

THE TORMENTED CONSCIENCE: APPLYING AND APPRAISING UNAUTHORIZED COERCION*

by
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Imagine, for a moment, that it is three days after the unconditional surrender of Germany. Allied occupation forces have taken complete control of all governmental activities in what had been the Third Reich. The United States Judge Advocate General Corps has assumed responsibility for the criminal justice system in the American sector and must now decide what to do with a number of cases that were pending at the time of surrender. Perhaps the thorniest case concerns one Otto Bessermann, who was arrested several days before surrender and charged with murder and treason. Bessermann had planted a bomb in a Munich cafe that killed six German officers, three enlisted men, and ten civilians. Bessermann hardly fits the popular image of the homicidal maniac. He is a high school teacher and church deacon with no history of mental or emotional illness and no indication of it now. He appears genuinely anguished but unrepentant. He claims his act was part of an underground resistance movement of which he was a member, and that what he did was an act of war which, in addition to killing German soldiers, demoralized the war effort and hastened the surrender.

“Bessermann” is, of course, fictitious. He has been created to highlight the moral dilemma of human beings who find themselves in the eponymous Bessermann’s position and of human beings who must appraise what the “Bessermanns” have done and determine whether and how to sanction them. The “Bessermanns” are members of a group or community (in this case an integrated nation-

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state) and are generally committed to the continuity of its identity, institutional arrangements, and authority system. Often, they identify intensely with an imagined past and mythic future of the community. But they disagree profoundly with a particular decision or line of decisions being taken by the group's present leadership. They feel that the decision violates some fundamental norm or myth of the group as they understand it and should be opposed. Their issue may be preservation of the environment or opposition to certain weapon systems or modes of power, generation of participation in particular wars or war in general, or the racism of organizations like the Klan. They conclude (assuming for the moment plausibly) that opposition through authorized procedures provided for within the group decision structure is or has proved futile. They contemplate resort to procedures, including coercion, which would violate their group's law.

This phenomenon is fairly specific. It might be useful to distinguish it from other forms of unauthorized coercion and the problems they raise. First, it is substantially different from that of members of a group or morality system which has collectively rejected some outside decision and has "authorized" coercion to oppose it. Colonized peoples, for example, frequently support terrorist violence against functionaries of the colonial apparatus, including even noncombatants associated with the colonizer. Those who resort to such violence are considered heroes, even, or especially, if they are apprehended and executed by the government in power. No irony is sensed by the government of South Korea, which annually celebrates as national heroes those Koreans who assassinated Japanese Prime Minister Ito and General Shirakawa and those who made an attempt on the life of the Japanese Emperor at Sakuradamon outside the Imperial palace in January 1932, but which routinely characterizes as criminals and terrorists those who resort to far less coercion in agitating against the current indigenous dictatorship. Nor does the Israeli government find irony in constantly characterizing the current Palestinian resistance as "terrorist" while upholding Mr. Begin's *Etzel* role in mandatory Palestine. Bessermann's dilemma is also different from that of an internal opponent—be it the Weathermen of the Left or the Posse Comitatus of the Right—who, though identifying with a

generic community, seeks a revolutionary change in the governmental apparatus and public order system. The latter's problem is primarily one of tactics—the rejection of the community's sociopolitical system having already been decided upon—whereas a “Bessermann” may have other moral and philosophical problems.

The dilemma that faces a “Bessermann” and those who would judge him is different, as well, when an authority system, such as international law, permits and even mandates the use of violence against what are characterized as illegitimate governments. Nor is it the same phenomenon as international terrorism which is, in fact, intergovernmental conflict conducted through unacknowledged agents operating in unconventional, if not uncommon, warfare. The focus of this paper is on the specific dilemma of a self-perceived loyal opposition, of men and women within a single authority system, who accept its legitimacy generally, and, in particular, accept the need for the institutional finality of its decisions, but reluctantly conclude that they must oppose a particular decision. This is not a unique problem and, if anything, the conditions that account for it are likely to make it even more prevalent in the future.

The dilemma in question also must be distinguished from the problem of judging antigovernmental violence in other states. Decision makers in different polities are frequently called upon in extradition cases to appraise politically motivated private violence. In response to these cases, a “political crime exception” to extradition claims was developed in the nineteenth century. When a government sought the return of a fugitive in accord with an extradition treaty, the government in which refuge had been granted reserved the right to refuse extradition if it felt the actions for which the fugitive was being sought had a “political,” rather than criminal, motivation. Such practice is, of course, an example of what Professor Hart would call a very open-textured formula.¹ The actual jurisprudence which developed in different countries indicated that some crimes, and indeed some governments, were to be treated differently than others. Nonetheless, the flow of decisions,

¹ H.L.A. HART, *THE CONCEPT OF LAW* 120, 124-32 (1961).

treated comparatively and diachronically, indicates greater tolerance and a degree of sympathy, even at the official level, for politically motivated violence against established orders, *if it is committed abroad and preferably in a state viewed as hostile*.² For the most part, the criminal law provides no comparable development with regard to domestic politically motivated violence.³ As a general matter, the officials of the state would be expected to view themselves as targets and custodians of the government being challenged and to apply the full severity of the law to those who had resorted to violence.

It is a general observation of psychoanalysis that the unconscious impulse to aggression is pervasive and irrepressible and that the only difference between those whom we consider to be civilized and law abiding and those whom we do not so characterize is that the former have learned to express their aggressiveness in ways deemed appropriate to the group in which they are acculturated. There is a popular tendency to extrapolate this insight to characterize all unconventional resort to violence as neurotic or worse. Reduced to its crudest, all those who resort to unconventional or unsanctioned violence are perceived as ill. This perception is a misapplication of the insight. The basic issue is much more complicated. It is not simply a question of synchronizing one's aggressive impulses with the authorized channels of one's culture. The problem occurs when more than one authority system or culture, each claiming the loyalty of the individual, indicates discrepant methods for discharging aggressiveness in what are deemed to be socially beneficial channels. Or, alternatively, none of the channels for the discharge of such aggressiveness—a foreign war, an increased military budget, new or continued alliances with tyrants—which are sanctioned by the groups of which the individual

² For discussion of cases in this area see C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION* (1980); Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247 (1933); Gutteridge, *The Notion of Political Offences and the Law of Extradition*, 31 BRIT. Y.B. INT'L L. 430 (1954).

³ There are exceptions to this general perception. Studies of judges in the ante-bellum period provide some picture of the agonizing of the bench over private violence against slavery. See, e.g., R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 216 (1975).

is a member strike that individual as in fact likely to conduce to the realization of common interests. Thus, the psychoanalytic insight or explanation is not an answer for either those contemplating the exercise of private judgment leading to violence or those who are called upon to appraise such action.

Unquestionably, the entire notion of violent dissent may have deep and unrecognized attractions for personalities that have not learned to express these impulses in socially acceptable ways. Since a likely outcome of these private initiatives is the purposive use of violence against others, the subjective impulses that operate in the personalities under consideration must be explored. In this respect, the psychoanalytical insight must be reconsidered when addressing the specific problem of developing a code for appraising such choices. For the moment, it is enough to note that an opponent of Nazism, such as Herr Bessermann, would hardly find his own dilemma resolved were he told that his opposition to the systematic brutality of the Third Reich was a result of an unresolved aggressive impulse and that it should be treated not at the level of political action or philosophy but at the level of personal psychoanalysis.

Bessermann's dilemma is not purely discretionary, for it contains imperative aspects. The compulsion and necessity to exercise private judgment, formerly the specific domain of only the highly sensitized conscience and of those individuals whose social and economic positions entitled them to, and prepared them for, choice, has become more generalized. One of the primary features of industrial mass society is the rise of the consumer, a role distributed more democratically than any other, and which regularly demands of individuals the exercise of private judgment in a wide range of mundane choices. Exercise of private judgment presupposes and is built upon a reorganized personality system, with sufficient definition of ego to want to make choices and, of necessity, a sufficient sense of self-worth to believe in and rely upon its own judgment. Not surprisingly, it increases the predisposition of many to choose in the political arena as well. Where a social system endorses self-interest—or licit greed—whether by economic or religious doctrine, the rightness of private judgment becomes even more compelling.

It is no great step from the initial sense of a prerogative of choice to an assumption of a *right* to appraise choices made by those in authority and, by implication, a right to reject some of those choices if they do not approximate a personal code of rectitude. Part of this is the culmination of a process of reorganization of the social order, in particular, the economic system and, perforce, the self-system, that began with the waning of the Middle Ages. The coincidence of key sects in Protestantism with industrialization and popular democracy significantly reinforced these trends. This unique acculturation synergizes with the conscious cultivation of a *civic sense*, indispensable to an industrial democracy in which the government must frequently call upon broad strata of the population to modulate their behavior in ways useful to government policy. Each such call reinforces the belief that one's personal behavior is critical to the working of one's government and more generally, concretizes the sense of the importance of personal choice to the operation of the "State." At the same time, the constant framing by those in authority of appeals in which conscience is supposed to temper one's self-interest reinforces the individual code of rectitude or morality to which such appeals are ultimately made. Fanon's lapidary and frequently cited characterization of people as spectators of their own destiny, "crushed by their inessentiality" referred to colonized peoples.⁴ It is simply not the phenomenology of the modern. The modern's political ego is constantly validated by the socioeconomic processes he inhabits.

In these characteristically modern circumstances, the visual media, constituting an authoritative source of information as well as a form of popular culture and entertainment, have come to play a major role in refining, and tormenting, the conscience. One of the key features of media presentation, particularly the visual, is the truncation and simplification of cause and effect through space and time, so that the viewer perceives events presented as "cause" and events presented as their "effect" in an unusual physical and temporal proximity. This technique has been called the "cinemato-

⁴ F. FANON, *THE WRETCHED OF THE EARTH* 30 (C. Farrington trans. 1968).

graphic effect.”⁵ Sergei Eisenstein innovated its use as an esthetic and propaganda technique. Recall “Potemkin”: in one frame, you see the battleship Potemkin’s great guns billowing smoke and fire, in the next frame, miles away, the walls of a palace crumbling as the shell explodes.

The cinematographic technique has become a fundamental part of the epistemology and “reality” of the modern human being. We are able to operate in an extraordinarily complex world by having a simplified artifact of reality in which cinematographication cuts through complexity to establish cause and effect. Cinematographication is of special importance in the present discussion because it underlines, even exaggerates, the contribution of individual acts to collective efforts and to their consequences. In the industrial democracy characterized by a widely shared sense of the appropriateness of personal choice, by the capacity to make informed judgments, and by the premeditated enlargement of the civic conscience, the cinematographic effect reinforces a belief in the effectiveness of individual action and the sense of responsibility for it. That belief also feeds on the perception of accelerated change in this century, inflated expectations, social and geographical mobility, the extravagant sense of possibility, and the unwillingness to wait or defer gratification.

Where people attribute political effects to their behavior (including their acquiescence in the actions of others) and where those effects are inconsistent with the rectitude values or morality of the developed civic conscience, anguish is generated. Privatization, one economical way for individuals to escape from this discomfort, is barred because it is condemned by the civic culture, which, being industrialized, depends on consumer participation. Hence, protest, in one form or another, becomes a necessary outlet for the anguish.

Folk sayings such as “sticks and stones” and “words are cheap” express a general recognition that verbalization—“sounding off,” “letting off steam”—is an acceptable form of catharsis. Much self-described political protest is little more than this and serves to sta-

⁵ See generally R. ARNHEIM, *FILM AS ART* 20-29 (1957) (discussing the absence of space-time continuum in film).

bilize the protester and the entire body politic. But precisely because of the epistemic effect of cinematographication on the modern consciousness, the ordinary cathartic potential of words, thinking, and other symbolic action is reduced and depreciated. One of the consequences of the cinematographication of reality is a reduction of the capacity to defer gratification, heretofore a key aspect of an individual's maturation and transformation into a basic component of the complex organization of contemporary civilization. Now, however, the more traditional outlets do not yield the rapid effects which cinematographic reality has conditioned people to expect. Hence, the additional pressure for actions which have immediate, perceivable consequences arises. Here, however, the modern consciousness collides with an unyielding reality, comprised of other human beings and their institutional arrangements that resist and frustrate the demand for change. The conjunction of all of these factors increases the always latent proclivity for dramatic and violent action. Even if, as is likely, the action fails to bring about the desired changes, it ventilates frustration in ways that words alone cannot, persuades the tormented conscience that it is doing *something* consistent with its ideals, and, at a deeper and unexamined level of consciousness, supplies the gratification of the ecstasies of violence.

The incompatible tendencies generated by the dynamics of advanced industrial democracies both for compliance with the policies of the state, and for private judgment to be exercised and unauthorized action taken against the policies of the state apparatus, are an increasing feature of everyday life. Even when there is widespread compliance with unpopular policies, the dynamic may be operative with diffused or delayed but, nonetheless, corrosive effects. The poet Ferlinghetti's snide but revealing characterization of America as a nation of "conscientious non-objectors" is indicative of the inner conflicts between political consciousness and compliance which may lead to self-loathing, autopunitive behavior and nonpolitical violence.⁶

When overt violence with a relevant political vector erupts, it

⁶ L. FERLINGHETTI, *A CONEY ISLAND OF THE MIND*, Canto III, line 21, at 8 (1958).

does not necessarily signal the disintegration of authority or the breakup of the community. Pareto believed that the centralization of violence, with transfer of the coercive functions of the community to specialists, was indispensable to community integration; when this trend was reversed, he believed, processes of disintegration were underway.⁷ That may be the case in other social constellations, but, in the advanced industrial system considered above, the resort to violence against communities with which the actor identifies should not be viewed as disintegrative. Rather, it is endemic to the contemporary social structure and the psychopersonal organization. We confront acts of violence, which in Georg Simmel's sense, are integrative rather than disintegrative.⁸ This violence is disruptive in the short term especially for the elite and for those parts of the counter-elite committed to the decisions under attack, but the end result often is to reinforce identity with the collectivity.

The words "protest" and "acts of conscience" conjure for many persons notions of passivity and studied nonviolence. People who suffer the torments of conscience, and whose self-images as "good" are a central part of their being and effectiveness, are often people who have learned (or think they have learned) to control their own impulses to violence. This does not necessarily mean they are naive or unfamiliar with official coercion. Some, inevitably, may cultivate the fond notion that politics is a benign, consensual process but many appreciate that government is a system of organized and systematic coercion and accept a need for the centralization and supervision of specialists on violence within a community. Yet, the torments of their own conscience have often been stimulated by the cinematographic presentation of violence, which, they believe, derives from acts to which they feel they have contributed or in which they believe they are implicated symbolically.

When such people contemplate actively resisting a community decision they find intolerable, they frequently go out of their way

⁷ V. PARETO, *THE MIND AND SOCIETY* §§ 2060-612 (A. Bongiorno & A. Livingston trans. 1935).

⁸ G. SIMMEL, *CONFLICT* 17-18 (K. Wolff trans. 1955). For a discussion of Simmel's theory of social conflict see L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 33 *passim* (1956).

to characterize their resistance with adjectives such as "peaceful," "civil," "passive," or "symbolic." Such terms often mean the opposite and conceal from both self and others a decision on the part of the protestor to resort to coercion. These words and tokens then function to ease the transition from the ethic of compliance and the belief in the appropriateness of the centralization of violence to an ability to tolerate or personally exercise coercion against the wishes of those performing roles in and operating with the authority of the apparatus of the state.

I

We hold some political ideas at levels of consciousness so deep that we are quite unaware of them. If we think about them at all, we take them to be self-evident and natural. As a result, we never explore the social, political, and personality origins which they necessarily had—who shaped them, for whose benefit, in what context—and we rarely appraise them. Precisely because these ideas dispose actors unaccountably to ignore or reject certain political options, they are especially important to political science and political philosophy.

One of the most subtle of these "natural" ideas is a complex of assumptions about the appropriate role of an individual within a group. In whatever group they operate, most people simply take for granted that group life means that, in return for participation in the group and for some role in its decision processes, one accepts the authority of group decisions even to the point of accepting episodic or periodic unjust decisions. The calculation seems to be that the long-run interest in group order requires the continuation of institutionalized group decision and that this long-run interest always outweighs the short-run interest in the rectification, through "illegal" means, of injustice.

This complex of assumptions becomes interesting when individuated consciousness occurs within a culture which encourages individuation, for this is the context of the modern conflict. The idea of the subordination of the individuated consciousness to the group seems to have entered western political thought about 2500 years ago in Athens. Like many other basic ideas which have be-

come immune to appraisal, this one was not introduced in direct exposition, but in a more indirect, artistic mode, a Platonic Dialogue.

The fact that this particular medium was chosen and that over time it has become a genre, draws attention to some latent features of the message conveyed and the audience sought. Ordinarily, one would not expect problems of political philosophy to be treated in rather amusing pamphlets. In fact, this problem has been treated more in pamphlet, myth, and poetry than in weighty tome. The pamphlet is a generic for all writings with political content directed at a broader audience and intended not simply to enlighten, but to shape perspectives and political actions. The reason for the choice of genre is hardly recondite: many of the documents were in fact skillful propaganda, in which the reader was being enlightened only in part as to the latent purposes of the writer. The medium chosen for the audience reveals to the cautious observer part of the message. As with all contemporary political communications, the student of political theory is advised to ask not only what the writer has written, but why he has written it, why he has chosen that particular modality for expressing his view, and what effect he sought to achieve.

Artistically, *Crito* is an early and arguably crude effort by Plato at the Dialogue form.⁹ But whatever their quality, the very presence of artistic elements raises questions about their function in philosophical pamphlets.¹⁰ "Political art"—visual, musical, or literary—is a species of political communication in which techniques of illusion-creation, and characteristics-of-art, intentionally are used to convey political messages. Illusion-creation may draw on a deep, often intuitive understanding of the psychodynamics of the audi-

⁹ PLATO, CRITO, in 1 THE DIALOGUES OF PLATO 367 (B. Jowett trans. 4th ed., Oxford, Clarendon Press 1953) [hereinafter cited as CRITO].

¹⁰ Since Aristotle, and particularly in the works of Cicero, there has been philosophical interest in the effect of elements discrete from a message content that can increase or decrease its incorporation by an intended audience. One of the major early figures in the inquiry was Dionysius of Halicarnassus who identified certain rhythmic patterns and long words which could be used "to suggest nature rather than art, and to stir emotion rather than reflect character." DIONYSIUS OF HALICARNASSUS, ON LITERARY COMPOSITION 211-13 (W. Roberts trans. 1910).

ence, its yearnings, guilts, repressions, and conflicts. Characteristics-of-art such as rhythm may be used for hypnotic effect or to quicken passion. Religious symbols and assurances of the wishes or approval of the divinity may be used with great effect. Events from the mythic past of the group concerned—of glory or horror—may be incorporated explicitly or by indirect semiotic reference. Political art is populated by larger than life heroes and villains. The villains are the enemy or its agents and are profoundly wicked. The heroes are innocent; their programs are fantastically beneficial and do evil to no one. The heroes, in their devotion to the latent goal of the communicator, are oblivious to more conventional loyalties and to their own security. In political art, voluntary death is frequently a sanctification of the program, designed to stir feelings of guilt and admiration and to create a desire for emulation.

The function of art in these communications is to anesthetize the critical, more rational faculties of the intended audience and to render them more susceptible to the message that they might have otherwise rejected entirely or accepted only in exchange for counterconcessions. Political art may be contrasted with what we can call "political discourse" in which the political objectives of the communicator and the probable political consequences of his program are made explicit and in which appeals to the audience are in terms of overt self-interest or demonstrable common interest. Political art is thus highly manipulative and finds its most intense use in fascist systems. Political communication is nonmanipulative and is most characteristic of discourse in systems of coarchy and power sharing, or in inter-elite communication. In complex heterogeneous systems in which the audience is made up of members from different groups, castes, classes, and language and dialect groups, political communication has elements of both political art and political discourse. Where the latter predominates, the art serves a subsidiary function of emphasizing and entertaining. Sometimes, however, the discourse component is superficial and only legitimizes the manipulative communication. As a general rule of procedure, the presence of political art in a communication presented as political discourse should alert the reader to the probability of the latent if not consciously concealed objectives of the writer.

The historic event that supplied the background for the Dialogue *Crito* was Socrates' conviction and death sentence in Athens.¹¹ In the Dialogue, Crito, one of Socrates' most devoted friends, tries to persuade his master to evade what presumably Socrates, and certainly his friends, considered to be a most unjust decision. Evasion would be nonviolent and perhaps neither unexpected nor strenuously opposed by the jailers and other officials. Socrates takes the opposite position, arguing in favor of complying with the decision, which he apparently concedes to be wrong and unjust; and he is quite willing to accept the fact that winning this argument means his own death.

Socrates argues, unexceptionably, that one ought to do the right thing. But what is the right thing here? To address this, Plato, the political artist, creates a dialogue within a dialogue in which Socrates now argues, not with his devoted friend Crito, but with the Laws themselves.

[T]he laws and the state appear to me and interrogate me: 'Tell us, Socrates,' they say; 'what are you about? are you not going by an act of yours to bring us to ruin—the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?'"¹²

The laws, you will notice, are old friends, stern, but good, a kindly old school master, injured but not injuring, certainly not the interests of another class, and never Thrasymachus' "advantages of the stronger."¹³ In the verisimilitude of the interior Dialogue, Plato cleverly casts Socrates as defendant; almost by stipulation, *only* violation of a decree can be discussed. If that were not enough, Socrates' answer virtually concedes his case by assuming that all agree with him that a particular decree should never be ignored. This

¹¹ For a full account of Socrates' last days see PLATO, EUTHYPHRO, APOLOGY, CRITO, and PHAEDO, in 1 THE DIALOGUES OF PLATO, *supra* note 9, at 303-477 [hereinafter cited by individual title].

¹² CRITO, *supra* note 9, at 379.

¹³ Thrasymachus' definition of justice and law is analysed by Socrates in PLATO, REPUBLIC, in 2 THE DIALOGUES OF PLATO, *supra* note 9, at 176-82 [hereinafter cited as REPUBLIC].

point is hardly self-evident. Once accepted, however, it is easy for him and all who would agree with him to insist that the burden of proof rests upon the party seeking to set aside a particular law.

Suppose, Plato has Socrates admit, we argue, "Yes; but the state has injured us and given an unjust sentence."¹⁴ In the interior dialogue which follows, Plato has Socrates persuade himself and Crito, and subsequent generations that one may protest an injustice, indeed violate certain applications as a form of protest, but if the vehicle of injustice is law, one must finally accept the punishment that is meted out.¹⁵ Plato's rendering of Socrates' death is so artistic that one resents disturbing the effect with niggling questions. Given the enormous stature of Socrates in our civilization and the supreme selflessness of his sacrifice, it seems irreverent to question the quality of the arguments that Plato has Socrates make, to probe the motives of artist and subject, or to examine the cogency of the entire position. But there are problems.

Pontius Pilate's ultimate relativism of "what is truth" is not for the disobedient. The dissenter and those agitating for disobedience seem to require the unshakeable conviction that they are right and the group policy they oppose is wrong. Supporters of the official policy may have a similarly unshakeable conviction that the challenged policy is central to group order. And they may be right. Such a conflict requires an appraisal of the relative merits of each side. The Athenians may have had reasonable cause to view Socrates as a public danger. Socrates protested the innocence of his intentions and actions, insisting that he intended to do no more than expose the "truth." But, like anyone probing deeply into the myths and conventions that support the artifactual reality of every society, Socrates was challenging that society and the vision of reality that was central to those who were committed to it. Whether or not we sympathize with the Athenian elders, we can at least understand their perception of Socrates as a threat. One might compare him in this regard to an extraordinarily magnetic and charming junior high school teacher arguing to his pupils, in most subtle

¹⁴ CRITO, *supra* note 9, at 379.

¹⁵ *Id.* at 379-84.

fashion, the attractions of free love, the glamour and psychic enrichment of drugs, or urging some other lifestyle that seems to challenge the fundamental postulates of many in society. Even the most liberal and tolerant of parents would be quite anxious to immunize children from the charisma of such a teacher. Indeed, the Socratic political vision itself doubted the wisdom of sharing such ideas with those incapable of using them for the social weal.

Plato's objective would be weakened by an excursus into the merits of the decisions in question. The argument is framed, not in terms of the justice of a particular official decision, but rather in the justice of complying with the law in general. And why should one comply? Because, says Socrates, one owes an obligation to the law and the state. He exaggerates, of course, in saying that the law brought him into the world,¹⁶ for that imports biological functions which it is difficult to imagine laws performing. Socrates means that he was reared, educated, and protected by a social order that he seems to have voluntarily accepted; it would now be churlish, to say the least, to refuse to comply with its decisions. The element of political art is, of course, the conflation of the laws (or the state) and parents whom most of his listeners would be predisposed to respect if not revere.

Plato's conflation of images has become a *leit motif* in political rhetoric: parents with the state apparatus, whatever its structure, and the state apparatus with the community. Most significantly, Socrates merges social processes and community structures, many of which were anterior to and continued independently of the state, with the apparatus of the state itself. This conflation is important, for Plato will argue that participation in and benefit from one imports future obligations to the other. An initial obligation is reinforced, Socrates argues, by the lifelong presence of the person who now considers dissenting from the law. Continued presence involves cumulative validation and multiplication of the obligations of group membership; it may not, at some opportune moment, be rejected in favor of a short-term gain. This is a slick presentation of what is put more crudely in this country: "America—love it or

¹⁶ *Id.* at 383.

leave it.”

Plato's argument has logical problems, many of which have been criticized in other contexts.¹⁷ Recall, for example, Adam Smith's mordant example of the shanghaied sailor, drugged and seized, who awakes when the ship is miles at sea: Is his presence ship-board, Smith asks rhetorically, to be construed as validating the authority system of the ship because he does not leave it?¹⁸ The sleight of hand here is to present birth and continuous presence in a group until the moment of protest as an account in favor of the decision process of the group which can be discharged only by compliance. After birth, your “right to dissent” declines steadily. Plato also fails to weigh seriously the real costs for a human being in leaving his kin, his home, his language, and so on as a matter of protest. Nor does he acknowledge that this option, which he would make the only lawful form of dissent, is most advantageous to the elite and least likely to occasion change.

Plato holds that if one is either prepolitical, or private and nonpolitical and thus slow to discern evil (or presented with a late-blooming evil), one has by such acquiescence irrevocably validated the entire political system. This argument is not an easy one to swallow and, indeed, it is not presented *expressis verbis*. Political art, not fact, has the laws “say” to Socrates that he himself was fond of “the state, and obviously therefore of us her laws”¹⁹ Socrates may have been fond of Athens, his circle of students, the sunlight and air on the Acropolis, but it is unlikely that he was particularly fond of the state or the laws. The function of the merger is to render presence in one acquiescence to the other.

Acquiescence is not Plato's only argument. Fear of the loss of the respect of others is a sanction, potentially of great power, for

¹⁷ See generally D. MUELLER, PUBLIC CHOICE (1979) (emphasizing the role of discourse and protest in stimulating action and private immediate gain); J. ELLUL, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES 3-87 (1965) (same).

¹⁸ A. SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 12 (reported by student in 1763) (E. Cannan ed. 1896), quoted in T.D. CAMPBELL, ADAM SMITH'S SCIENCE OF MORALS 207 (1971) (“To say that by staying in a country a man agrees to a contract of obedience to government is just the same with carrying a man into a ship and after he is at a distance from land to tell him that by being in the ship he had contracted to obey the master.”).

¹⁹ CRITO, *supra* note 9, at 382.

all but the most self-assured or sociopathic. Young people can be brought to take life threatening risks, acquiescence to which is presented as cowardice or dishonor by adults who understand their normal and healthy fears. Availing themselves of the same insight, Socrates and the Laws construe the compact that emerges as one in which a debt of honor is imposed on Socrates. To dishonor it by failing to respect the laws would mean that Socrates is behaving like "a miserable slave"—a revealing comparison.

Repudiation of a single law is portrayed as somehow or other likely to bring down the entire system of law and administration in Athens. The proposition is put forward as self-evident, but it is far from it. In many cases, the infraction of a law, if it arouses widespread social indignation, may actually reinforce the norm and make it stronger. The notion that a single violation of a norm will bring down the entire system seems to be animated by the primitive notion that the infraction of sacred rites even by a mild deviation will anger the gods who will let loose the gravest consequences. It is curiously parallel to the phenomenology of obsessional neurotics.

None of the great Socrates' arguments are persuasive. The careful reader able to withstand the spell of the "wisest of men" and the art of his disciple would have to conclude that Crito had the better case. Why then did an artist of Plato's power put these weak arguments into his master's mouth and let him prevail? The answer cannot be found in a dissection of logic. In political art, logic is along for the ride; its function is to legitimize. It is the message per se and not its rationality that counts.

The fundamental message of *Crito* is that a social organization can neither exist nor survive unless its members submit to its authority system. That unexceptionable proposition escapes banality only if a highly individuated and self-conscious ego is willing to submit to the authority of a particular group when the costs to the self and to other loyalties in one's self-system are severe if not supreme. Hence, the need for Socrates' self-sacrifice for the impact of the message.

The key innovation in the Dialogue is the specific grouping to

which this loyalty is owed. Interestingly enough, the obligation of submission is not to the authority of one's academy or intellectual circle, which one would have thought to be the primary identification of a man like Socrates, nor to the family or extended family, nor to its equivalent—those devoted friends with whom one had chosen to make one's life. Rather, the focus of loyalty in this Dialogue is the city-state itself, or we may say in more general terms, the apparatus of the state.

This Dialogue was conceived at a time when the authority of the state had not yet crystallized. Older social formations such as clans, extended families, and families were still deemed to be the major foci of loyalty. Each had its own gods, customary laws, and powerful claims on the loyalty of its members. They were frequently in competition with the myth and political ambitions of those who sought to maximize their own power through the comparatively novel symbols and machinery of the city-state. Subjected to the conflicting claims of competing authority systems, individuals might more often than not resolve them in favor of the older social formations. The fundamental message of *Crito* is that in a competition with these earlier formations, it is the state—presented somewhat ambiguously as “the Laws,” a term associated with other formations and thus stimulating a transference of authority—which is to be given primary loyalty. Could this be made more dramatic than by having the wisest of men sacrifice himself to vindicate the authority of that state and the effectiveness of its laws *even when they were wrong*? Plato, who was committed to the superordination of the state over the older formations, thus uses the Dialogue as political art to reinforce commitments to the city-state.

The conflict of loyalties that gives so much dramatic background to the Dialogue was a major theme in Greek civilization of the time. It is the spine of the great play *Antigone*, in which precisely the same conflict is established.²⁰ There, however, the vision of the dramatist outweighs the objectives of the political artist. Rather than a vindication of the state and an unequivocal message af-

²⁰ SOPHOCLES, *ANTIGONE* (R. Braun trans. N.Y. 1973).

firming the political supremacy of this new apparatus, the playwright leaves his audience with an irreconcilably tragic situation in which social and political change leads to grief for all the parties, each conspicuously loyal to his or her own code.

The social and political experiences of fifth century Greece are not unique. Nascent political systems in the process of incorporating and integrating a variety of discrete groups, each of which is shaped and reinforced by its own myth, loyalty, and legal system, pursue the standard strategies of individual assassination, cephalocide, and cooptation. But to facilitate and then confirm integration, they frequently resort to the cultivation of myths as a way of sacerdotalizing and legitimating the new and appropriate loyalty. One may compare in this regard *Antigone* and *Crito* in the Greek context to the powerful myth of the sacrifice of Isaac in Chapter 22 of Genesis.²¹ As in fifth century Greece, the conflict is between two

²¹ That chapter provides:

After these things God tested Abraham, and said to him, "Abraham!" And he said, "Here am I." He said, "Take your son, your only son Isaac, whom you love, and go to the land of Mori'ah, and offer him there as a burnt offering upon one of the mountains of which I shall tell you." So Abraham rose early in the morning, saddled his ass, and took two of his young men with him, and his son Isaac; and he cut the wood for the burnt offering, and arose and went to the place of which God had told him. On the third day Abraham lifted up his eyes and saw the place afar off. Then Abraham said to his young men, "Stay here with the ass; I and the lad will go yonder and worship, and come again to you." And Abraham took the wood of the burnt offering, and laid it on Isaac his son; and he took in his hand the fire and the knife. So they went both of them together. And Isaac said to his father Abraham, "My father!" And he said, "Here am I, my son." He said, "Behold, the fire and the wood; but where is the lamb for a burnt offering?" Abraham said, "God will provide himself the lamb for a burnt offering, my son." So they went both of them together.

When they came to the place of which God had told him, Abraham built an altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar, upon the wood. The Abraham put forth his hand, and took the knife to slay his son. But the angel of the LORD called to him from heaven, and said, "Abraham, Abraham!" And he said, "Here am I." He said, "Do not lay your hand on the lad or do anything to him; for now I know that you fear God, seeing you have not withheld your son, your only son, from me." And Abraham lifted up his eyes and looked, and behold, behind him was a ram, caught in a thicket by his horns; and Abraham went and took the ram, and offered it up as a burnt offering instead of his son. So Abraham called the name of that place The LORD will provide; as it is said to this day, "On the mount of the LORD it shall be provided."

And the angel of the LORD called to Abraham a second time from heaven, and

incompatible loyalties that Abraham owes: the continuity of his family and his self as a discrete entity and his loyalty to a divinity that came to symbolize a collectivity much larger than a single family, the collectivity of Israel. As in *Crito*, Abraham's decision predictably subordinates his older and narrower interest to that of the higher law despite the potentially great costs. Once the point has been made, the sacrifice of Isaac need not be consummated; a surrogate creature is slaughtered in his place. In Attic Greece, as in ancient Israel, the superordinate loyalty to the new inclusive entity over the older, more exclusive units is confirmed.

The ritualized but purposive violence in all of these political myths has been included for more than entertainment value. As is obvious from the previous discussion, Socrates' execution is not compelled by his logical argument. The power which is being mythologized must be awesome and, obviously, jealous of its exclusive prerogatives. A key part of the lesson is that defections are serious and that full price must be exacted for them. The terror aroused by a single infraction of the law has primitive and animistic sources. It rests on a conception of law as always incorporating elements of the command of a jealous and wrathful god who brooks no compromise and defection from his orders. Secular law reinforces its power and authority by co-opting the divinity, a common enough technique carried to its logical extreme in Sudanic and Czarist systems, where god and king are fused. It is, in short, no surprise that Socrates' "sin" of having violated the law must conclude in his death. One senses here, as part of Plato's art or perhaps as an idea of which Plato himself was only partially aware, a deep sense of guilt about the violation of some other real or imagined obligation. It has been expressed at the conscious level in the personification of "The Laws," stern but fair, rightly aggrieved and justly demanding a recompense. At a deeper level the violation

said, "By myself I have sworn, says the LORD, because you have done this, and have not withheld your son, your only son, I will indeed bless you, and I will multiply your descendants as the stars of heaven and as the sand which is on the seashore. And your descendants shall possess the gate of their enemies, and by your descendants shall all the nations of the earth bless themselves, because you have obeyed my voice."

Genesis 22:1-18 (Revised Standard Version 1962) (verse numbers omitted).

and guilt give rise to autopunitive mechanisms, which require that the law violator initiate or facilitate his own destruction. A more contemporary parallel of this curious pattern may be found in the cases of Japanese students in the thirties who might attack a political opponent with a sword and immediately afterwards ritually disembowel themselves. The peremptory demand for demonstration of the disobedient's purity of motive by self-destruction is an important theoretical and practical aspect of the political doctrines we are considering. One encounters it again and again, most recently in the work of Abe Fortas and John Rawls.²²

II

Some religions, because of alignment with temporal authorities or because of a unique metaphysic, have adopted a position of ultimately complete subjection to the governing authorities, functionally equivalent to the Platonic position. The quintessential expression of this is in *Romans*, in phrases that anticipate Hobbes and Bodin:

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who was in authority? Then do what is good, and you will receive his approval, for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain. . . . Therefore, one must be subject, not only to avoid God's wrath but also for the sake of conscience.²³

That view recurs, though with some ambivalence, even in the writing of that sometime rebel, Martin Luther.²⁴ In comparison with these views, Socrates' view of the individual's right to question authority seems comparatively radical.

²² A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968); J. RAWLS, A THEORY OF JUSTICE (1971).

²³ *Romans* 13:1-5 (Revised Standard Version 1962).

²⁴ M. LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in 45 LUTHER'S WORKS 81 (J. Pelikan & H. Lehman eds. 1962).

By the twelfth century, writers, such as John of Salisbury, were insisting that tyrannicide is not only permitted but is an appropriate and a just action in the proper circumstances.²⁵ In the next century, the same position was advocated by Jean Petit.²⁶ The Spanish theorists, Suarez and Mariana, express the view forcefully. Suarez' position was based on a separation of the king from the apparatus and interests of the State. He argued that the powers of the king derive directly from the state; in a case of extreme misgovernment when the defense and conservation requires it, the people may dispose of its sovereign and may, were it necessary, designate some person to kill him.²⁷ Mariana, Suarez' contemporary, developed the same notion by distinguishing the apparatus of the State from the people and subordinating the authority of the former to the latter.²⁸ From the French Revolution on, there was even more agreement on the general theory and right of revolution, a popular right not simply to depose a particular ruler but to use violence to bring about radical changes in the structures of the political, economic, and social processes of a community.

The Naturalist tone in all of these theories is discordant to the modern ear and provides little balm to the contemporary tormented conscience. Note that all of them assume that there is a discoverable "good" position that favors the interests of the people over the state and that there is a consensus among the nation or people that the current incumbent of a governmental apparatus is violating those interests. Hence, the resistance leading to deposition or tyrannicide is essentially defensive and authorized by the fundamental principles which the apparatus of the state was designed to realize. The modern position, in contrast, is not one of

²⁵ JOHN OF SALISBURY, *POLICRATICUS*, bk. 8, chs. XVII-XXIII, reprinted in *THE STATESMAN'S BOOK OF JOHN OF SALISBURY* 335-410 (J. Dickinson trans. 1927). See also THOMAS AQUINAS, *COMMENTARIO IN LIBRO SENTENTIARUM*, II, dist. 44.

²⁶ J. PETIT, *JUSTIFICATION DU DUC DE BURGOGNE* (n.p. 1408). See A. COVILLE, *JEAN PETIT: LA QUESTION DU TYRANNICIDE DU COMMENCEMENT DU XX^e SIECLE* (1932) (an analysis of Petit's theory of tyrannicide).

²⁷ See 2 *SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ*, S. J. 705-20, 854-55 (Classics of International Law No. 20, Vol. II 1944); L. SICHES RECASÉNS, *LA FILOSOFIA DEL DERECHO EN FRANCISCO SUAREZ* (1927) (examining Suarez' justification of tyrannicide).

²⁸ J. DE MARIANA, *DE REGE ET REGIS INSTITUTIONES LIBRI III AD PHILLIPUM III* (Toleti, apud P. Rodericum 1599) (Aelen, Scienta Verlag 1969).

natural truth, but rather of a dialectical process-of-truths. The modern rebels, not to achieve something that all know is self-evidently right thanks to a consensus on natural law, but to achieve something that, perhaps only his own judgment indicates is appropriate and that only his own success will establish as truth by retroactively validating his insurrection. This is the intellectual and emotional burden of the tormented conscience. Its closest approximation in the inherited literature, though still far removed from our subject, is anarchism, a spectrum of thought and practice extending from high-minded pacifism to violent nihilism.

The anarchist tradition has never burrowed into political consciousness the way the Socratic political ideology has. Nevertheless, one should not lightly assume that the intense and often violent reaction of official elites to the literature exploring the theories of authority and loyalty of the population and contemplating the possibility of civil disobedience is irrational or needlessly exaggerated. Elites are among the first to realize that their continuation in effective power depends less on the overt instruments of power and to a much larger extent on what Merriam called the *credenda* and *miranda* of power. This is especially the case in industrial systems in which a social formation often called the "middle class" plays an exceedingly important role. The middle class here is not used purely in its economic sense of a bourgeoisie, *i.e.*, a class whose income derives from the profits of commercial and industrial enterprise, that is of the marketplace. Rather, it is used in its contemporary acceptance, *i.e.*, that stratum which is urbanized and trained in skills which are indispensable for the maintenance of a science-based and industrialized civilization. Revolutionaries in this century have realized that support from this stratum is critical to precipitating change. If its loyalty to, or belief in, an existing government can be weaned away, the likelihood of bringing about a major power transformation is enhanced. This is the lesson of the Bolshevik Revolution in its early phases and most recently the Iranian and Nicaraguan Revolutions.

It is to this group that the message of the literature of civil disobedience is most pertinent, for it is this group which has developed a refined capacity for making evaluations and choices but at the

same time operates with an extreme dependence on, if not symbiosis with, the existing state apparatus. It is thus no surprise that the publication of apparently scholarly literature which undermines the authority of the existing government will be viewed as a crime approaching treason. Similarly, the mere reporting of events based upon such challenges to authority are perceived (accurately, one would add) by the elite as sources of contagion and are themselves often criminalized and prohibited. Note in this regard that this reaction is not limited to the elites of democratic polities. The military government in Poland seeks to control press reports of resistance against it for precisely the same reason.

This countertradition of resistance to the state is rich and varied with many different emphases but probably the most thorough, systematic and intellectually responsible attempt to present it as a political philosophy is found in William Godwin's *Enquiry Concerning Political Justice and Its Influence on Morals and Happiness*.²⁹ The basic starting point in all work in this genre is, as Godwin would put it, the rational and ethical appropriateness and unsuspendable validity of the exercise of private judgment. "To a rational being there can be but one rule of conduct, justice, and one mode of ascertaining that rule, the exercise of his understanding."³⁰ Adam Smith had already applied this notion to economic choice and the market in which private judgment expressing self-interest was to yield the combined benefits of high productivity and low price, all without chaos, thanks to the operation of the "invisible hand."³¹ But Smith had not extended this notion to government; indeed, he felt that a limited government continued to be necessary.

Godwin, in contrast, went the extra step. The potential chaos that one might encounter in the uncoordinated exercise of millions and millions of individual *political* judgments is avoided in his

²⁹ W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MORALS AND HAPPINESS (3d ed. 1797 & photo. reprint Toronto 1946) (1st ed. London 1793).

³⁰ 1 *Id.* at 170. (Godwin discusses the relationship between private judgment and justice throughout Book 2 in Volume I).

³¹ 1 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Chicago 1976)(1st ed. London 1776) (the general concept of the invisible hand is discussed in Book IV, Chapter 2).

theory, thanks to a special kind of (non-Smithian) invisible hand: in Godwin's work, there is a deep assumption that reason or principles of utility will generally yield the same answer in the separate and uncoordinated calculations of millions and millions of autonomous individuals. And even if it should not, Godwin would not abandon his position. He was not unaware of the possibility of conflict but apparently quite willing to accept it as a necessary price for maintaining the autonomy and the dignity of human beings. His German contemporary, Rudolf von Jhering, addressed the problem more directly by making the invisible hand a mailed fist; for Jhering, overt conflict was a personal and social virtue.³² In Godwin, on the other hand, there prevails a naive sweetness wholly oblivious to that other vision of reality.

Godwin writes in the age of innocence. He assumed that human beings equipped with a certain basic apparatus will reach correct decisions. Like Kropotkin,³³ he believed that, left to their own healthy devices and without the intermediation of law, human beings will reach a consensus whose content will be good. He assumed that the rationality he believed he encountered in human decision making was complete and reliable. Somehow he was able to cultivate a blindness to the savagery and violence of which his species, his nation, and perhaps he himself routinely proved themselves capable. To Godwin it is law itself which is the source of conflict.

Alas, the twentieth century bears ample witness to the irrationality and violence to which human beings are prone. Freud, to whom we will return, demonstrated that beneath a veneer of rationality lurked counter-rational and often self-destructive forces.³⁴ The modern who has looked into himself tends to assume that one of the functions of government is to protect us not only from external enemies but from ourselves. In this conception, governments

³² See, e.g., R. VON JHERING, *THE STRUGGLE FOR LAW* (1st ed. 1879) (J. Lalor trans. 2d ed. 1915). "Every principle of law which obtains had first to be wrung by force from those who denied it." *Id.* at 1. "The end of the law is peace. The means to that end is war." *Id.* "The law is not mere theory, but living force." *Id.* at 2. "Every man is a born battler for the law in the interest of society." *Id.* at 77-78.

³³ See P. KROPOTKIN, *THE ESSENTIAL KROPOTKIN* (E. Capouya ed. 1975).

³⁴ See, e.g., S. FREUD, *THE EGO AND THE ID*, 1923-25, at 53-56 (1961).

serve as a collective superego, taming the id and trying to conduce a flow of nearly rational behavior. Weak government or the absence of the controls of government appears increasingly to many as an invitation to the continuous brutish violence of which Hobbes³⁵ and Bodin³⁶ wrote.

The Anarchist position cannot be considered even near the mainstream of contemporary thought. But it appeals to elements of the modern and that appeal has generated a tension with its polar opposite: the Platonic view considered earlier. The uneasy resolution or synthesis of the conflict is to be found in the modern doctrine of civil disobedience.

III

Plato's position, as expressed in *Crito*, is often held up as an early and prototypical expression of civil disobedience. In fact, it is not. It is a system of ritual but empty dissent, carefully nuanced to convey to its intended audience the expectation that it may be rejected; even then, dissent must be followed by the willing acceptance of whatever punishment the authority system chooses to mete out. The anarchist, Kropotkin, dismissed this conception of dissent with utter disdain. According to Kropotkin, dissent without disobedience, is consent.³⁷

A theory of civil disobedience is meaningful only with Godwin's postulates; and it is from them that we can trace the development of the theory in the nineteenth century. The most famous tract in this genre, the virtual *opus classicus*, is Henry David Thoreau's pamphlet, *On Civil Disobedience*.³⁸

History is often capricious in choosing a single work from the oeuvre of an author and characterizing it as his most important. *On Civil Disobedience* was hardly Thoreau's chef d'oeuvre. It is a

³⁵ See generally T. HOBBS, *LEVIATHON* 104 & *passim* (M. Oakshott ed. 1962) (1st ed. n.p. 1651) (discussing man's tendency to violence when left unchecked by government).

³⁶ See generally J. BODIN, *DE REPUBLICA LIBRI SEX passim* (Francofurti 1641) (discussing Bodin's major political theories).

³⁷ P. KROPOTKIN, *supra* note 33.

³⁸ 10 H. THOREAU, *Civil Disobedience* in *THE WRITINGS OF HENRY DAVID THOREAU* 131 (1893) (1st ed. 1849).

comparatively light work, but more importantly it does not adequately reflect all or even the most important of his views. We know, for example, that Thoreau was quite willing to countenance the use of violence if he felt the object warranted it; indeed, he supported John Brown.³⁹ In this tract, however, the emphasis is on the playfulness and painlessness of civil disobedience. The pamphlet's style may have taken account of an audience that was rather socially indulged and essentially complacent and that viewed the very idea of dissent and open defiance of government as patently wrong and demeaning in its application, and as horrifying and dangerous in its consequences. To counteract these predilections, Thoreau seems anxious to demonstrate that dissent could be harmless, humorous, and comparatively costless.

The basic argument is well known. Thoreau, in a very passive posture, allows that he was not put into the world to change it but rather to enjoy it. He is willing to accept a certain amount of what he regards as the inherent evil of government but will not contribute anything to it if he is convinced it is engaged in wickedness. When such iniquity is encountered, the appropriate posture is not agitation against it, but rather passive withdrawal. The passivity need not yield a substantial political result. Thoreau seems oblivious to the fact that his protest of the Mexican-American War through nonpayment of his taxes was meaningless, since his aunt secured his release from jail by paying them. (Indeed, the United States now includes about one-third of what had been Mexico, as Mexicans ruefully testify.) He did not protest the familial subrogation, but in fact quite happily proceeded to enjoy the day. The activity of protest is symbolic. One ventilates one's indignation without necessarily giving it political vector and maximizing its effectiveness.

The main message of the work then and now is that *protest of evil is a proper civic responsibility*. The tone of the pamphlet notwithstanding, Thoreau's position actually tolerated privately initiated violence if the evil warranted it. The quantum of force in the

³⁹ See, e.g., *A Plea for Captain John Brown* in *id.* at 197; *The Last Days of John Brown* in *id.* at 237; and *After the Death of John Brown* in *id.* at 349.

protest is to be determined by the protester but unfortunately, no guidelines are given. Perhaps the reason for this is that Thoreau could believe in the effectiveness of symbolic protest.

Thoreau's conception—disobedience as a *jeu d'esprit*—may be compared with some of the more violent tracts of the twentieth century in which overt and sometimes apparently indiscriminate violence is urged.⁴⁰ Castro,⁴¹ Guevara,⁴² and, most of all, Fanon⁴³ have sanctioned and legitimized revolutionary violence directed against the apparatus of the state. In some cases the violence need not justify itself by an immediate net pay-off in human dignity as against the debits from its actual operation. Fanon authorizes apparently aimless violence as long as it has some substantial psychological or psychotherapeutic impact on the perpetrator.⁴⁴

IV

Twentieth century America has been a laboratory for experiments with Thoreau's notion of civil disobedience. Although any slice of this experience would serve our purposes, the explicit literature on civil disobedience spawned by the Vietnam War is particularly apt for some consideration.

By the middle-to-late 1960's, a substantial part of the politically relevant and active American constituency had become disenchanted with the war. Initially, the disagreement was expressed by symbolic protest. As it became apparent that the government was intent on pressing on with the war and as the media began to present in more graphic detail some of the consequences of the United States campaign, the cinematographic factor operated; protesters became more frantic and the antagonism to the war reached new levels of intensity. The resistance became even more

⁴⁰ See *infra* text accompanying notes 45-50 for treatment of the problem of discrimination in the use of violence.

⁴¹ See, e.g., F. CASTRO, *REVOLUTIONARY STRUGGLE 1947-58* (1970).

⁴² See, e.g., E. GUEVARA, *SOCIALISM AND MAN IN CUBA AND OTHER WORKS* (1968); C. GUEVARA, *GUERRILLA WARFARE* (1961).

⁴³ F. FANON, *THE WRETCHED OF THE EARTH* (C. Farrington trans. 1968); F. FANON, *TOWARD THE AFRICAN REVOLUTION* (H. Chevalier trans. 1969).

⁴⁴ See, e.g., F. FANON, *THE WRETCHED OF THE EARTH* 85-86 (C. Farrington trans. 1968).

intense as those opposed to the war realized that efforts through constitutionally prescribed channels of protest were unlikely to prevail.

More and more people openly advocated violent resistance. Of interest is the fact that this new trend had to develop a certain intellectual appeal to win or hold strata of the population that ordinarily would have eschewed it. For the moment, let us put aside the considerations of those moving toward resort to violence and focus instead on those who sought to rework the notion of disobedience with which Thoreau was concerned so that they could discharge their obligations to their own consciences, achieve some change in undesirable policy, but not undermine the authority and efficacy of government processes to which they were committed.

Abe Fortas had impeccable credentials as a liberal long before his appointment to the Supreme Court. He had represented Owen Lattimore during the McCarthy period and had been a major figure in civil rights litigation; history may well, and should, judge him more generously than did his peers at the end of his own career. In 1968, Fortas, then on the Supreme Court, published a pamphlet called *Concerning Dissent and Civil Disobedience*.⁴⁵ Not surprisingly, it affirmed fealty to the law and confidence that established and authorized procedures for registering disagreement with official behavior would succeed in yielding the desired results.

Fortas' priorities were apparent in the way he formulated his problem. The question for him was not, as it then was for many frustrated dissenters, how to effect policies when constitutionally authorized procedures had proved ineffective. For Fortas, the question was how the Constitution permitted a law abiding citizen to dissent, a question for which the range of possible answers was, perforce, limited. Fortas devised a theory of lawful dissent and disobedience. Basically, one could challenge a law one believed to be inconsistent with the Constitution. If the courts upheld the challenge, one was vindicated. If the courts confirmed the law, one's act was criminal and punishment was to be accepted.

⁴⁵ A. FORTAS, *supra* note 22.

A core of Fortas' thinking was expressed in a set of contraposed values tilted perceptibly against change.

Unavoidably, the Constitution seeks to accommodate two conflicting values, each of which is fundamental: the need for freedom to speak freely, to protest effectively, to organize, and to demonstrate; and the necessity of maintaining order so that other people's rights, and the peace and security of the state will not be impaired.⁴⁶

All change is disruptive, especially to those who rely on the constellations of behavior approved in the past but now under challenge and who are most likely to resist the change. By contraposing the two interests as he did, Fortas created a very strong presumption against dissent in any manner likely to be effective enough to bring about the changes sought by the person contemplating dissent.

One entity committed to the maintenance of the status quo was the state itself. Fortas devoted a chapter to what he called its rights. The propriety of a state's sanctioning an individual who has dissented is justified, in Fortas' view, by the very idea of the "rule of law" as he understood it. As for securing change, violence is arguably lawful only if there are no alternatives. Fortas held as a virtual postulate that in the United States there are alternatives which promise success in achieving the change, so violence is not an acceptable option.

Curiously similar to Fortas' conception is John Rawls' theory of justice which appeared in 1971.⁴⁷ Like Fortas, Rawls wrote from a perspective of satisfaction with the segment of social process that he determined was his society; repeatedly he cautions his readers that his book was written for the "nearly just society." Indeed, he concedes that his prescriptions may not even apply to permanently disadvantaged groups, but he does not provide guidelines for their protest. As for more indulged community members, they are subject to Rawls' "duty of civility."

⁴⁶ *Id.* at 30.

⁴⁷ J. RAWLS, *supra* note 22.

[W]e submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system. Accepting these hardships is simply recognizing and being willing to work within the limits imposed by the circumstances of human life. In view of this, we have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them. Without some recognition of this duty mutual trust and confidence is liable to break down. Thus in a state of near justice at least, there is normally a duty (and for some also the obligation) to comply with unjust laws provided that they do not exceed certain bounds of injustice. This conclusion is not much stronger than that asserting our duty to comply with just laws. It does, however, take us a step further, since it covers a wider range of situations; but more important, it gives some idea of the questions that are to be asked in ascertaining our political duty.⁴⁸

In a manner similar to Fortas, much of Rawls' book is concerned with the methods and appropriateness, if at all, of defending some decisions taken by the community. Rather than elaborating a somewhat formalistic theory of constitutionality as did Fortas, Rawls established more substantive principles by which one determines the quality of law.

Rawls' conception of the appropriate limitations of civil disobedience rests on his assumption that in a nearly just society several principles may not be protested. Their application must be accepted even in circumstances in which one is not completely satisfied with the result. These are Rawls' Principle of Justice, augmented and explained by his Principles of Efficiency and of Fair Equality, of Opportunity, the Difference Principle, the Principle of Fairness, the Principle of Average Utility, the Principle of Perfection, and his Principles of Natural Duty.⁴⁹

⁴⁸ *Id.* at 355.

⁴⁹ *Id.* at 363-68. Rawls applied these principles to "[sketch] a theory of civil disobedi-

When civil disobedience is to be resorted to, the precipitating events should be quite clear in the calculus of equity of the population to which the appeal is being made. The need for clarity leads Rawls to exclude from the ambit of civil disobedience infractions having to do with the distribution of values other than power, for here "[t]here is usually a wide range of conflicting yet rational opinion as to whether this principle is satisfied."⁵⁰ This rule presumably would exclude many of the subjects of disobedience in contemporary industrial society, *e.g.*, protests over nuclear plants, environmental deterioration, and so on.

It appears that Rawls is almost indistinguishable from the Socratic position and from Abe Fortas. Insofar as there is a difference, Rawls would have to be viewed as somewhat more conservative, for he limits individual protests to matters having to do with power and not with the production and distribution of all the other values that are a fundamental part of a life of human dignity. Insofar as one has concluded that it is the maldistribution of other values, *e.g.*, wealth, health, respect, and skill, that leads to general maldistributions and inequities in society, Rawls' prescription precludes initiating change. As in the Socratic view, there is a strong concern with the maintenance of a minimum of order.

V

The tension between the impulses of a tormented conscience to submit to substantively offensive but nonetheless authoritative prescripts of its government or to resist them is sufficiently great in our time to require even "conservative" writers such as Rawls and Fortas to acknowledge that in some circumstances their limited notions of dissent do not apply and more effective opposition may be mounted. But it is significant that this is a possibility so far from their own thinking that they do not bother to consider methods and standards for appraisal of when such circumstances actually arise and whether, if at all, the quantum and form of opposition is itself subject to appraisal for "lawfulness" or, at least, compatibility with other political philosophical principles.

ence." *Id.* at 363.

⁵⁰ *Id.* at 372.

The view that in such circumstance *no principles* can be devised to appraise the lawfulness of unilateral action is unacceptable. Writers such as Hobbes or von Clausewitz, in what one hopes are exercises of hypothesis rather than delusional paranoia, propose that in a "state of nature" the right of self-defense imports that there are no criteria for evaluating the perceived needs and choices of response of the individual exercising that right.⁵¹ Even if one postulated that such a condition might prevail, it plainly is not the milieu of the individual, integrated within his community and committed to the continuity of the established authority, who feels that he must oppose one flow of decision in that community for its inconsistency with group myth or with higher law. It is that part of the dilemma of the tormented conscience that now will be explored.

In matters that primarily affect the actor, our civilization imposes no moral or ethical responsibility on the actor to take account of all the known or statistically probable negative effects that flow from choices. The effects are primarily visited on the actor himself and, if he should choose to behave spontaneously and to indulge in a variety of ecstasies of the moment, from smoking to sky-diving, others cannot claim, according to contemporary theories of personal responsibility and social restraint, that he is acting improperly. A contemporary arena, with its theatrical aspects and entertainment dimension, provides many opportunities for such self-indulgent activity. But more deliberate actions which are undertaken not simply to gratify the self but to influence the behavior of the collectivity and hence the lives of many others, do engage a responsibility to consider both the motives of the individual in initiating such action and the aggregate consequences, in terms of all community goals, that his action is likely to precipitate. When actions that can affect others and impose severe deprivations on them are contemplated, the grave responsibilities for consideration of the need for and form of such action are imposed.

In any process of decision making, a number of conceptions and

⁵¹ J. HOBBS, *supra* note 35, at 98-124; C. VON CLAUSEWITZ, *ON WAR* (M. Howard & B. Brodie trans. 1976).

methods may be resorted to, as tools for gathering and organizing information and identifying and appraising options. They may be described as standpoint, focus, target, and choice praxis. These elements will be considered briefly with reference to the problem of resort to unauthorized action against prescripts of a government whose authority is generally recognized.

Inquiries as well as actions affecting the self or the environment can be conducted more effectively if a standpoint distinct and disengaged from the processes under consideration can be taken. If one is to be optimally effective in making choices, it is not only necessary to separate oneself for realism in perception from the processes under observation, but also to examine most carefully the self-system making the observations. It is so obvious that it is often overlooked, but the basic instrument for observation and choice by human beings is the self-system itself: that bundle of personalities within each of us involved in a dynamic internal process of changing identification, demands, images, and expectations about past and future. When decisions with a potential for influencing others are contemplated, it is particularly important to examine this system very carefully, much as one would examine and calibrate a fine tool for observation or recording in a laboratory. Obviously, it is no easy matter to take a "hard look at oneself." But such self-examination and self-calibration would appear particularly urgent when one of the options being contemplated is resort to violence. Precisely because there are so many deep and consciously unperceived gratifications to be gained from this option, it is important that resort to it be justified by a thorough and systematic contextual analysis of the situation and not by facile subservience to unacknowledged instinctual needs imprinted in our species in different contexts and for various earlier survival reasons.

Three particular distortions of the individual's perceptual and evaluative apparatus may have severe impacts on choices which may include or lead to resort to violence. The first includes the neurotic tendencies latent in every individual. Erik Erikson described them as "fragments such as undigested memories, unsatisfied drives, unallayed fears, unconsummated relationships, unap-

peasable demands of conscience, unused capacities, incomplete patterns of identity, suppressed spiritual needs.”⁵² They affect contemporary behavior by impeding the individual’s integrative forces and preventing him from responding to the present, forcing him instead to cope constantly with a past compulsively projected onto the present. “The big historical decisions,” Erikson writes, “are simply those by which a leader or a leading group, being motivated and chosen to be in the lead, and possessing superior gifts of leadership, create a joint future out of the combination of their own pasts and the typical pasts of the led, and thus acquire and provide a conception of truth in action.”⁵³ Lasswell argued that primitive psychological structures, in more or less disguised form, continue to control thoughts and efforts.⁵⁴ Since so much of political action, as Lasswell wrote in his classic formulation,⁵⁵ is privately motivated with a superimposition of some public justification, actions with severe impacts on others require very careful self-scrutiny for these latent tendencies which may be inconsistent with and counterproductive for more manifest goals.

Many methods are available for scrutinizing the self for neurotic distortions. Detailed exploration of them is unnecessary here other than to emphasize that the process of knowing oneself does not conclude with the granting of a diploma certifying that the undersigned knows himself and is entitled to all the rights and privileges thereunto appertaining. It is never completed, but is an ongoing process. The responsible participant in civic decisions develops a repertory of techniques for constantly scrutinizing his self-system, making it a dimension of all contemporary behavior.

The other patterns of distortion pertinent to this discussion affect the structure of demands that the self makes on itself and on the environment; both derive from and reinforce the expectation network, the entire conception of past and future within which the

⁵² E. ERIKSON, *INSIGHT AND RESPONSIBILITY* 206 (1964).

⁵³ *Id.* at 205.

⁵⁴ H. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 75 (1930), *reprinted in* H. LASSWELL, *THE POLITICAL WRITINGS OF HAROLD D. LASSWELL* 75 (1951); H. LASSWELL, *POWER AND PERSONALITY* 39 (1948).

⁵⁵ *See, e.g.*, H. LASSWELL, *WHO GETS WHAT, WHEN, HOW* (1936), *reprinted in* H. LASSWELL, *THE POLITICAL WRITINGS OF HAROLD D. LASSWELL* 304 (1951).

self locates itself and that conditions the perception and appraisal of every option. One distortion derives from the universal and inescapable parochializing effect of acculturation. To be acculturated means to have adopted at a very deep level of consciousness—so deep that one is often unaware of its effect on contemporary behavior—the fundamental postulates of a particular system. Many of these postulates are absorbed and reinforced by the use of language itself. Others are established and maintained by fundamental group experiences which are ritualized in myth, folklore, and miranda, and themselves establish a key part of the identity of the individual through his membership in a particular group. These views are parochial because they tend to exalt the values of the group with which the individual identifies and to denigrate or view as incomprehensible the value preferences of other groups. The emphasis is on loyalty to particular value institutions per se and not to projected patterns of value production and distribution. The particular group to which parochial loyalties may be owed and which influences expectations and demands may be territorial or nonterritorial, based upon identification with a language or dialect group, a class or caste, or a tribal formation.

In the cross-cultural conflicts in which the tormented conscience necessarily finds itself, these parochial views and value preferences can be particularly debilitating. When they operate unchecked, they prevent the individual governed by them from making keen appraisals of the relative utilities of his own and adverse value systems with respect to a specific projected pattern of value production and distribution. In particular, dogmatic and unappraised commitment to parochial values prevents the process of consideration and compromise which is necessary for avoiding, composing, or diverting intergroup conflict.

In making and appraising decisions that may involve resort to unauthorized coercion, is it not fair and efficient to insist that the person contemplating or reviewing such an option develop effective procedures for examining, in comparative and contextual perspective, his own expectations of past and future and his own demand set? This does not import an a priori commitment to abjure deeply held values, but rather a willingness to adopt the preliminary pos-

tulate that all value choices are cultural and not absolute, that they derive in substantial part from historical and psychopersonal processes which may or may not have been cogent responses in the contexts in which they were formed but in any case represent only selections from a much wider range of contemporary options. It is recommended that the individual contemplating unauthorized and potentially violent action as well as those reviewing or appraising it suspend, insofar as possible, commitments to particular values and appraise them as no more than parochial choices. This state of mind should permit the individual to refocus commitments from value institutions per se to the value consequences that their implementation will precipitate in projected contexts. While a number of techniques are available for gaining and refining this type of disengagement, the most economical and venerable one is devil's advocacy, either undertaking or designating another to undertake the committed and spirited development of arguments on behalf of the position which one opposes. Some studies have indicated that this often provides deep insights into the defects in one's own position and may in fact lead to growth beyond it.⁵⁶

Related to the distortions in perception and choice arising from cultural parochialism are distortions that derive from participation and intense inculcation in particular institutional arrangements. Institutions, such as particular bureaucracies, companies, professions like the law, medicine, and the clergy, are essentially coordinated patterns of behavior and perspectives. The perspectives involve very selective conceptions of social process. The narrowing of the intellectual and emotional concentration onto a particular matter or sector contributes to the great power of institutional arrangements and permits a mobilization and intense localization of efforts. But in cross-institutional and cross-cultural settings, these potential benefits become limitations that can be no less distorting than those arising from cultural parochialism or neurotic tendencies. They may be referred to as institutional biases. Institutional biases are often reinforced through formation of "teams" composed of individuals with the same institutional acculturation or parochial biases deriving from common culture, class, language or dia-

⁵⁶ See L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

lect, sex, or exposure to crisis. The result is often what Irving Janis has called "groupthink."⁵⁷

One way of counteracting the tendency toward institutional bias is to interact consciously with individuals who have been acculturated in different institutional settings and to form decision making units that consciously incorporate individuals with entirely different acculturations and institutional orientations. In homogeneous teams, adversaries always seem stubborn, perverse, naive, and wrong-headed. When persons of widely varying viewpoints are incorporated into the same team, there is often more understanding of the demands and expectations of past and future borne by adversaries, more potential sympathy for their views, and, hence, greater possibilities of discovering grounds for conciliation and composition of differences.

The disengagement from group processes with which one both identifies and wishes to influence, and the efforts at systematic scrutiny of the deeper impulses of the self may provide a better understanding of the motivations of the individual. These efforts are particularly urgent when the options under consideration include either the direct resort to violence or the more subtle forms of complicity such as a moderated stance of resistance to its use. Since both of these options provide very deep opportunities for gratification, it is important that the individual contemplating them be aware of himself and of their operation.

Contemplation of the self, though continuous, is only a preliminary operation. A major component of focus must be external, directed toward the features or outcomes of the processes which the tormented conscience wishes to change.

The contemporary social process ironically creates a psychoper-sonal system which is impelled to act when there are patent viola-tions of its own rectitude system, but at the same time is often deprived of the accurate intelligence that would permit it to for-

⁵⁷ I. JANIS, *GROUPTHINK* 174-97 (1983). More specifically, the concept of groupthink involves members of a particular group overestimating their power and morality and acting with "closed minds" and with uniformity. Such practice often results in poor thinkers making critically poor decisions. *Id.*

manipulate and implement a rational strategy. A major impediment to political participation in the contemporary world, and certainly a major impediment to rational action, is the insufficiency of reliable information about the world. Hence, an important element of rational and responsible decision making is access to flows of accurate information both about the processes in operation as well as the probable consequences of resort to different options.

There is no simple solution to this problem. There are, however, a number of steps by which an individual concerned with responsible civic participation can increase receptivity to information and, more generally, the reliability of the intelligence gathered. First, the individual should develop a systematic map of the social and power processes which permits a realistic and comprehensive orientation to the actual flow of decisions. Idealized pictures of the world or expertise in the authorized myth systems of different polities are not useful in this regard. Instead, what is required is a way of focusing on the participants, their subjective perspectives, the situations in which they operate, the resources they draw on to influence others, the strategies or modalities by which they manipulate those resources so as to assess the net outcomes in terms of production and distribution of power, as well as other values that flow from this process. When such a model is refined, it becomes possible for the person contemplating a more effective response to refine his focus on particular targets and to canvass the full range of persuasive as well as coercive modalities which can be deployed to secure changes in the target's behavior.

Ultimately, the individual who seeks to enhance his effectiveness in the realization of his objectives must devise an appropriate strategy program, that blend of persuasive and coercive, symbolic and substantive modalities that is presumed to be optimally designed to secure desired outcomes. Thoreau does not reach this issue. His objective was to wean his audience, which was law-abiding and committed to the authority of the established order, to contemplate at least a limited defection. As a result, he was anxious to make his actual defection seem little more than a jeu

d'esprit.⁵⁸ For a member of the aristocracy who had, moreover, cultivated a public eccentricity as a further protection, it may have been just that. But for others, civil disobedience, whether actors or victims, is no game.

Should all other values be subordinated to the achievement of some limited political goal or should the modalities for achievement of the goal themselves be consistent, under all circumstances or insofar as possible, with a variety of other values? The Leninist approach has been to subordinate everything to the achievement of a goal. According to Lenin, it is a poor revolutionary who in a moment of intensive struggle is stopped by the inviolability of the law.⁵⁹ Consider a recent application of that principle: Carlos Marighella's *Mini-Manual of the Urban Guerilla*, published in 1970.⁶⁰ Marighella advocates as a general objective of those he counsels to weaken otherwise moderate governments by constantly challenging them, thereby forcing them, "to intensify repression."⁶¹ This, Marighella believes, will lead to a development in which "the political situation in the country is transformed into a military situation in which the militarists appear more and more to be the ones responsible for errors and violence while the problems in the lives of the people become truly catastrophic."⁶² To achieve this desirable state, Marighella advises that "the urban guerilla must become more aggressive and violent, resorting without let up to sabotage, terrorism, expropriations, assaults, kidnapping and ex-

⁵⁸ Thoreau's wordplay in comparing a standing army to a "standing government," H. THOREAU, *supra* note 38, at 131, calling for Americans to "be men first, and subjects afterward," *id.* at 134, and noting that "any man more right than his neighbors constitutes a majority of one already," *id.* at 147, all tend to downplay the seriousness of the cause. Furthermore, Thoreau's own declaration that "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," *id.* at 146, indicates that the method of civil disobedience could and, in fact, should be carried on as simply a normal part of life. To Thoreau, the only life threatening issues concerned soldiers in a war he chose not to support; the safety of the civilly disobedient citizen was never threatened. *Id.* at 146.

⁵⁹ See Alekseev, *V.I. Lenin o Praze v Sotsialisticheskoy Obschestve* (V.I. Lenin on Law in Socialist Society), 1969 SOVETSKOE GOSUDARSTVO I PRAEVO No. 9, at 3, 5, cited in B. RAMUNDO, *THE SOVIET LEGAL SYSTEM: A PRIMER* 6 (1971).

⁶⁰ C. MARIGHELLA, *MINI-MANUAL OF THE URBAN GUERRILLA* (Adelphi Papers No. 79, 1970).

⁶¹ *Id.* at 3.

⁶² *Id.* at 7.

ecutions, heightening the disastrous situation in which the government must act."⁶³

Without addressing the probability of effectiveness, his strategy plainly shows scant concern for innocent individuals and little concern for the peripheral damage that is caused in the achievement of the goal. To the contrary, the victims become mediant instruments for the achievement of a political goal. A comparable strategic view can be found in the work of Fanon,⁶⁴ Castro,⁶⁵ and Guevara.⁶⁶ Regis Debray, an enthusiastic admirer of the work of Castro and Guevara, addresses the issue directly.⁶⁷ He voices a certain melancholy for the victims of the violence wrought by those with whom he identifies, but accepts it as a necessary cost for procuring the desired changes.

The tormented conscience and those who must appraise its actions are unlikely to find the sweeping prescriptions in the Leninist mode acceptable, even if they were deemed to increase significantly the margin of probable success. For one thing, the tormented conscience continues to identify with the decision process and is only trying to change one sector of decision or flow of decisions within it. In contrast, the Leninist view characterizes the entire process of decision and the system of public order which sustains it as pathological and hence a target for radical change.⁶⁸ For another thing, the tormented conscience, insofar as it is part of the western political tradition, is likely to premise all behavior on the notion of respect for the autonomy and inherent value of other individuals and to eschew the temptation to use others as instrumental means to political ends.

During the Vietnam war, tormented consciences in the United States, which were driven to resist what they felt was the illegiti-

⁶³ *Id.* at 16.

⁶⁴ See F. FANON, *supra* note 4.

⁶⁵ See 1 F. CASTRO, *Revolutionary Struggle (1922)* in *SELECTED WORKS OF FIDEL CASTRO* (R. Bonachea & N. Valdés eds. 1971).

⁶⁶ See C. GUEVERA, *GUERRILLA WARFARE (1961)*. See also R. DEBRAY, *REVOLUTION IN THE REVOLUTION? ARMED STRUGGLE AND POLITICAL STRUGGLE IN LATIN AMERICA* (B. Ortiz trans. 1967).

⁶⁷ R. DEBRAY, *STRATEGY FOR REVOLUTION 207* (R. Blackburn ed. 1970).

⁶⁸ See, e.g., 2 V.I. LENIN, *WHAT IS TO BE DONE?* in *SELECTED WORKS 30-192 (1943)*.

mate use of an authority they otherwise recognized, frequently thought and wrote about the resort to violence. Such deliberations became more anguished and urgent when some people concluded, accurately or not, that their relatively nonviolent efforts to secure change in the policy they opposed were not succeeding. One interesting example of the anguish, entitled *Thoughts on a Doctrine of Just Destruction*, was written by William Davidon, a professor at Swarthmore College, and appeared in a newsletter called *Resist*, published by an organization that opposed the draft and sought to aid resisters. Davidon supported the strategic option of destruction of property but sought to limit its use by five tests. First, he eschewed actions which directly debased or threatened the life of anyone else, thus separating himself from the Leninist political tradition considered above. Second, he eschewed destruction unless it promised an immediate effect on the institutions he felt were directly involved in the behavior he wished to terminate. Third, he eschewed destruction unless popular support for the action was sufficiently broad-based that it would be viewed as a positive action and not as a kind of violence similar to that which he opposed. Fourth, he eschewed action that would lead to what Carlos Marighella explicitly sought: the aggravation of fear and paranoia, providing the government with either the need or justification for increased repression. Fifth, he eschewed action which did not increase the wide popular support for the political movement of which he felt he was a part.

Davidon's approach would unquestionably be criticized by Marighella and the Leninists as a bourgeois atavism, for apparently he is willing to contemplate the failure of his political program rather than adopt methods which would augment effectiveness but substantially violate other goals and values.

Similarly, international law, which is a summary of the attitudes of elites in many nation-states about the appropriate level of violence and its mode of use in international conflicts, has increasingly avoided judgments about the circumstances that initiate violence. Instead, it focuses more on *jus in bello*, on the proper level and appropriate targeting of the instruments of violence. The basic international formula has been that resort to the use of violence

must be necessary in the context, proportional to need, and capable of discriminating between combatant and noncombatant. None of these terms, as many critics have observed, is so pellucid as to be self-executing. As they are to be interpreted in each case by those who use and benefit from the violence, they do not appear to have provided a significant restraint. International lawyers specializing in appraisal of the military instrument have little difficulty in justifying the killing of noncombatants or destruction of their property if the actions taken fulfilled the proportionality, necessity, and discrimination tests. Thus, international law, as a compact between governmental elites, is as clear on its consensus on the lawfulness of official elite violence as it is on its condemnation of violence by nonofficials.

The limitation of violence, whether by state or non-state entities, to combatants has become more difficult to achieve operationally because of the increasingly permeable line between combatants and noncombatants. Before the French Revolution, wars were routinely conducted by professionals who were distinct from the civil population upon whom they generally preyed indiscriminately to their own advantage but without military gain. The rise of Napoleon initiated a new period in world history in which armies were based upon the *levée en masse*. As the methods and achievements of the industrial revolution were adapted to the needs of a contemporary war machine, the entire state and the whole population became pertinent factors in national mobilization for war. By the Second World War, military strategists, usually loath to waste ordinance on civilian populations, increasingly targeted industrial concentrations in enemy states as well as neighborhoods in which the workers employed in these concentrations resided. In a system of comprehensive mobilization for war, more general attacks on civilian populations in and of themselves acquire a substantial military valance to the extent they lead to demoralization. By the end of the Second World War, even without the special case of atomic attacks on Hiroshima and Nagasaki, it had become increasingly difficult to distinguish military and civilian targets. Herr Bessermann would have contended that they simply cannot be distinguished.

As urban civilization has spread and as industrial civilization increasingly has been incorporated into the preparation for war, "military" targets are no longer presented in splendid isolation from civilian contexts. To the contrary, they are often inextricably interlinked. Hence, the dilemma of both the person contemplating unauthorized violence and that of the military planner developing contingency plans to be used by his state may have become similar. Indeed, there is reason to suspect that some military planners calculate the terror dividend for military operations in terms of its gains and its costs, in a manner not dissimilar from cadres, espousing Marighella's views and resorting to unauthorized violence.⁶⁹ The assimilation of target and periphery would appear to operate as part of the erosion of the more general restraints that operate on socialized beings in any society to refrain from directing violence at the defenseless.

Apparently, most individuals are drawn to the types of tests and conditions with which Professor Davidon struggled, for all of the difficulty involved in operationalizing them, and are repelled by the relentless logic of the Leninist position. It is virtually impossible for us to contemplate appraising the behavior promoted by the Leninists as lawful within the present system. One suspects, however, that testing our values in a variety of hypotheticals would lead many to endorse high levels of violence in some circumstances and for some goals even when they were likely to lead to death and destruction of noncombatants or otherwise non-engaged individuals. Remember Herr Bessermann? How many would rush to condemn his actions? How many would condemn comparable actions by resisters or dissidents in a Cambodia, a Uganda, or in some other brutal despotism in which the possibilities of securing appropriate change by peaceful means did not exist?

VI

Thus this discussion leads back full circle to Herr Bessermann, the quintessential tormented conscience, who concluded that peaceful means of securing change in a policy were unlikely to end the behavior he opposed and, it was presumed, reluctantly, re-

⁶⁹ C. MARIGHELLA, *supra* note 60.

sorted to violence. After this exploration of the tortured conscience, it is probable that the uneasy sympathy that the reader felt for Herr Bessermann at the beginning of this excursion remains that: an uneasy, disquieting, even tormented sympathy; an admiration for Bessermann's courage; a horror at the action; and an uncertainty over how to characterize and respond to it. There is no respite for the tormented conscience of Bessermann or of one who would judge him. Only a psychopath or a sociopath could contemplate with equanimity the sorts of things that a "Bessermann" does. Only a citizen without values and conscience could fail to share the anguish that prompted Bessermann to take the steps he took.

It is easier to judge "Bessermanns" when they operate in foreign countries and especially easy to appraise their actions when they oppose a government that one can characterize as wicked and violent. It is harder to appraise "Bessermanns" when they are native sons. But there is no escape from that task. There will continue to be tormented consciences in all industrial democracies that emphasize power-sharing and the development of autonomous personalities with wills vigorous enough to insist on a measure of conformity to their consciences.

Intellectual clarification of the problem has not been helped appreciably by scholars and publicists. As a nation, we have used the word "terrorist" without discrimination tending toward what Thomas Szasz calls the "rhetoric of rejection": the use of a term which simultaneously designates a pattern of action and judges it unlawful.⁷⁰ The word "terrorist" is used now to refer to virtually all who resort to unauthorized violence to secure political objectives. Hence, the PLO and JDL and the Afghan resistance are terrorists, SWAPO fighting the illegal occupation of Southwest Africa by South Africa as well as the ANC fighting South African apartheid are terrorists. The Ku Klux Klan also could be characterized as terrorists, though it is not clear if that particular epithet has ever been applied to them. Presumably physicians who refuse to participate in civil defense contingency planning will be likened

⁷⁰ T. SZASZ, *IDEOLOGY AND INSANITY* 56-68 (1970).

to terrorists. People who oppose nuclear plants or nuclear weapons and who resort to coercion will be given the same title.

The catholic use of a term like terrorism in these contexts may serve the purposes of the elite who oppose the methods and objectives of those resorting to coercion, but for intellectual and policy clarification, it is self-defeating. Its invocation affirms the rightness of one's own position and characterizes as wicked per se those who unlawfully oppose it. It focuses not on what opponents seek and why they have resorted to particular methods, but only on the methods themselves. It studiously overlooks the fact that in comparable circumstances one's own specialists in violence might resort to the same or similar tactics. After all, terror is a procedure for neutralizing opposition, probably used more often by official elites than by those opposing them.

Would it not be better to suspend the use of that term and those like it and to focus instead on the objectives sought by those who have resorted to coercion?—and the context, contingencies, available alternatives, and consequences of its use or its nonuse? Some, to be sure, perhaps many of those who resort to violence will be exposed as deranged or committed to a public order system so odious to civilized western values that they must be intractably opposed. One should neither assume that adversaries, enemies, and wicked people do not exist nor gainsay that some indeterminable number of people who resort to violence are insane. On the other hand, many may emerge not as those with an appetite for violence per se, but rather as tormented consciences. Addressing them on the merits and not on the methods may itself conduce to less violent resolutions of conflict.