

ON THE MORAL OBLIGATION TO OBEY UNJUST LAWS

TWO DEFENSES, A CASE STUDY, AND CRITIQUE



Universiteit Leiden

MASTER'S THESIS

R.C.H. HAERKENS VAN DEN BRAND, BA

PHILOSOPHY: ETHICS AND POLITICS

SUPERVISOR: DR. D.M. MOKROSINSKA

JUNE 15, 2017

*Mankind are greater gainers by suffering each other
to live as seems good to themselves, than by compelling each
to live as seems good to the rest.*

John Stuart Mill

On Liberty

TABLE OF CONTENTS

PREFACE.....	v
INTRODUCTION	1
I. TWO DEFENSES OF THE MORAL OBLIGATION TO OBEY UNJUST LAWS ..	5
§I.1. JOHN RAWLS ON FAIR PLAY	5
§I.2. A CRITIQUE OF RAWLS.....	9
§I.3. THOMAS CHRISTIANO ON PUBLIC EQUALITY.....	13
Public equality.....	14
The authority of democracy	16
The limits to democratic authority	18
II. CASE STUDY: THE DUTCH LAW ON EUTHANASIA AND PHYSICIAN- ASSISTED SUICIDE	21
§II.1. EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE IN CASES OF A COMPLETED LIFE.....	21
Euthanasia and physician-assisted suicide.....	22
The reality of the desire to end one's completed life.....	24
§II.2. OBJECTIONS TO THE LAW ON EUTHANASIA AND PHYSICIAN- ASSISTED SUICIDE.....	25
The principle of autonomy.....	25
The right to die (alongside the right to life)	29
III. A CRITIQUE OF THE MORAL OBLIGATION TO OBEY UNJUST LAWS	34
§III.1. JOHN STUART MILL ON THE HARM PRINCIPLE	34
§III.2. PERSONAL AUTHORITY OVER SELF-REGARDING CONDUCT.....	39

Other-regarding and self-regarding conduct.....	39
Euthanasia and physician-assisted suicide as a critique of Rawls and Christiano	42
CONCLUSION	46
BIBLIOGRAPHY	48

PREFACE

“It is, of course, a familiar situation in a constitutional democracy that a person finds himself morally obligated to obey an unjust law.” When I came across this sentence in a paper by John Rawls that I was reading for a course on authority, little did I know that it would eventually become the topic of my master’s thesis. It immediately puzzled me, for two reasons. First of all, I never would have thought that a moral obligation to obey an unjust law would be “a familiar situation.” And second, this claim seemed to me very uncharacteristic of Rawls.

As the principle of fair play lies at the heart of Rawls’ claim, I wrote my final essay for the course on authority mainly as a critique of that ground (while also pointing out that his prerequisite of a constitutional democracy with a just legislative procedure was not elaborate enough to be very convincing), thereby hoping to demonstrate that the claim that democratic citizens are morally obligated to obey unjust laws¹ could not be upheld – (over)confidently calling it *On the Alleged Moral Obligation to Obey Unjust Laws*.

I had enjoyed the course very much, so I asked the teacher, Dr. Bruno Verbeek, if he would be willing to discuss possible topics for my master’s thesis that would fit well with its subject matter. He encouraged me to further develop my views on the moral obligation to obey unjust laws and I took his advice, once again hoping to demonstrate that citizens could not be obligated to obey unjust laws. Due to prior commitments, Dr. Verbeek referred me to Dr. Dorota Mokrosinska as a supervisor, given her expertise in political obligation.

Dr. Mokrosinska then introduced me to Thomas Christiano as another political thinker who defends the moral obligation to obey unjust laws. His theory turned out to be much more convincing. At the heart of Christiano’s claim lies the principle of

¹ Throughout the master’s thesis, whenever I speak of *the claim*, I refer to this claim, viz. that democratic citizens are morally obligated to obey unjust laws (unless otherwise specified).

public equality, which, I would soon learn, makes for a much stronger case than the principle of fair play. Additionally, his account elaborates on the prerequisite of a constitutional democracy with a just legislative procedure to a greater extent than Rawls'. Christiano's defense convinced me that there is indeed a moral obligation to obey unjust laws. And so, I was faced with a different challenge: I no longer wanted to prove that there cannot *be* such an obligation, but instead wanted to find out *to what extent* citizens can be said to be bound by that obligation. This enquiry resulted in my critique of the claim with regard to self-regarding conduct, as will become clear. In a sense, the master's thesis embodies the road that I have travelled regarding the moral obligation to obey unjust laws during my master's studies.

In this preface, I wish to offer yet another critique that, although it will not be discussed any further, is of considerable importance to me. The main reason why I was so puzzled by the statement "moral obligation to obey unjust laws" to begin with (as I encountered it in Rawls and later in Christiano as well, coming to understand it as common usage) is that the terminology seems to imply that the moral ground of "moral obligation" and "unjust laws" is one and the same, while they are in fact very different.

As I will explain momentarily, the moral ground of the "moral obligation" is *institutional justice* whereas the moral ground of the "unjust law" is *one's personal views on justice*. There is a real danger in the way that both Rawls and Christiano state this claim (as well as presumably most if not all the other participants in the debates surrounding this topic) that their readers might come to believe that they share one and the same moral ground, as a result of which an in fact significant non-negligible dissimilarity between the two grounds might become obscured.²

² Please note that the following content of this argument will be discussed at great length in the master's thesis (albeit in a different context), and will therefore be presented only succinctly and without references here.

Christiano explicitly states that only by obeying the democratically made choices can citizens act justly. The justice of the rules with which citizens are expected to comply is determined by the legal system of their society. Citizens differ in their views on justice and are therefore in need of an authority, recognized by all, that decides on matters of justice. Only the democratic assembly can establish what justice requires, by means of democratic decision-making, and enforce public rules that are meant to guide citizens' behavior. If justice can only be established through government institutions (such as the democratic assembly), then there is no justice outside of the state.

Now, if the *only* way to establish what justice requires is the vote of the democratic assembly on policies and laws, any individual citizen's personal views on any given law cannot be sufficient to speak of an "unjust law" as such – for a single citizen's views are not nearly enough to establish what justice requires. When Rawls and Christiano speak of a "moral obligation to obey unjust laws" in one breath, they in effect conceal this significant dissimilarity between justice as established by the people (that is, the democratic assembly) and justice as a mere personal view of any given citizen. Thus, there is a very important difference between an *unjust law* – which in the strict sense could only be a law which defeats the authority of the democratic assembly – and a *law with which a citizen disagrees*.

To be sure, after stating their claim that democratic citizens are morally obligated to obey unjust laws, both Rawls and Christiano proceed to explain that the unjustness of unjust laws has to be understood as mere disagreement that a citizen has with the justness of the laws in question. Christiano frequently interchanges the qualifier *unjust* with a variety of other words or descriptions with regard to laws and policies, such as "mistaken," "against one's sense of what ought to be done" and "when one disagrees with it." The danger here, however, is that the distinction between on the one hand unjust laws that are merely laws with which citizens disagree and on the other hand unjust laws that are unjust in the institutional sense of the word

becomes obscured – even though there is no real *need* to refer to laws with which citizens disagree as “unjust laws.”³

To conclude, the phrase “moral obligation to obey unjust laws” cannot be used without any danger. Therefore, it seems prudent to me to refrain from this terminology. Instead, I would advocate for an unambiguous phrase, such as “moral obligation to obey laws with which one disagrees,” or, perhaps even better, “moral obligation to obey laws which are unjust in one’s personal views on justice.”

Last, but certainly not least, I would like to express my sincere gratitude to Dr. Dorota Mokrosinska. I am deeply indebted to her for her guidance, her aid, and perhaps most of all the many hours spent discussing my work, which have contributed extensively to the journey that has been this master’s thesis.

³ To give a telling example: as soon as people asking me about my master’s thesis hear that its topic is the moral obligation to obey unjust laws, *if* they associate it with anything, it is without exception the rule of the Nazi regime and its manifestly unjust laws – whether a fellow student, a friend or an acquaintance. (Whereas, I would think unsurprisingly, not once has anyone associated the unjustness of the unjust laws merely with an individual’s personal views on justice.)

INTRODUCTION

The political obligation to obey the law is an essential feature of many modern-day states. Quite certainly, most citizens of any given modern state do not (easily) question whether they have an obligation to obey the laws of their government – provided, of course, that they consider their state to be just. Their willingness to obey most likely stands or falls with the justness of its legislative procedure and its laws. States that act immorally, that frequently enact unjust laws, cannot count (easily) on their citizens to obey – at best unwillingly, under the threat of coercion.

Nonetheless, several political thinkers claim that citizens are not only obligated to obey just laws (which we may presume to be true), but *unjust* laws as well, asserting that this obligation is a more or less unquestionable part of modern-day societies. Among those thinkers are John Rawls and Thomas Christiano.

In his paper *Legal Obligation and the Duty of Fair Play*, John Rawls essentially defends that claim with the principle of fair play. When a society consists of a mutually beneficial and just scheme of social cooperation, the advantages of which can only be obtained if (nearly) everyone cooperates, Rawls believes that any person who has accepted the benefits of the scheme is bound by a duty of fair play to do her part and not to take advantage of the free benefit by not cooperating. With regard to political obligation, provided that the democratic state and its constitutional procedure are just, citizens have a duty to obey the laws of their state. And since it will (most likely) never be the case that the people enact a constitution that decides in favor of any individual citizen, the inevitable compromise is a just constitution that sometimes requires having to obey laws that are unjust.

More recently, Thomas Christiano has written *The Constitution of Equality* in which he defends the claim as well, as he sets out his thesis that social justice requires the public realization of the equal advancement of interests. According to Christiano, in order to satisfy the principle of public equality a society has to have a democratic

decision-making process for the enactment of laws. He ascribes a substantial amount of authority to democracy. One of the ways in which public equality manifests itself in society is the equal say each citizen has in the establishment of the democratic assembly that enacts policies and laws. The outcomes of democratically made decisions have to be obeyed by all citizens, as they are made by all (through their vote on representatives who then vote on the bills). Christiano holds that citizens who disobey the law act superior to their fellow citizens. Their disobedience would result in a loss of the public equality that lies at the core of his theory. Therefore, citizens are morally obligated to obey the laws of their state *even if* they are unjust.

The main purpose of the master's thesis is to offer a critique of the claim that democratic citizens are morally obligated to obey unjust laws as defended by Rawls and Christiano. To this end, I will present the following thesis:

Every individual has a most basic and innate right to be the sole authority on her self-regarding conduct, and therefore, democratic authority is limited to citizens' other-regarding conduct.

The master's thesis is constructed in the following manner.

In the first chapter, we will analyze both Rawls' and Christiano's defense of the claim, grounded in the principle of fair play and the principle of public equality, respectively. Additionally, I will critically assess some of the main aspects of Rawls' theory. I shall demonstrate that the duty of fair play has its weaknesses that make it unfit to account for a moral obligation to obey unjust laws. (As I believe that Christiano's defense of the claim is stronger than Rawls', I will not offer a critique of his theory here. My main critique of the claim, which applies to both Rawls and Christiano, will be developed in the subsequent chapters.)

In the second chapter, we will discuss an existing unjust law, viz. the Dutch law on euthanasia and physician-assisted suicide. Article 293 of the Dutch Criminal Law states that any case of euthanasia and physician-assisted suicide that is *not* based on hopeless and unbearable suffering is a crime. I shall defend euthanasia and physician-

assisted suicide in cases of a completed life (*voltooid leven*), which do not have to involve such suffering. I will demonstrate that there are moral grounds – the principle of autonomy and the right to die (alongside the right to life) – that undermine the claim that citizens should obey a law such as article 293. It is my thesis, which I will work out in more detail in the following chapter, that citizens should have the right to make their own choices with regard to their self-regarding conduct – of which euthanasia and physician-assisted suicide are examples – over which the democratic assembly should have no authority. I regard the aforementioned moral grounds as manifestations of this innate right.

In the third chapter, I will offer my critique of the claim and present my own thesis. I will argue that neither Rawls' nor Christiano's theory properly takes into account every individual's most basic and innate right to be the sole authority on her self-regarding conduct. Because of this hiatus, a law such as article 293 of the Dutch Criminal Law would be endorsed on both Rawls' and Christiano's account, even though that should not be the case. Therefore, if we want to uphold that democratic citizens indeed have an obligation to obey unjust laws, we have to protect each citizen's right to that authority. To demonstrate this, first, we will analyze John Stuart Mill's theory of social liberty, the nucleus of which is his well-known harm principle, and second, I will defend my thesis that democratic authority is limited to other-regarding conduct, as authority over one's self-regarding conduct belongs solely to oneself.

In the conclusion, finally, I will briefly summarize the main elements of the master's thesis and explicitly state my conclusions, viz. that democratic citizens are indeed morally obligated to obey unjust laws; that Rawls' defense of the claim is unconvincing, however, as the principle of fair play has its weaknesses that cannot be overlooked; and that, even setting aside those weaknesses, both Rawls' and Christiano's defense are incomplete as they do not incorporate nor protect every individual's most basic and innate right to be the sole authority on her self-regarding conduct, and consequently do not acknowledge that democratic authority, and

therefore citizens' obligation to obey unjust laws, is limited to their other-regarding conduct.

I

TWO DEFENSES OF THE MORAL OBLIGATION TO OBEY UNJUST LAWS

Two prominent political thinkers who defend the claim that democratic citizens are morally obligated to obey unjust laws, are John Rawls and Thomas Christiano. In this chapter, first, we will analyze Rawls' theory. Then, I will critically assess the main ground of his defense, viz. the principle of fair play, discussing several weaknesses that undermine Rawls' case for a moral obligation to obey unjust laws. And finally, we will analyze Christiano's theory.⁴

With a proper understanding of their theories, in the second chapter, we can discuss a case study of an existing unjust law that would be endorsed on both Rawls' and Christiano's account. I will argue, however, that we have good reason to believe that citizens are *not* obligated to obey that law, and therefore claim that their accounts can be challenged (as I will set out in more detail in the third chapter).

§I.1. JOHN RAWLS ON FAIR PLAY

According to John Rawls, when tackling the issue of obedience to an unjust law, the decision each citizen has to make comes down to the balancing of opposing the unjust law on the one hand and abiding by the just constitution on the other:

⁴ As mentioned in the Introduction, I believe that Christiano's defense of the claim is stronger than Rawls', and therefore, I will not offer a critique of his theory here. My main critique of the claim, which applies to both Rawls and Christiano, will be developed in the subsequent chapters.

A person has to decide, in each case where he is in the minority, whether the nature of the statute is such that, given that it will get, or has got, a majority vote, he should oppose its being implemented, engage in civil disobedience, or take equivalent action. In this situation he simply has to balance his obligation to oppose an unjust statute against his obligation to abide by a just constitution.⁵

To this, Rawls adds that, generally speaking, we may hope that each citizen's obligation to the constitution is "clearly the decisive one."⁶ How can our obligation to the constitution have more weight than our obligation to oppose an unjust law?

According to Rawls, moral obligations arise in a legal order that has a number of special features. It has to satisfy the following conditions: the generally strategic place of its system of rules (regarding the fundamental institutions of society), the concept of the rule of law, and constitutional democracy as its system of government. In his *magnum opus*, Rawls describes the rule of law as "the regular and impartial, and in this sense fair, administration of law."⁷ Having rules that are public, ensuring equality before the law, and having no bills of attainder are a few examples. Only when we can speak of a legal system that satisfies these conditions may we assume citizens to have moral obligations to obey its laws.⁸

How can it be, then, that "sometimes we have an obligation to obey what we think, and think correctly, is an unjust law?" According to Rawls, this statement only *appears* to be an "anomalous fact," but is actually entirely reasonable:

It is, of course, a familiar situation in a constitutional democracy that a person finds himself morally obligated to obey an unjust law. This will be the case whenever a

⁵ John Rawls, *John Rawls: Collected Papers*, ed. Samuel Freeman, *Legal Obligation and the Duty of Fair Play* (Cambridge: Harvard University Press, 2001), 120.

⁶ Ibid.

⁷ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), 207.

⁸ Rawls, *Legal Obligation and the Duty of Fair Play*, 118-119.

member of the minority, on some legislative proposal, opposes the majority view for reasons of justice.⁹

According to Rawls, if there is a choice between two bills – *A* and *B* – that are contrary to one another, and a minority believes that *A* is just and *B* unjust, when a majority votes for *B*, the minority *has* to accept it as law, that is, has a moral obligation to obey it.¹⁰

The question then becomes, says Rawls, how we can justify a constitutional lawmaking process the unjust outcomes of which citizens have to accept. He believes that our acceptance of it can be “entirely reasonable,” so long as the unjust laws are “within certain limits,” because it is necessary as a political device to decide between conflicting legislative proposals. Given that it will never be the case that every citizen agrees with everyone else on all political matters, some constitutional procedure has to be employed to ensure that the state can function properly.¹¹

The principle upon which this obligation to obey unjust laws is founded is *the principle of fair play*, the nucleus of Rawls’ argument:

Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has

⁹ Rawls, *Legal Obligation and the Duty of Fair Play*, 119.

¹⁰ Ibid.

¹¹ Rawls, *Legal Obligation and the Duty of Fair Play*, 121-122.

accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating.¹²

Under these conditions, one who accepts the benefits of the scheme is bound to do one's part, that is, accept the burdens as well, by a duty of fair play. The basic idea is quite simple: it is only fair to contribute to a scheme of social cooperation the benefits of which you accept and enjoy. Rawls sees a constitutional democracy as such a cooperative scheme. The principle of fair play thus defined is the general moral principle upon which the moral obligation to obey unjust laws is based. Rawls emphasizes that as a condition, the obligation "depends upon our having accepted and our intention to continue accepting the benefits of a just scheme of cooperation that the constitution defines."¹³

Another essential condition of this obligation is the justice of the constitution concerned.¹⁴ According to Rawls, a constitution is just if it meets the two principles of justice.¹⁵ The first is relevant to the current line of reasoning,¹⁶ which he defines as follows: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."¹⁷ Rawls argues that the kind of equal liberties that this principle calls for are characteristic of a constitutional democracy, such as the right to vote and freedom of expression.

¹² Rawls, *Legal Obligation and the Duty of Fair Play*, 122.

¹³ Rawls, *Legal Obligation and the Duty of Fair Play*, 122-123.

¹⁴ Rawls, *Legal Obligation and the Duty of Fair Play*, 123-125.

¹⁵ Rawls discusses these two principles in great detail in *A Theory of Justice*. For example, see (there) §11, §13, and §26.

¹⁶ The second principle is relevant for a second apparent "anomalous fact," according to which "we sometimes have an obligation to obey a law even in a situation where more good (thought of as a sum of social advantages) would seem to result from not doing so" (*Legal Obligation and the Duty of Fair Play*, 119), which is of no concern to us.

¹⁷ Rawls, *A Theory of Justice*, 53.

The final question that Rawls takes up, is why citizens would rule out any and all constitutional procedures that would decide in accordance with their own individual judgment of justice against everyone else. He follows I.M.D. Little's approach to this question, stating two hypotheses:

that among the very limited number of procedures that would stand any chance of being established, none would make my decision decisive in this way; and that all such procedures would determine social conditions that I judge to be better than anarchy.¹⁸

Constitutional procedures that would decide in accordance with a single citizen's judgment against everyone else would make her a dictator and are therefore clearly unjust, asserts Rawls. For such procedures clearly violate equality (protected by the principles of justice), as it is impossible for everyone to have this authority. Of all possible constitutions that could be agreed upon, (most likely) none would be established, i.e., chosen by all, that would always decide in favor of any individual citizen. What we are left with, then, is either compromise or sheer anarchy (which we might rule out in advance¹⁹).²⁰ And it has become clear already that Rawls believes that a constitutional democracy is the best compromise.

§1.2. A CRITIQUE OF RAWLS

However commendable Rawls' principle of fair play might be, it is subject to several objections. I will discuss two objections, given by A. John Simmons, that lay bare

¹⁸ Rawls, *Legal Obligation and the Duty of Fair Play*, 124.

¹⁹ There are several political thinkers, however, who are proponents of philosophical anarchy. See, for example: A. John Simmons, *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001); Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988); M.B.E. Smith, "Is There a Prima Facie Obligation to Obey the Law?" (*Yale Law Journal* 82 (1973): 950-976).

²⁰ Rawls, *Legal Obligation and the Duty of Fair Play*, 124.

inherent weaknesses of the duty of fair play regarding its dependence on reciprocity and consent.²¹

According to Simmons, all Western accounts of political obligation belong to one of three general types: natural duty accounts, associative accounts, and transactional accounts.²² With regard to Rawls' principle of fair play, the transactional accounts are of interest here. Simmons describes them as accounts that appeal to "the nature of [one's] morally significant interactions or transactions with the state."²³ He discusses two categories of transactional accounts: consent theories and reciprocity theories.²⁴ Rawls' principle of fair play falls (at least in part) under both. As Simmons discusses fairness as a reciprocity theory, we will start our discussion with that category.

Simmons describes fairness theories as maintaining that

persons who benefit from the good-faith sacrifices of others, made in support of a mutually beneficial cooperative scheme, have obligations to do their own fair shares within those schemes.²⁵

He then succinctly discusses a considerable problem that fairness theories face, a weakness with which Rawls himself was confronted already. Fairness theories hold that it is unfair if a person refuses to contribute to a cooperative scheme that is beneficial to her. The problem with this claim is that the mere receiving of benefits on its own is insufficient to claim that someone would treat others unfairly if she would refuse to reciprocate for those benefits.

²¹ A. John Simmons, "Political Obligation and Authority," in *The Blackwell Guide to Social and Political Philosophy*, ed. Robert L. Simon (Malden: Blackwell Publishing, 2002), 17-37.

²² Simmons, "Political Obligation and Authority," 27ff.

²³ Simmons, "Political Obligation and Authority," 24.

²⁴ Simmons, "Political Obligation and Authority," 33-35.

²⁵ Simmons, "Political Obligation and Authority," 34.

For example: imagine a newsletter being delivered to you every week for a month. At the end of the month, the newsletter company asks you to pay for the received newsletters, the reason being that you have been enjoying their services. Now, would that be fair? Of course it would not – that would imply that we could impose obligations on others, merely by providing unsolicited services. Even though this example satisfies the conditions under which Rawls believes we have a duty of fair play, i.e., a duty to reciprocate, it shows that it is in fact not fair to demand your cooperation.

Let us walk through the conditions. There is a mutually beneficial and just scheme of social cooperation: the newsletter company provides everyone in their area with valuable information every week, and the recipients in turn pay for the services that the company provides. The advantages, i.e., valuable information in the form of newsletters, can only be obtained if (nearly) everyone cooperates: the company can only provide its services if most recipients pay for it. This cooperation requires a certain sacrifice from each person: the employees of the company have to work in order to obtain the information, and the recipients have to pay for the newsletters. And finally, the benefits produced by the cooperation are, up to a certain point, free: if any one recipient does not do her part – i.e., pay for the services – she will still be able to share a gain from the scheme – i.e., receive the newsletters, as they are delivered to everyone in the area.

Simmons notes that Rawls already responded to this objection by acknowledging that citizens do not treat others unfairly if they decline to reciprocate benefits that their societies provide so long as they have not explicitly *accepted* those benefits.²⁶ Only if you would have agreed to enjoy the benefits that the cooperative scheme provides could you be said to be bound to make a sacrifice yourself.

As I have stated above, Rawls' principle of fair play can also be categorized (at least in part) as a transactional consent theory. Recall that Rawls explicitly states that

²⁶ Simmons, "Political Obligation and Authority," 34-35.

acceptance – that is to say, consent – is required for there to be an obligation. He claims that the obligation to obey the law “depends upon our having accepted and our intention to continue accepting the benefits of a just scheme of cooperation that the constitution defines.” According to Simmons, consent theories maintain that

our political obligations (and the political authority with which these correlate) arise from those of our deliberate acts that constitute voluntary undertakings of political obligations, such as our promises or contracts to support and obey or our consent to be so bound.²⁷

But even if this reading of Rawls’ argument is plausible, it is still subject to important objections.

Simmons objects to consent theories to the extent that they face difficulties in terms of realism and voluntariness. The question whether consent theories are very realistic is (closely) related to the objection to reciprocity. Consent theories might seem to contribute substantially to the ongoing project of ascertaining what constitutes a proper foundation of political obligation. But the moment we step outside of the theoretical framework within which that project predominantly takes place, we find that in reality, citizens rarely consent – carry out “deliberate acts that constitute voluntary undertakings of political obligations” – to become bound to obey the laws and the political institutions of their state. The occasions at which such consent is actually given, such as oaths of allegiance or citizenship, are very scarce and certainly not representative for the collective. Therefore, we seriously have to question just how voluntary citizens come to be obligated to obey their state if that obedience has consent as its ground. And thus, neither the voluntariness nor the reality of consent theories seems convincing.

²⁷ Simmons, “Political Obligation and Authority,” 33.

Moreover, even if it were possible to defend Rawls' account of fairness, Simmons has yet another objection that calls into question whether it is even possible for the principle of fairness to be applied to "the kinds of large-scale, pluralistic, loosely associated polities," which are the locus of political obligation.²⁸ Whereas the theory might have some ground in small-scale cooperative schemes, it is very questionable – and certainly unclear – whether citizens of an entire state interact with and rely on (nearly) all of their fellow citizens. The existence of separate divisions within a state alone (social, regional, economic, etc.) is enough to be very skeptical in this respect.

To summarize, Simmons provides strong objections to reciprocity and consent theories.²⁹ Reciprocity and consent are among the main elements of the principle of fair play; the objections show why it is not very convincing. The acceptance on which the principle rests is rarely found in actual states, and it is unclear how the principle – if it is convincing with regard to small-scale cooperative schemes to begin with – can account for obligations to schemes as vast as states and the political nature of those obligations. Thus, Rawls' argument for the moral obligation to obey unjust laws is undermined by several weaknesses that demonstrate that his claim cannot be properly accounted for.

§1.3. THOMAS CHRISTIANO ON PUBLIC EQUALITY

We now turn our attention to Thomas Christiano and his defense of the claim that democratic citizens are morally obligated to obey unjust laws. As we shall see,

²⁸ Simmons, "Political Obligation and Authority," 35.

²⁹ In fact, Simmons even denies the existence of a political obligation, an obligation to obey the law (qua law), *as such*. See, for example, A. John Simmons, *Moral Principles and Political Obligations* (Princeton, New Jersey: Princeton University Press, 1979). For additional theories that deny the existence of a political obligation, see for example: Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press, 1979); R.P. Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970).

Christiano's claim is based on a more elaborate theory than Rawls', which contributes significantly to its strength.

In essence, the claim is Christiano's answer to the following question:

When the outcome of democratic decision-making conflicts with a citizen's best judgment about what justice requires in substantive law and policy, what is the citizen required to do?³⁰

At the heart of Christiano's defense lies the principle of public equality, which he regards as the quintessential fundament of democracy. He defends the moral obligation to obey unjust laws with an appeal to the authority of democracy, which is derived from public equality:

democratic assemblies have rights to make decisions, which are sometimes just and unjust but which citizens must nevertheless obey. Democracy has real authority over many issues that arise in a democratic society and this authority is grounded in the preeminent importance of the principle of public equality in evaluating political societies. So though the citizen attempts to advance justice and the common good according to her lights, she rightly accepts the decision of the democratic assembly as authoritative even if it goes against her sense of what ought to be done.³¹

In order to attain a proper understanding of Christiano's defense, in this section, we will analyze three of the most important elements of his theory, viz. public equality, the authority of democracy, and the limits to democratic authority.

Public equality

³⁰ Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008), 231.

³¹ Christiano, *The Constitution of Equality*, 3.

Throughout *The Constitution of Equality*, Christiano sets out the importance of public equality in democratic societies.³² *The principle of public equality* entails that the institutions of society are structured in a way that ensures equal treatment of all citizens and that enables citizens to *see* that they are being treated equally as well. Christiano posits as a maxim that social justice requires that “justice must not only be done, it must be seen to be done.”³³ We may understand justice as “a matter of public realization of equal advancement of interests” of all citizens.³⁴ Public equality, therefore, is the core principle of social justice.³⁵

In order to satisfy the principle of public equality, a number of difficulties have to be overcome. Christiano discusses several basic facts that any given theory of social justice has to account for, mainly: disagreement, diversity, fallibility, and cognitive bias. Citizens disagree about justice, have different interests, are fallible in their judgment of the interests of others, and are biased towards their own interests (mainly because they understand their own interests better and are more sensitive to the harms they undergo themselves than those of others).³⁶ In search of the best way in which citizens can be publicly treated as equals, these facts, which Christiano calls the “facts of judgment,” have to be taken into account. He believes that the answer to this problem lies in democratic decision-making, which he considers “uniquely suited” for it.³⁷ Democratic decision-making treats all citizens publicly as equals, but nevertheless

³² A few years earlier, Christiano already presented a rough sketch of his views on public equality and democracy, which serves as a good introduction. See: “The Authority of Democracy” in *The Journal of Political Philosophy* 12, no. 3 (2004), 266-290.

³³ Christiano, *The Constitution of Equality*, 46.

³⁴ Christiano, *The Constitution of Equality*, 87 (a poignant phrasing of 46ff).

³⁵ Christiano, *The Constitution of Equality*, 2.

³⁶ Christiano, *The Constitution of Equality*, 56ff.

³⁷ Christiano, *The Constitution of Equality*, 78 (and further).

respects disagreements about justice, the common good and the desirability of substantive laws and policies.³⁸

The authority of democracy

Democracy – or, more specific, the democratic decision-making process³⁹ – derives its authority over citizens from the equal say all citizens have in the formation of the democratic assembly. Citizens have to obey its decisions because both the assembly and the decision-making process are grounded in that equal say of all citizens. Therefore, the democratic assembly has a right to rule by means of laws and policies. The citizens have a duty to obey its decisions because of its authority over them.⁴⁰ Obedience is a duty, more specifically, because of the democratic nature of those decisions. It follows, then, that these duties are content-independent:

Citizens have duties to obey democratic decisions not because of the content of the decision or the consequences of their obedience but because of the source of the decision in the democratic assembly. (...) it is because the decision is made by a process that embodies public equality that the decision must be obeyed by citizens.

This duty preempts or at least normally outweighs other duties that democratic citizens have to bring about substantive justice in law and policy. In other words, when the democratic assembly makes a decision about law on the basis of a controversial conception of justice, citizens have duties to go along with the decision even if they think the conception, and therefore the decision, is mistaken.⁴¹

³⁸ Christiano, *The Constitution of Equality*, 75-76.

³⁹ Christiano frequently interchanges “democracy” with “the democratic decision-making process.”

⁴⁰ Christiano, *The Constitution of Equality*, 243.

⁴¹ Christiano, *The Constitution of Equality*, 244.

As democratic decision-making is a publicly just and fair way of making collective decisions, according to Christiano, anyone who disobeys legislation of the assembly acts superior to their fellow citizens:

Citizens who skirt democratically made law act contrary to the equal right of all citizens to have a say in making laws when there is substantial and informed disagreement. Those who refuse to pay taxes or who refuse to respect property laws on the grounds that these are unjust are simply affirming a superior right to that of others in determining how the shared aspects of social life ought to be arranged. Thus, they act unjustly and violate the duty to treat others publicly as equals.⁴²

Therefore, even when a law of the assembly is unjust, citizens *have* to obey it.⁴³ Citizens have to tolerate and abide by unjust laws for the sake of the publicity of democratic equality. For the interest every citizen has to be publicly treated as an equal member of society is *pre-eminent* given the aforementioned facts of judgment.⁴⁴ Christiano even goes so far as to say that “only by obeying the democratically made choices can citizens act justly.”⁴⁵ How are we to understand this?

To act justly it is essential for us to be on the same page with others, to coordinate with them on the same rules. Otherwise, though two people may be perfectly conscientious and even believe in the same basic principles, they will end up violating each other's rights if they follow different sets of rules that implement the same principles. (...) Since, in order to treat others justly, we must be acting on the basis of the same rules, in a complex society we need an authority for promulgating those rules in a publicly

⁴² Christiano, *The Constitution of Equality*, 250.

⁴³ There are limits to democratic authority, however, which take away the duty citizens would otherwise have to obey the laws of the assembly. We will discuss this momentarily.

⁴⁴ Christiano, *The Constitution of Equality*, 250-251.

⁴⁵ Christiano, *The Constitution of Equality*, 252.

clear way and we must expect individuals to comply with the rules the authority lays down.⁴⁶

The authority, of course, lies with democracy, i.e., the democratic assembly of the state. The justice of the rules with which citizens are expected to comply is determined by “the legal system of a reasonably just society.” That is to say, the state establishes what justice consists in through its enforcement of public rules that are meant to guide citizens’ behavior.

Thus, because citizens have different views on justice, they are in need of an authority, recognized by all, that decides on matters of justice “for practical purposes.” In that sense, there is no justice outside of the authority of the state, because there is no (guaranteed) *agreement* on justice outside of the state.⁴⁷

The limits to democratic authority

It may seem to follow from all of the above that the democratic assembly holds a position of practically unlimited authority over all citizens, for any disobedience is regarded as an act against the duty to treat others publicly as equals, and therefore as unjust. Although Christiano indeed ascribes a substantial amount of authority to the democratic assembly, he does not believe that its authority is or should be unlimited. There are several circumstances in which the authority of the democratic assembly is undermined:

⁴⁶ Christiano, *The Constitution of Equality*, 54.

⁴⁷ Christiano, *The Constitution of Equality*, 53. For a more detailed account of the establishment of justice by the state, see Anna Stilz, *Liberal Loyalty. Freedom, Obligation, and the State* (Princeton, New Jersey: Princeton University Press, 2009), second chapter.

there are reasonably clear limits to the authority of democracy and they can be derived from the same principle of public equality that underlies democratic authority.⁴⁸

Christiano describes a limit to democratic authority as “a principle violation of which defeats the authority of the democratic assembly.”⁴⁹ According to him, there is an *internal* limit to democratic authority: only so long as the democratic assembly publicly embodies equality does it have authority; as soon as it treats parts of the population publicly as inferiors, its authority becomes limited. This limit is internal because it is based on public equality, which is at the same time the fundament of the authority of the democratic assembly (as we have seen already). Furthermore, the limit is necessary because it ensures the proper functioning of the democratic process.⁵⁰

Christiano distinguishes between two types of requirements on democratic authority, i.e., a negative and a positive requirement, and two corresponding basic ways in which it can be undermined. The negative requirement entails that the democratic assembly cannot make laws that violate public equality. The positive requirement entails that it has to ensure that the society satisfies the requirements of public equality. As soon as the assembly fails to satisfy these requirements, its authority is threatened.⁵¹ When citizens are not even assured of an economic minimum or the protection of their liberal and democratic rights,⁵² they no longer have to treat the democratic assembly as having a right to rule over them. And the assembly may lose its authority altogether when it acts systematically to undermine public equality in many areas of society.⁵³ Thus, we see that the democratic assembly does not hold a

⁴⁸ Christiano, *The Constitution of Equality*, 260.

⁴⁹ Christiano, *The Constitution of Equality*, 261.

⁵⁰ Christiano, *The Constitution of Equality*, 264-266.

⁵¹ Christiano, *The Constitution of Equality*, 276.

⁵² Christiano, *The Constitution of Equality*, 271ff.

⁵³ Christiano, *The Constitution of Equality*, 276-277.

position of unlimited authority over all its citizens – or, as Christiano puts it, “not everything can be up for grabs.”⁵⁴

With a proper understanding of both Rawls’ and Christiano’s defense of the claim that democratic citizens are morally obligated to obey unjust laws, and a critical assessment of Rawls’ theory as well, in the next chapter, we will turn our attention to a case study of an existing unjust law, viz. the Dutch law on euthanasia and physician-assisted suicide. As we shall see in the third chapter, that law would be endorsed on both Rawls’ and Christiano’s account. I will argue, however, that citizens do not have to obey it. My argument will challenge their defense of the claim.

⁵⁴ Christiano, *The Constitution of Equality*, 288.

II

CASE STUDY: THE DUTCH LAW ON EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE

Both Rawls' and Christiano's defense of the claim that democratic citizens are morally obligated to obey unjust laws can be challenged. To demonstrate this, in this chapter, we will discuss an existing Dutch law that a large group of citizens and public groups believe to be unjust, viz. the law on euthanasia and physician-assisted suicide. I shall present an in-depth analysis of that law and its unjustness.

Then, in the third chapter, I will challenge both Rawls' and Christiano's account, as they would endorse the law on euthanasia and physician-assisted suicide. I will claim that each individual's self-regarding conduct – of which euthanasia and physician-assisted suicide are examples – should be beyond the reach of the democratic assembly. My claim is a critique of their theories because they do not protect this invaluable freedom.

§II.1. EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE IN CASES OF A COMPLETED LIFE

In The Netherlands (and undoubtedly in many other countries as well), there are citizens who have the desire to end their lives in cases of a *completed life* (Dutch: *voltooid leven*). In the Dutch Criminal Law, article 293, section 1 states that "he who intentionally ends the life of another on their explicit and serious desire" commits a crime and is therefore punishable by law.⁵⁵ The *only* exception to this crime, as stated

⁵⁵ Overheid, "Wetboek van Strafrecht," article 293, section 1: "Hij die opzettelijk het leven van een ander op diens uitdrukkelijk en ernstig verlangen beëindigt, wordt gestraft (...);" available from

in section 2 of the article, has been laid down in the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (2002), also known as the Euthanasia Act.⁵⁶ The exception is only granted (along with several procedural conditions) when people have to endure hopeless and unbearable suffering (“uitzichtloos en ondraaglijk lijden”) and for that reason alone want to end their lives.⁵⁷

Euthanasia and physician-assisted suicide

We are concerned with two ways in which a life can be ended that are among the central notions of the debate surrounding euthanasia: active voluntary euthanasia and physician-assisted suicide. In his discussion of the debate, Craig Paterson makes use of working definitions that are sufficient for our purposes here.

For *euthanasia*, Paterson follows the definition of Tom Beauchamp and Arnold Davidson, who define an action as euthanasia

... if and only if: A's death is intended by at least one other human being, B, where B is either the cause of death or a causally relevant feature ... (whether by action or omission) ... [and] there is sufficient evidence for B to believe that A is acutely suffering ... [and] B's primary reason for intending A's death is the cessation of A's (actual or predicted) ... suffering.⁵⁸

http://wetten.overheid.nl/BWBR0001854/2014-01-06#BoekTweede_TiteldeelXIX_Artikel293; Internet; accessed June 15, 2017.

⁵⁶ “Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding,” also known as the “Euthanasiewet.”

⁵⁷ Overheid, “Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding,” article 2, section 1, clause b; available from http://wetten.overheid.nl/BWBR0012410/2014-02-15#HoofdstukII_Artikel2; Internet; accessed June 15, 2017.

⁵⁸ Tom L. Beauchamp and Arnold Davidson, “The Definition of Euthanasia,” *Journal of Medicine and Philosophy* 4 (1979): 304, as cited in Craig Paterson, *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach* (Hampshire: Ashgate Publishing, 2008), 11.

Paterson praises this definition for its non-arbitrariness and clarity.⁵⁹ However, as we are concerned with *active voluntary euthanasia*, this definition needs to be qualified even further. We may speak of *voluntary* euthanasia when the one whose life is to be ended has the express will of suicide and consents to the final act of taking her life (as opposed to involuntary or non-voluntary euthanasia). And finally, we may speak of *active* euthanasia when the one whose life is to be ended intentionally takes a lethal dose of drugs herself in order to end her life (as opposed to passive euthanasia, in which case she is either not provided with medical treatment at all or the physician withdraws the treatment).⁶⁰

Paterson defines *assisted-suicide* as

a third party action informed by the intended objective (at the very least), to furnish a potential suicide with the lethal means necessary to end his or her bodily life.⁶¹

Since we are concerned with *physician-assisted suicide*, we may qualify the “third party” in the aforementioned definition as a *physician*.

The main difference between active voluntary euthanasia⁶² and physician-assisted suicide, then, concerns the matter in which the life is ended: either autonomously by the one whose life is to be ended, or by a physician who is of assistance in the act.

⁵⁹ Paterson compares the definition of Beauchamp and Davidson with the definition of the Oxford English Dictionary: euthanasia as “the action of inducing a gentle and easy death.” Such a definition is arbitrary in the sense that it could also apply to a case of homicide (say, a murderer inducing a gentle and easy death even though the person being killed has no desire to die), and unclear because it cannot properly account for cases of euthanasia with omission (for instance, the choice not to treat a very ill patient) as the means of intentional killing.

⁶⁰ Paterson, *Assisted Suicide and Euthanasia*, 11-12.

⁶¹ Paterson, *Assisted Suicide and Euthanasia*, 11.

⁶² For the remainder of the master’s thesis, whenever I speak of *euthanasia*, I refer to active voluntary euthanasia (unless otherwise specified).

The reality of the desire to end one's completed life

Even though the taking of a life is considered a crime in all cases but those in which patients have to endure hopeless and unbearable suffering, there are people that do not (necessarily) have to endure such suffering but still have a genuine desire to end their lives, because they consider their lives to be completed (*voltooid*).

The Adviescentrum (advice centre) of the Nederlandse Vereniging voor een Vrijwillig Levenseinde (Dutch association for a voluntary end of life), or NVVE,⁶³ distinguishes between three dimensions of a completed life:

- i. *Accumulation of complaints in old age* ("stapelend van ouderdomsklachten"): cases of hopeless and unbearable suffering due to an accumulation of physical and/or psychological complaints that occur later in life;
- ii. *Existential suffering* ("existentieel lijden"): cases of suffering that are not of a medical but an existential nature;
- iii. *Healthy autonomous* ("gezond autonoom"): cases of health, thus without suffering (of a pressing nature), and the desire to be in control of one's end of life.⁶⁴

Since 2010, the NVVE registers incoming requests from its members for help with the problems they face regarding their desire to end their completed lives, exactly because the existing law regards euthanasia and physician-assisted suicide as a crime in many of their cases. The NVVE has made an analysis of the casuistics of completed life. According to the Commissie-Schnabel, a government-appointed committee that was charged with the task to investigate whether it is desirable to expand the legal possibilities regarding assistance with suicide in cases of completed life, such an

⁶³ The association was established as the Nederlandse Vereniging voor Vrijwillige Euthanasie (Dutch association for voluntary euthanasia), thus: NVVE.

⁶⁴ NVVE, *Voltooid leven, de weg naar het levenseinde* (2016), 6; available from <http://voltooidleven.nl/wp-content/uploads/2016/10/NVVE-Rapport-Voltooid-Leven-2016-DEF.pdf>; Internet; accessed June 15, 2017.

expansion is unnecessary and undesirable (“onnodig en onwenselijk”).⁶⁵ The analysis of the NVVE reveals, however, that it is *not* true that most cases of completed life can be resolved within the confines of the Euthanasia Act, stating that the assumption of the committee does not correspond with reality (“niet strookt met de realiteit”).⁶⁶

Thus, there are Dutch citizens who have the desire to end their lives because they consider them completed, but who do not have the *right* to euthanasia and physician-assisted suicide – and therefore, if they act on that desire nonetheless, they are criminals in the eyes of the law.

§II.2. OBJECTIONS TO THE LAW ON EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE

In this section, I will argue that a law such as article 293 of the Dutch Criminal Law is unjust. I will demonstrate the unjustness of article 293 on two moral grounds: first, the principle of autonomy, and second, the right to die (alongside the right to life).

The principle of autonomy

Margaret Pabst Battin – who has established a reputation as one of the top philosophers working in bioethics – has been thinking about the way we die and the

⁶⁵ Rijksoverheid, “Levens einde en euthanasie;” available from <https://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/inhoud/commissie-voltooid-leven>; Internet; accessed June 15, 2017. See also: Adviescommissie voltooid leven, *Voltooid leven. Over hulp bij zelfdoding aan mensen die hun leven voltooid achten* (2016), for example 17ff and 229-231; available from <https://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/documenten/rapporten/2016/02/04/rapport-adviescommissie-voltooid-leven>; Internet; accessed June 15, 2017.

⁶⁶ NVVE, *Voltooid leven, de weg naar het levens einde*, 16.

way we *could* die for decades.⁶⁷ According to her analysis, the proponents of euthanasia and physician-assisted suicide present two main arguments for their case: autonomy and relief of pain and suffering.⁶⁸ Since hopeless and unbearable suffering is already covered in article 293,⁶⁹ we turn our attention to the quintessential argument for many citizens who consider their lives completed even though they do not have to endure such suffering, viz. *the argument from autonomy*:

Just as a person has the right to determine as much as possible the course of his or her own life, a person also has the right to determine as much as possible the course of his or her own dying.⁷⁰

Autonomy, or self-determination, entails both freedom from restriction (liberty) and the capacity to act intentionally (agency), as well as respect for a person's autonomous choice, Battin explains. The principle of autonomy insists that "free, considered, individual choice, where one is the architect of one's own life and the chooser of one's own deepest values, must be respected," which includes choices of physician-assisted suicide.⁷¹ Not only should citizens have the freedom to *preserve* their lives, but also to *depart* from their lives, on their own account, "not so much because they fear pain, but because they want to be the architects of the ends of their lives."⁷² They wish to live for as long as they are independent, as long as they can depart from life with dignity and remain able to identify with themselves.

⁶⁷ Margaret Pabst Battin, *Ending Life. Ethics and the Way We Die* (Oxford: Oxford University Press, 2005), 3.

⁶⁸ Battin, *Ending Life*, 18.

⁶⁹ For Battin's discussion of pain and suffering, see *Ending Life*, 29-33.

⁷⁰ Battin, *Ending Life*, 20.

⁷¹ Battin, *Ending Life*, 20-21.

⁷² Battin, *Ending Life*, 37.

Battin emphasizes that people often develop “a kind of personal philosophy” about issues surrounding death and dying, even long before the possible start of a grave illness, a philosophy broad and deep enough to make substantial decisions about their lives. She calls this *advance personal policy making*, which may involve “the antecedent, lifelong, philosophically reflective exploration and articulation of one’s deeper commitments about living and dying, alert to shifts it may undergo but sensitive to the most basic elements of one’s convictions.”⁷³

Advance personal policy making not only satisfies the principle of autonomy, but it also protects against the main argument of the opponents of euthanasia and physician-assisted suicide, viz. the slippery slope.⁷⁴ According to the slippery slope objection, “permitting physicians to assist in suicide, even in sympathetic cases, may lead to situations in which patients are killed against their will.”⁷⁵ The main concern is that people would request assisted suicide out of a feeling of social pressure, even though they would have no desire whatsoever to end their lives. But people who consider their lives to be completed are exactly the kind of people who have a personal philosophy about issues surrounding death and dying. That is to say, their desire to end their completed lives is not an external pressure but on the contrary an internal conviction, a free, deliberate and personal decision. With an appeal to their own autonomy, they wish to end their lives when it is still *theirs*. In doing so, they do not have to become dependent, nor have to worry about losing their dignity or even their own personal identity.

Of course, although the debate surrounding euthanasia and physician-assisted suicide already started to take shape in the 1970’s, it has been preoccupied with cases of pain and suffering. Cases of completed life, that are not primarily concerned with such suffering but focus mainly on our autonomy as we are the architects of our life –

⁷³ Battin, *Ending Life*, 40.

⁷⁴ Battin, *Ending Life*, 39-40.

⁷⁵ Battin, *Ending Life*, 25.

which includes our death as well – are still on their way to get the attention they truly deserve in the overall debate.⁷⁶ Battin can already envision a future, however, in which a new perspective on death and dying will take hold of society, a shift in attitudes which we might call

a shift toward “directed dying,” or “self-directed dying,” in which the individual who is dying plays a far more prominent, directive role than in earlier eras in determining how and when his or her death shall occur. In this changed view, dying is no longer *something that happens to you* but *something you do*.⁷⁷

Gradually, society may become more and more accepting of euthanasia and physician-assisted suicide; they might even become *normal* instead of rare and exceptional. Context-specific cultural practices might arise that would further develop their acceptance:

social practices come to function as positive reasons for choosing a somewhat earlier, elective death—formerly and rudely called “physician-assisted suicide,” even when pain control is no longer the issue at all, and the new social pattern—so different from our current one—reinforces itself.⁷⁸

⁷⁶ Recall that the NVVE has only been registering the casuistics of completed life since 2010, thus for a relatively short amount of time. Of course, people may have had the desire to end their completed lives long before.

It is interesting to see that ProDemos’ voting guide for the recently held Dutch general elections (on March 15, 2017), the Stemwijzer, shows that 15 of the 23 participating political parties (the total number of political parties being 28) – thus more than half, already – agree that people of old age who regard their lives as completed should be able to receive help to end their lives. (Of the 23, 3 were undecided and 5 against.) ProDemos, “Stemwijzer” (2017), proposition 24; available from <https://tweedekamer2017.stemwijzer.nl/#statements:voltooid-leven:7049>; Internet; accessed June 15, 2017.

⁷⁷ Battin, *Ending Life*, 324.

⁷⁸ Battin, *Ending Life*, 328.

To conclude, the principle of autonomy provides us with the first moral ground that supports my claim that a law such as article 293 of the Dutch Criminal Law is unjust. The principle holds that euthanasia and physician-assisted suicide should not be accessible exclusively for those citizens who have to endure hopeless and unbearable suffering, but instead should be extended to cases that have nothing to do (necessarily) with the accumulation of complaints in old age, but instead with, for instance, existential suffering and a healthy autonomous stance with regard to the end of our lives (to use the NVVE's terminology).

The right to die (alongside the right to life)

The second moral ground that supports my claim that a law such as article 293 of the Dutch Criminal Law is unjust is that people have a *right to die*. My claim to the effect that such a right exists is embedded in Joel Feinberg's interpretation of the inalienability of the right to life, which *allows* for voluntary euthanasia.⁷⁹ Feinberg's claim provides us with a legal ground to end our own lives if we so desire.

In the euthanasia debate, the *right to life* is characteristically understood as "the right not to be killed or allowed to die."⁸⁰ It is generally thought of as a claim-right, which is to say "a liberty correlated with another person's duty (or *all* other persons' duties) not to interfere." Thus, my claim to the right to life entails the duty of (presumably) everyone else neither to kill me nor to let me die when I can be saved without danger to others.⁸¹

Feinberg's interpretation of the right to life is a response to the opponents of voluntary euthanasia, who claim that killing another person, even at her considered

⁷⁹ Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7, no. 2 (1978): 93-123.

⁸⁰ Feinberg interchanges the "right to life" with the "right to live" a few times. As he predominantly speaks of the *right to life*, however (e.g. in the title of his paper), I will consistently use that phrase.

⁸¹ Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 94-95.

request, is an infringement of her right to life. If you permit someone to take your life, they say, you alienate your right to life, but since that right is in effect *inalienable*, it cannot be given away. And thus, you cannot let anyone else end your life for you (nor end your life of your own accord, for that matter). Feinberg believes, however, that a right to die can very well be reconciled with the inalienability of the right to life.⁸²

To attain a proper understanding of Feinberg's position, we will discuss three key distinctions with regard to rights: the distinction between discretionary and mandatory rights; inalienable and alienable rights; and waiving exercise and relinquishing the possession of rights.

First, discretionary and mandatory rights. Feinberg describes a *discretionary* right, following Martin Golding, as "an area of autonomy within which the right-holder alone is free to decide." A discretionary right is an open option to either do or not do something, correlated with the duties of others not to interfere with the rightsholder's choice. An example of a discretionary right is the freedom of movement, which entitles you to travel where you wish or not to travel at all – that is entirely up to you.⁸³ In contrast, a *mandatory* right confers no discretion: there is only *one* way to act. Therefore, asserts Feinberg, a duty and a mandatory right are entirely "coincident" (that is to say, they match completely). An example of a mandatory right is the right to education that "children in a certain age group" have, which entails a duty to educate oneself, a non-optional right.⁸⁴

The second key distinction regards inalienable and alienable rights. An *inalienable* right is a right that "a person cannot give away or dispense with through his own deliberate choice."⁸⁵ An example of an inalienable right is the right to freedom: we cannot give it away and thereby become slaves. An *alienable* right, on the other

⁸² Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 93-94.

⁸³ All within the confines of the law, of course.

⁸⁴ Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 104-105.

⁸⁵ Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 112.

hand, is a right that *can* be given away. As an example of an alienable right, Feinberg imagines a constitutional order and a legal system in which the right to property is alienable. In that order, if someone alienates herself permanently from that right (due to a vow of permanent poverty, for instance), “one could possess objects and occupy places but never *own* them.”⁸⁶ A right can be alienated by either waiving or relinquishing,⁸⁷ which we will discuss next.

The third and final key distinction regards the distinction between waiving exercise and relinquishing the possession of rights. To *waive exercise* of a right is “to exercise my power to release others from correlative duties to me, to desist from claiming my right against them.” An example of waiving exercise of a right is allowing someone to enter and enjoy land that you own. When you waive exercise of a right, you nonetheless continue to possess it. Feinberg emphasizes that waiving implies the protected discretion to act or not act as you choose.⁸⁸ To *relinquish the possession* of a right, on the other hand, is to renounce a right altogether, permanently and irrevocably.⁸⁹ We have already seen an example of this when we discussed alienable rights.

Now, with a working knowledge of these three key distinctions, we can consider Feinberg’s claim that a right to die can be reconciled with the inalienability of the right to life. First of all, Feinberg interprets the right to life as a *discretionary* (instead of a mandatory) right,⁹⁰ describing that “I have a right, of course, to stay alive as long as I can, but I can *waive* that right, if I honestly and voluntarily choose to do so, and choose to die instead.”⁹¹ Second, although Feinberg concurs that the right to life is

⁸⁶ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 115-116.

⁸⁷ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 111 and 114ff.

⁸⁸ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 115.

⁸⁹ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 115-116.

⁹⁰ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 121-122 and 123 (of the three positions that Feinberg discusses there, the second position is his own).

⁹¹ Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” 110.

inalienable, he claims that the inalienability does not entail that *life itself* is inalienable, but only that the *right* to life is. I cannot alienate myself from my *right* to life. But, third, I can alienate myself from my *life*, by *waiving* my right to life as I choose:

It does not follow from the inalienability of the *right* to life, that I may not decline to exercise it positively or that I cannot waive it (by releasing others from their duties not to kill me or let me die) if I choose. If I decline to exercise the right in a positive way or else waive it, then it is my *life* that I alienate, not my right to life.⁹²

Therefore, Feinberg's interpretation of the inalienability of the right to life *allows* for voluntary euthanasia – allows for a person to die of her own accord – because euthanasia is not an *infringement* (a violation or breach) of the right to life, but in accordance with *waiving exercise* of that right:

we have a right, within the boundaries of our own autonomy, to live or die, as we choose. The right to die is simply the other side of the coin of the right to live. The basic right underlying each is the right to be one's own master, to dispose of one's own lot as one chooses, subject of course to the limits imposed by the like rights of others. Just as my right to live imposes a duty on others not to kill me, so my right to die, which it entails, imposes a duty on others not to prevent me from implementing my choice of death (...). When I am unable to terminate my own life, I *waive* my right to live in exercising my right to die, which is one and the same thing as releasing at least one other person from his duty not to kill me.⁹³

Now, given that every citizen has a right to die, whether alone or with help from another (such as a physician), the law on euthanasia and physician-assisted suicide severely restricts every citizen's freedom to do so, as it only allows someone to die by such means if she has to endure hopeless and unbearable suffering. Thus, Feinberg's

⁹² Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 115.

⁹³ Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 121.

interpretation of the right to life demonstrates that we have a right to die that is unjustly restricted by the law on euthanasia and physician-assisted suicide.

To summarize, I have presented two moral grounds – the principle of autonomy (taking into account values such as independence, dignity and personal identity as well) and the right to die (alongside the right to life) – that demonstrate that a law such as article 293 of the Dutch Criminal Law is unjust. They illustrate that euthanasia and physician-assisted suicide should be (legally) accessible to people who consider their life to be completed, without unbearable and hopeless suffering as a requirement.

So far, we have discussed two defenses of the claim that democratic citizens are morally obligated to obey unjust laws. I have also introduced a case study of an existing unjust law, viz. the law on euthanasia and physician-assisted suicide. In the next chapter, I will claim that, to the extent that both Rawls' and Christiano's account endorse this law and therefore obligate citizens to obey it, their accounts are mistaken. It is my thesis that every individual has the most basic and innate right to be the sole authority on her self-regarding conduct. Therefore, defenses of the claim have to protect this right. My critique of Rawls' and Christiano's theories is based on the fact that they do not account for nor protect this basic right.

III

A CRITIQUE OF THE MORAL OBLIGATION TO OBEY UNJUST LAWS

In this final chapter, I shall demonstrate that the claim that democratic citizens are morally obligated to obey unjust laws is vulnerable to critique. I will claim that every individual has a most basic and innate right to be the sole authority on her self-regarding conduct, and that neither Rawls' nor Christiano's theory properly takes this right into account, thereby severely limiting people's freedom. If we want to uphold that democratic citizens indeed have an obligation to obey unjust laws, we have to protect each citizen's right to that authority.

To demonstrate this, first, we will analyze John Stuart Mill's theory of social liberty, the nucleus of which is his well-known harm principle, and second, I will offer my thesis that democratic authority is limited to other-regarding conduct, as authority over one's self-regarding conduct belongs solely to oneself.

§III.1. JOHN STUART MILL ON THE HARM PRINCIPLE

Over a century and a half ago, John Stuart Mill made an alarming observation that may very well still give us pause today:

there is (...) in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation: and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not

one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable.⁹⁴

This “inclination” was of great concern to Mill. It became the primary focus of his essay *On Liberty*, which would become and remains to this day highly influential. The relevance of this essay for our topic becomes apparent already from its opening statement: “The subject of this Essay is (...) Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual.”⁹⁵

In his day, Mill ascertained that “there is, in fact, no recognised principle by which the propriety or impropriety of government interference is customarily tested.”⁹⁶ In essence, *On Liberty* is Mill’s solution to that problem:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that,

⁹⁴ John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb (New Haven and London: Yale University Press, 2003), 84.

⁹⁵ Mill, *On Liberty*, 73.

⁹⁶ Mill, *On Liberty*, 80.

the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁹⁷

Mill's principle for government interference in the lives of individuals – widely known as the *harm principle* – has as a main criterion that an individual's conduct has to involve *others* (not just herself) in order to justify interference. A person is amenable to society only for that part of her conduct that concerns others, and even then interference is only justifiable if her conduct is *harmful* to others. Insofar as her conduct concerns only herself, she should be able to act with absolute independence.

When can we say that an individual's conduct is of no concern to others?
According to Mill,

there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others *through* himself (...). This, then, is the appropriate region of human liberty.⁹⁸

Thus, a person's conduct concerns only herself if it affects her *directly* and *in the first instance*. It may very well affect others too, but that on its own is not enough to speak of conduct that is of their *concern*.

⁹⁷ Mill, *On Liberty*, 80-81.

⁹⁸ Mill, *On Liberty*, 82.

The “appropriate region of human liberty” consists of three liberties: liberty of consciousness; tastes and pursuits; and formation of a union.⁹⁹ The first liberty protects conscience, thought and feeling, opinion and sentiment; the second “framing the plan of our life to suit our own character;” and the third any kind of grouping of individuals. Mill emphasizes that no society is free in which these liberties are not respected and protected. “The only freedom which deserves the name,” he says, “is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” We might say that the following sentiment expresses Mill’s deepest conviction:

Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹⁰⁰

To say that conduct is of concern to people is to say that they have a certain amount of interest in it. To be sure, other people can have an interest in a person’s individual conduct – Mill is very much aware of that. His argument, however, is that the interest someone has in her own life vastly surpasses the interest in her life that others might have:

neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years,¹⁰¹ that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most

⁹⁹ Mill, *On Liberty*, 82-83.

¹⁰⁰ Mill, *On Liberty*, 83.

¹⁰¹ A “human creature of ripe years” is a person of age.

ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.¹⁰²

Of course, the conduct of any given individual may seriously affect, “both through their sympathies and their interests,” others around her, or even, albeit in a minor degree, society at large. Mill distinguishes between actions that “violate a distinct and assignable obligation” to anyone else and actions that cause “merely contingent” or “constructive” injury to society. Only the first kind of actions are punishable, according to Mill; the second kind has to be tolerated for the sake of freedom.¹⁰³

Whenever (...) there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.

But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.¹⁰⁴

All of his considerations lead up to two maxims that together form “the entire doctrine of this Essay,” which have to be held in proper balance:

The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the

¹⁰² Mill, *On Liberty*, 140.

¹⁰³ Mill, *On Liberty*, 144-145.

¹⁰⁴ Mill, *On Liberty*, 145.

interests of others, the individual is accountable, and may be subjected either to social or to legal punishments, if society is of opinion that the one or the other is requisite for its protection.¹⁰⁵

With these two maxims, held in proper balance, we have a principle – the harm principle – by which we should be able to assess whether government interference in the lives of individuals is justified. Whenever that is not the case, the individual should be able to enjoy her freedom to the fullest.

§III.2. PERSONAL AUTHORITY OVER SELF-REGARDING CONDUCT

Now, I would like to present my thesis that every individual has a most basic and innate right to be the sole authority on her self-regarding conduct, and therefore that democratic authority is limited to citizens' other-regarding conduct. My thesis is a critique of both Rawls' and Christiano's defense of the moral obligation to obey unjust laws. In defending a duty to obey unjust laws, I argue, they make no distinction between laws addressing self-regarding and other-regarding conduct, and thereby wrongly and severely limit every citizen's freedom.

In this section, first, I will make clear why it is of the utmost importance that we distinguish between other-regarding and self-regarding conduct, and second, I will apply my thesis to the case study on euthanasia and physician-assisted suicide, thereby demonstrating that both Rawls' and Christiano's account need to incorporate and protect every individual's right to be the sole authority on her self-regarding conduct if they want to uphold the claim that citizens have to obey unjust laws.

Other-regarding and self-regarding conduct

¹⁰⁵ Mill, *On Liberty*, 156.

Recall that Christiano asserts that democracy (i.e., the democratic decision-making process) derives its authority over citizens from the equal say all citizens have in the formation of the democratic assembly. The citizens are in need of an authority that can promulgate rules which guide citizens' behavior in a publicly clear manner. This authority is ascribed to the state (that is, the democratic assembly), recognized by all, to decide on matters of justice. Only by obeying the democratically made choices, Christiano states, can citizens act justly.

As individual citizens disagree on what justice requires, without such an overarching authority life would be "every man for himself," as no one would have to answer to anyone. If we imagine the political state as something which individuals can enter into (rather than something into which they are born) by which they become citizens, we may say that they originally reside in a *state of nature*.¹⁰⁶ In the state of nature, every individual is her own authority, that is to say, the only one who has the right, by nature, to make decisions regarding herself. Although individuals are free in the state of nature in the sense that they do not have to justify their actions to anyone, at the same time they have no safe and secure way of living, as they have no control over others whatsoever.¹⁰⁷

Thus, individuals enter into the political state in order to have an overarching authority (i.e., the democratic assembly) which ensures that they can pursue their life

¹⁰⁶ For detailed accounts of the state of nature, see (for example): Thomas Hobbes, *Leviathan*, ed. J.C.A. Gaskin (Oxford: Oxford University Press, 1998); John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro, *Second Treatise on Civil Government* (New Haven and London: Yale University Press, 2003); Jean-Jacques Rousseau, *Basic Political Writings*, trans. and ed. Donald A. Cress, *Discourse on the Origin of Inequality* (Indianapolis/Cambridge: Hackett Publishing Company, 1987).

¹⁰⁷ To be sure, it is entirely possible to enter into agreements with others in the state of nature, for example with regard to safety. The problem is, however, that you can only rely on that agreement for as long as the other party or parties involved honor that agreement; there is no external force (such as a police or an army) that helps to ensure that everyone honors their agreements.

plans in a safe and secure manner. They willingly give up part of their natural authority over themselves so that the state can regulate the actions of all citizens in a way that all citizens can agree with. To guarantee *safety and security* for all citizens, the state, i.e., the democratic assembly, needs to have the authority to regulate every citizen's *other*-regarding conduct (for citizens do not have to be protected against themselves, as their *self*-regarding conduct is of their own accord). And because every citizen has an equal say in the formation of the democratic assembly, the democratic decision-making process is a just and fair way of making collective decisions. The democratic assembly establishes what justice requires and all citizens abide by its decisions.

Now, the main issue that I have with both Rawls and Christiano is that they make no distinction between laws addressing self-regarding and other-regarding conduct. This distinction is of the utmost importance, however, as all citizens, who figuratively enter into the political state by giving up part of their natural authority to it, only give up *part* of their authority, viz. the authority they had over their *other-regarding* conduct. Individuals enter into the state to have an overarching authority that ensures that any and all interactions between them are of a civil nature, that is to say, that they can pursue their life plans in a safe and secure manner. However, as a member of the state, they still do not need – nor want – anyone else to make decisions for them with regard to their *self-regarding* conduct. And exactly because an individual's self-regarding conduct is of no concern to others, *because it does not regard them*, neither are they in need of an authority to regulate that conduct.

Recall that Mill asserts that an individual's conduct is of no concern to others because they have at best only an indirect interest in it, and society as a whole even a miniscule interest at that. To say that an individual's conduct only concerns herself is to say that it affects her directly and in the first instance. Mill associates three liberties with self-regarding conduct: liberty of consciousness (conscience, thought and feeling, opinion and sentiment), tastes and pursuits ("framing the plan of our life to suit our own character"), and any kind of grouping of individuals. Because we all have an

innate right to these freedoms, society has no say over the choices of any individual (of age) regarding her sphere of action that is protected by them. Thus, society has no say over one's choice which schools to attend, which political party to vote on, which job to take, which – if any – religion to adhere to. We all want to be able to give shape to our lives as *we ourselves* see fit – and rightly so.

Thus, it is of the utmost importance that we distinguish between other-regarding and self-regarding conduct because only by doing so can we assess which unjust laws citizens have to obey. Any and all laws that restrict an individual's most basic and innate right to be the sole authority on her self-regarding conduct cannot demand her obedience, as democratic authority – and thereby the laws that are enacted by the democratic assembly – is limited to citizens' other-regarding conduct.

Euthanasia and physician-assisted suicide as a critique of Rawls and Christiano

Let us consider euthanasia and physician-assisted suicide. A person's choice to live or to die is her own concern, as her life is hers alone, no one else's. To be sure, others may be affected by her decision to end her life, such as her loved ones and her close relationships, but that does not give them the right to decide for her on this matter, as their interest is only indirect (and would only be direct if the life concerned was their own), and the interest of society even more indirect at that. If she regards her life as completed, she should have the freedom to end it of her own accord (all the more because prolongment of her life would entail unnecessary suffering, whether physical, psychological, existential, or otherwise). And as long as the way in which she chooses to die – of which euthanasia and physician-assisted suicide are examples – is of no regard to others (that is to say, is of no concern to them), she should be free to end her life in that manner.

It might be questioned whether euthanasia and physician-assisted suicide really qualify as *self*-regarding conduct, as they both involve the procurement of lethal drugs,

and physician-assisted suicide involves the aid of a physician as well. In a sense, Mill already answered this question:

In cases of personal conduct supposed to be blameable, but which respect for liberty precludes society from preventing or punishing, because the evil directly resulting falls wholly on the agent; what the agent is free to do, ought other persons to be equally free to counsel or instigate? (...) The case of a person who solicits another to do an act, is not strictly a case of self-regarding conduct. To give advice or offer inducements to any one, is a social act, and may therefore, like actions in general which affect others, be supposed amenable to social control. But a little reflection corrects the first impression, by showing that if the case is not strictly within the definition of individual liberty, yet the reasons on which the principle of individual liberty is grounded, are applicable to it. If people must be allowed, in whatever concerns only themselves, to act as seems best to themselves at their own peril, they must equally be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions. Whatever it is permitted to do, it must be permitted to advise to do.¹⁰⁸

I believe that euthanasia and physician-assisted suicide are applicable to this passage. They are considered by many to be “blameable” acts (because they conflict with people’s religious beliefs, for example, or because people believe that their acceptance will result in a slippery slope). However, the “evil” directly resulting falls wholly on the agent: their only result is the death of the person who wants to end her life. And thus, anyone who wishes to end her life by means of euthanasia or physician-assisted suicide is free to consult with others – such as physicians – what is the best way to do so. If people may die by means of euthanasia or physician-assisted suicide, which they indeed (should) have a right to, they may also seek out the advice of a professional how to do so – and the advisor has a right to aid them as well. For Mill says that

¹⁰⁸ Mill, *On Liberty*, 160.

the liberty of the individual, in things wherein the individual is alone concerned, implies a corresponding liberty in any number of individuals to regulate by mutual agreement such things as regard them jointly, and regard no persons but themselves.¹⁰⁹

In this sense, a person who wants to end her life and the person whose aid she seeks out are free to carry out her wish to die without being amenable to anyone else, as the act of either euthanasia or physician-assisted suicide regards no one other than themselves.

Now, on both Rawls' and Christiano's account, if the democratic assembly would decree a law prohibiting anyone to end the life of another on their explicit and serious desire, such as article 293 of the Dutch Criminal Law, that law would be endorsed. For that law is not in violation of the principle of fair play (Rawls) nor the principle of public equality (Christiano), and therefore, it would not impose a limit on democratic authority. Once enacted by the assembly, both principles would in fact require citizens to obey this law, on grounds of fairness and equality, respectively. Rawls would recommend all citizens who oppose article 293 to abide by their just constitution, rather than to take action against this unjust law; Christiano would remind them that they have a content-independent duty to obey the decision of the democratic assembly, and that they therefore have to go along with the decision even though they think it is mistaken.

Article 293 is a clear example of an existing unjust law that we in fact do *not* have to obey, however, because it oversteps one of the most important boundaries of democratic authority: our own personal sphere of life. With regard to self-regarding conduct, the democratic assembly should have no say over people's lives.

We may conclude, therefore, that both Rawls' and Christiano's claim that democratic citizens have a moral obligation to obey unjust laws can be challenged. Their theories need to incorporate and protect every individual's most basic and innate

¹⁰⁹ Mill, *On Liberty*, 163.

right to be the sole authority on her self-regarding conduct. That right should be beyond the reach of any democratic assembly. For there to be a moral obligation to obey the law, even when it is unjust, it does not suffice to make an appeal to the principle of fair play nor even the principle of public equality. For even when a law is the outcome of a democratic decision-making process, enacted by a democratic assembly that has been established by the equal say of every citizen, it does not follow that citizens have to obey that law even when the assembly's decision is mistaken. When we consider whether citizens have a moral obligation to obey the law, we cannot overlook their right to be the sole authority on their self-regarding conduct.

CONCLUSION

The moral obligation to obey unjust laws has been a fascinating research topic for me. At first very skeptical, over time, I have developed a better understanding of it, finding new ways in which to be involved with the topic. Initially, I was puzzled by the moral obedience to unjust laws; now, I not only fully grasp its meaning, but I am even able to articulate a critique and thereby advance the claim that citizens have a moral obligation to obey unjust laws.

I agree with Rawls and Christiano that democratic citizens have a moral obligation to obey unjust laws.¹¹⁰ Because citizens disagree on what justice requires, they ascribe authority to a democratic assembly, by means of their equal say in its formation, which then decides on matters of justice. As all citizens have an equal say, they all have to abide by its decisions. The democratic decision-making process is a publicly just and fair way of making collective decisions.

Rawls and Christiano differ, however, on the general moral principle upon which the moral obligation to obey unjust laws is based. Rawls argues for the principle of fair play. Because of several weaknesses of that principle (regarding mainly reciprocity and consent) that cannot be overlooked, however, Rawls' defense is unconvincing. Christiano argues for the principle of public equality, which makes for a stronger case. However, there is a significant hiatus in both Rawls' and Christiano's account, which makes both vulnerable to critique.

It is my thesis that every individual has a most basic and innate right to be the sole authority on her self-regarding conduct, and therefore that democratic authority is limited to citizens' other-regarding conduct. The democratic assembly derives its authority from the need that all citizens have to be able to pursue their life plans in a safe and secure manner. To guarantee safety and security, the democratic assembly needs to have the authority to regulate every citizen's *other*-regarding conduct (for

¹¹⁰ Understanding "unjust laws" as laws with which citizens disagree. (See also the preface.)

citizens do not have to be protected against themselves, as their *self*-regarding conduct is of their own accord). Every citizen's self-regarding conduct is of no concern to others. Every person is free to shape her life as she herself sees fit, as long as her actions do not regard her fellow citizens. As neither Rawls nor Christiano takes into account the distinction between laws addressing self-regarding and other-regarding conduct, I claim they thereby wrongly and severely limit every citizen's invaluable freedom.

Thus, Rawls and Christiano are right to claim that democratic citizens have a moral obligation to obey unjust laws *only insofar as* they concern other-regarding conduct. Every individual's right to be the sole authority on her self-regarding conduct protects her from any government interference in her personal sphere of life. Therefore, if Rawls and Christiano wish to uphold the claim, they have to incorporate that right into their theories and protect it, in order to safeguard the only freedom worthy of the name.

BIBLIOGRAPHY

– Books and articles –

- Battin, Margaret Pabst. *Ending Life. Ethics and the Way We Die*. Oxford: Oxford University Press, 2005.
- Beauchamp, Tom L. and Arnold Davidson. "The Definition of Euthanasia," *Journal of Medicine and Philosophy* 4 (1979): 294-312.
- Christiano, Thomas. "The Authority of Democracy," *The Journal of Political Philosophy* 12, no. 3 (2004): 266-290.
- — —. *The Constitution of Equality*. Oxford: Oxford University Press, 2008.
- Feinberg, Joel. "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7, no. 2 (1978): 93-123.
- Green, Leslie. *The Authority of the State*. Oxford: Clarendon Press, 1988.
- Hobbes, Thomas. *Leviathan*. Edited by J.C.A. Gaskin. Oxford: Oxford University Press, 1998.
- Locke, John. *Two Treatises of Government and A Letter Concerning Toleration*. Edited by Ian Shapiro. *Second Treatise on Civil Government*. New Haven and London: Yale University Press, 2003.
- Mill, John Stuart. *On Liberty*. Edited by David Bromwich and George Kateb. New Haven and London: Yale University Press, 2003.
- Paterson, Craig. *Assisted Suicide and Euthanasia. A Natural Law Ethics Approach*. Hampshire: Ashgate Publishing, 2008.
- Rawls, John. *A Theory of Justice*. Rev. ed. Cambridge: Harvard University Press, 1999.
- — —. *John Rawls: Collected Papers*. Edited by Samuel Freeman. *Legal Obligation and the Duty of Fair Play*. Cambridge: Harvard University Press, 2001.
- Raz, Joseph. *The Authority of Law. Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

- Rousseau, Jean-Jacques. *Basic Political Writings*. Translated and edited by Donald A. Cress. *Discourse on the Origin of Inequality*. Indianapolis/Cambridge: Hackett Publishing Company, 1987.
- Simmons, A. John. *Justification and Legitimacy*. Cambridge: Cambridge University Press, 2001.
- — —. *Moral Principles and Political Obligations*. Princeton, New Jersey: Princeton University Press, 1979.
- — —. "Political Obligation and Authority." In *The Blackwell Guide to Social and Political Philosophy*, ed. Robert L. Simon, 17-37. Malden: Blackwell Publishing, 2002.
- Smith, M.B.E. "Is There a Prima Facie Obligation to Obey the Law?," *Yale Law Journal* 82 (1973): 950-976.
- Stilz, Anna. *Liberal Loyalty. Freedom, Obligation, and the State*. Princeton, New Jersey: Princeton University Press, 2009.
- Wolff, R. P. *In Defense of Anarchism*. New York: Harper & Row, 1970.

– Websites –

- Adviescommissie voltooid leven, *Voltooid leven. Over hulp bij zelfdoding aan mensen die hun leven voltooid achten* (2016). Available from <https://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/documenten/rapporten/2016/02/04/rapport-adviescommissie-voltooid-leven>; Internet; accessed June 15, 2017.
- NVVE. *Voltooid leven, de weg naar het levenseinde* (2016). Available from <http://voltooidleven.nl/wp-content/uploads/2016/10/NVVE-Rapport-Voltooid-Leven-2016-DEF.pdf>; Internet; accessed June 15, 2017.
- Overheid. "Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding." Available from http://wetten.overheid.nl/BWBR0012410/2014-02-15#HoofdstukII_Artikel2; Internet; accessed June 15, 2017.

Overheid. "Wetboek van Strafrecht." Available from

<http://wetten.overheid.nl/BWBR0001854/2014-01>

[06#BoekTweede TiteldeelXIX Artikel293](#); Internet; accessed June 15, 2017.

ProDemos, "Stemwijzer" (2017). Available from

<https://tweedekamer2017.stemwijzer.nl/#statements:voltooid-leven:7049>;

Internet; accessed June 15, 2017.

Rijksoverheid. "Levens einde en euthanasie." Available from

[https://www.rijksoverheid.nl/onderwerpen/levens-einde-en-](https://www.rijksoverheid.nl/onderwerpen/levens-einde-en-euthanasie/inhoud/commissie-voltooid-leven)

[euthanasie/inhoud/commissie-voltooid-leven](#); Internet; accessed June 15, 2017.