much more ambiguous. He wanted to protest the injustices of slavery and war-making in Mexico and said he was withdrawing his allegiance to the government. Surely it was conscientious refusal, but it does not fit the Socratic idea of refusing to perform an immoral act decreed by State authority. It also does not fit the model of Antigone, who refused to obey the state because the result would be a failure to perform a moral or religious duty. On the face of it, it looks like a protest over unjust laws, policies, and actions of the kind

³³⁹ AQUINAS, *supra* note 78, at 98.

³⁴⁰ RAWLS, *supra* note 2, at 367.

³⁴¹ *Id.* at 368.

³⁴² *Id.*

King was protesting in Birmingham. The difference is that it was not done in a clearly "open" way; it was not done in an unambiguously "loving" way. Furthermore, although Thoreau did spend his symbolic night in jail, he did not see acceptance of the penalty as part of the justification for his act, but merely as a symbolic gesture. Finally, although prompted in part by similar refusals to pay the poll tax by his friend and fellow abolitionist, Bronson Alcott, the act was not part of a mass movement.³⁴³ It was the individual protest of a highly individualistic man.

At the end of the day, even the individual act of law-breaking by an individual person must be justified on moral grounds that pay strict attention to the twin requirements that run straight through any attempt to account for the citizen's political obligation: duty to the larger community and duty to one's own conscience. The duty to the community is often manifested through law. Law-breaking, therefore, should not be lightly undertaken.

³⁴³ See Harding, *supra* note 258, at 11-13 (noting that although Thoreau was an abolitionist, he belonged to the "individualistic" not the "organizational" part of the movement).