

Chapter 2

SOCRATES AND EARLY SOCRATIC PHILOSOPHERS OF LAW

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2.1. The Socratic Movement

Socrates is arguably the most important and elusive figure in the history of moral philosophy. The few known facts about his life are easily told. He was an Athenian citizen, born in 469 B.C. and worked as a sculptor. He served his city bravely in the Peloponnesian War, but did not seek an active role in politics. Nevertheless, he was briefly forced into prominence after the battle of Arginusae when, as one of the presidents of the Assembly, he resisted the clamor to try the generals en masse, which he saw as illegal. During the rule of the Thirty Tyrants (404–403 B.C.) he refused an order to take part in arresting Leon of Salamis. After the restoration of democracy, he was put on trial in 399 for introducing strange gods and corrupting the young.² He refused to save himself by opting for exile or by using any of the devices by which defendants usually sought to arouse the sympathy of Athenian juries. As a result, he was condemned and put to death by poisoning.

It is clear that Socrates was an exceptional individual for his intelligence and for his moral character and integrity. He was interested less in questions about the nature of the universe than in what we could call moral questions, above all the question “What sort of life should we lead?” Although he wrote nothing and did not call himself a teacher, he acquired an extensive circle of admirers. These included the notorious Alcibiades, as well as Critias and Charmides, relatives of Plato who both took part in the tyranny of the Thirty. Several of his followers wrote “Socratic” dialogues, but only those by Plato (427–347 B.C.) and Xenophon (ca. 430–355 B.C.) survive in more than a fragmentary form. After Socrates’ death, the hedonistic Cyrenaics and the ascetic Cynics both traced their intellectual ancestry to Socrates. All these authors were immensely impressed by Socrates’ moral character and mode of argument, but they interpreted these in very different ways. It is therefore better to talk of a “Socratic movement” than a “Socratic school.”

¹ In this chapter, R. F. Stalley is the principal author of Sections 2.1 and 2.2, while Roderick T. Long is the principal author of Sections 2.3 and 2.4. All translations are by the authors unless otherwise indicated.

² The precise grounds of these charges are unclear. The involvement of some his pupils in the tyranny of the Thirty may account for the charge of corruption. His own references to a divine “sign” (*daimonion*) may explain the charge of introducing new gods.

According to Plato, Socrates claimed to be wise only in the sense that, unlike most other people, he recognized his own ignorance about the important things of life. He thus did not give lectures or make long speeches, but rather chose to question people reputed to have knowledge. Not surprisingly, those of Plato's dialogues that seem most Socratic in character generally end inconclusively. Socrates leads his interlocutors to appreciate their own ignorance without asserting any view of his own. Nevertheless, some positive doctrines do emerge. The most important of these are that everyone seeks the good and that it is always in our interest to be just. Taken together these imply that anyone who knows what is just will act justly. Unjust behavior must result from ignorance of what is truly good. It follows both that those who do wrong do so unwillingly and that virtue is a kind of knowledge. In many respects, the picture of Socrates offered by Xenophon is similar to Plato's, though Xenophon's Socrates seems less enigmatic than Plato's and is more prone to give positive moral advice.

At one time scholars assumed that Xenophon gives the more historically accurate picture of Socrates, but most now give preference to that of Plato. More recently, many have followed Vlastos (1971, chap. 1; 1991, chap. 2), who claimed that Plato's early dialogues embody "the philosophy of Socrates" and that only in the middle period does Plato begin to speak with his own voice. But this view is now under scholarly attack,³ as is the practice of dismissing Xenophon's evidence (Morrison 1988; Cooper 1999). Even though Plato seems to have known Socrates well, he is clearly not concerned with historical accuracy as we now understand it. Some scholars conclude that there is no reliable means of disentangling the Socratic and Platonic elements in Plato's work; others defend a "triangulation" strategy, using overlapping evidence from Plato and Xenophon to reconstruct the views of the historical Socrates. Whether or not those facts on which all the sources agree permit us to attribute to Socrates a fully worked out philosophy of law, they are sufficient to confirm his importance for the history of legal thought.

Both Xenophon and Plato agree that Socrates was always obedient to the law of Athens. He showed this most notably in his willingness to accept the verdict of the court that condemned him to death. According to both authors he lived by the principle that one should never behave unjustly. But if Socrates never committed injustice, the legal system that allowed him to be condemned cannot itself have been wholly just. This implies that positive law and justice do not necessarily coincide. Socrates' life thus presents a kind of paradox: We must be just and must obey the law, yet the law itself may be unjust. As we shall see in this chapter, several of Plato's dialogues, particularly the

³ This is argued at length by Kahn 1996. Of course, the fact that Plato's dialogues may not give an accurate picture of the historical Socrates does not, in itself, mean that we should rely on Xenophon. Kahn (1996, 393–401) also argues that Xenophon relies on Plato as a source.

Euthyphro, *Apology*, and *Crito*, which are all dramatically linked to Socrates' trial, seem to wrestle with this problem.⁴ There are similar concerns in certain passages from Xenophon's *Memorabilia*. Socrates' insistence on the importance of justice suggests that justice cannot simply be the product of convention. He must therefore take issue with the sophistic use of the distinction between *nomos* ("law" or "convention") and *phusis* ("nature") to imply that justice is simply a matter of conforming to the customs of one's community.

2.2. Plato's "Trial" Dialogues: *Euthyphro*, *Apology*, *Crito*

Early in the *Euthyphro* we learn that Socrates' interlocutor claims to be an expert in matters of religion. In fact, he is so confident of his expertise that he is prosecuting his own father for impiety.⁵ This prompts Socrates to question him about the nature of piety or holiness. In the first phase of the dialogue Euthyphro defines the holy as "what is dear to the gods" (6e–7a). But, since he accepts the traditional tales of quarrels among the gods, especially over matters of right and wrong, he has to admit that what is dear to some gods may be hated by others. So, his definition implies that the same thing may be both holy and unholy (8a). Socrates sets this issue aside by agreeing to investigate the claim that the holy is what is dear to *all* the gods, and then asks Euthyphro whether the holy is holy because it is dear to the gods or whether it is dear to the gods because it is holy (9e–10a). Euthyphro eventually agrees that the fact of the gods loving something is not what makes it holy. Rather, the gods love holy things because they are holy (10d). As we might say, there must be some standard of what is holy that is independent of whether the gods love it.

Plato's Socrates is evidently aware that similar difficulties can be raised for the claim that the just is the lawful.⁶ If we take this to mean that any act permitted by a legal system is just and that any act forbidden by a legal system is unjust, then we have to concede that the same act can be both just and unjust, for obviously acts forbidden in one city may be permitted in another. We cannot avoid this difficulty by arguing that to be just is to be in accordance with a law promulgated by the gods, because Socrates would then ask whether the fact that an act is commanded by the gods makes it just or whether the fact that something is just leads the gods to command it. Socrates would certainly opt

⁴ Most scholars assume that the *Apology* and *Crito* are among Plato's earliest dialogues. The *Euthyphro* is dramatically linked to the others and its brevity and simplicity of construction suggest that it is an early work. Whenever it was written, it seems likely that Plato intended it to be read in conjunction with the other two.

⁵ When a slave killed one of his free workmen, Euthyphro's father had the slave bound and left him in the open while he sent to Athens for a religious ruling on what should be done. The slave died, presumably of exposure.

⁶ Later in the dialogue it is argued that the holy is part of the just (11e–13e).

for the latter view. He believes that what is just is not dependent on the will of any agent, human or divine. It follows that human legal systems may include measures that are contrary to true justice. So, if merely being in accordance with some human code is enough to make an act lawful, the just and the lawful need not coincide. Since the gods are wise and good, the requirements of divine law must be the same as those of justice. So, if “lawful” means “in accordance with divine law” Socrates would recognize that the just and the lawful are in fact identical. But he would still insist that justice is prior to lawfulness.

The *Apology* purports to describe the three speeches Socrates made at his trial. Rather than dwelling on the legal niceties of his position, he mainly offers a justification of his life in moral and religious terms. A main element in this justification is the claim that he has a divine mission to subject his fellow citizens to philosophical examination. He first realized this when the Delphic oracle, questioned by his friend Chaerephon, replied that no one was wiser than Socrates (21a). This puzzled him, because he was not conscious of possessing any special wisdom. He therefore began questioning those, such as politicians and poets, who were reputed to be wise, only to find that they really understood nothing about the most important things in life. Socrates then understood the real meaning of the god who spoke through the oracle to be that the wisest human beings are those who recognize that they have no real wisdom (23a–b). Since then he has assisted the god by questioning those who seem to be wise and showing that they are not really so. This activity has naturally made him unpopular.

This account of his mission enables Socrates, later in the defense, to compare his own duty to philosophize with that of a soldier: “[W]herever a man has taken a position that he believes to be best or has been placed by his commander there he must, I think, remain and face danger without a thought of death or any thing else rather than disgrace” (28d). It would be dreadful if Socrates, who during his military service had remained where his commanders posted him, had abandoned the post assigned to him by a god (28e). No one knows whether death is a good or bad thing, but it is certainly wrong to disobey one’s betters, whether they be gods or men. So, even if the court offered to release Socrates on condition that he gave up philosophy, he would have to refuse (28e–29d; cf. 37d–e).

The second main theme of Socrates’ defense is the overriding importance of being just. In particular, it is more important to be just than to preserve one’s life: “You are wrong, sir, if you think that a man who is any good should take into account the risk of life or death; he should look only to this in his actions whether what he does is right or wrong and whether he is acting like a good or a bad man” (28b). In fact, as he claims in his concluding speech, “a good man cannot be harmed” (41d). It is a good thing that he has refrained from political activity, because no one can survive who opposes the populace and prevents it from doing unjust and illegal things (31d–32a).

As evidence that he would rather die than do wrong, Socrates refers to the trial of the generals when he risked his life to be on the side of law and justice. He also cites his refusal to arrest Leon of Salamis as showing his determination to avoid unjust or impious acts (32a–e). In the same vein he refuses to beg the jury for mercy, partly out of a regard for his own reputation, but also because it would be wrong to induce the jurors to decide a case other than in accordance with law (34b–35d, 38d–39b).

The *Apology* certainly gives modern readers the impression that Socrates is much more concerned to show that he has lived justly than to show that he has broken no law. It may be that the vagueness of the charges forced this strategy upon him—we have no real information as to what activities on his part were supposed to have constituted introducing new gods and corrupting the young. But, in any case, most interpreters take his speeches to imply that considerations of what is morally right override those of legality in the sense that they may sometimes justify one in breaking the law. Two passages in particular have been thought to make this point explicit. One refers to the affair of Leon of Salamis. Some scholars have argued that since the Thirty had legal authority at the time, this passage shows that Socrates was prepared to defy the law when it conflicted with justice. Unfortunately, we do not know whether Socrates and the majority of his fellow citizens regarded the Thirty as having valid legal authority. So it is not clear that he or the jury would have seen the incident in this light (Weiss 1998, 14).

In a more important passage Socrates insists that, even if the court were to release him on condition of giving up philosophy, he would not comply with their wishes. This has generally been taken to show that Socrates was willing to defy a legal requirement in order to do what he believed to be just. It certainly looks as though Socrates is envisaging a situation, albeit a purely hypothetical one, in which he would have to disregard a legal requirement in order to carry out his divinely imposed mission. As a matter of fact there was, it seems, no legal basis on which the jury could have imposed such a requirement, so Socrates cannot be seen as announcing an intention to break a requirement that could have been imposed upon him under the law as it stood at the time of his trial. But the passage surely does imply that if the Athenians had passed a law forbidding Socrates from philosophizing, he would have defied it.⁷ Hence, there are conceivable circumstances in which he would be willing to break Athenian law.

⁷ According to Brickhouse and Smith 1994, 146, even if the Athenians had introduced such a law, Socrates could have argued that, since he had a divine mission to philosophize, failure to do so would be an act of impiety and, as such, contrary to Athenian law. But it might be argued that to obey the law is not simply to follow one's own interpretation of the laws; it also requires us to obey the commands of duly appointed officials, if they are issued in accordance with the law, and to respect the decisions of properly constituted judicial bodies, if they are reached by correct procedures. Socrates might have argued that a law forbidding him

This is closely linked to the idea that the gods have assigned him the task of philosophizing. If he had argued that divine authority is higher than that of any human legal system, his contemporaries would easily have understood his position. The difficulty for him would be that he has very little evidence to support his claim that his divine mission was imposed on him by the gods. It is not *obviously* implied by the response of the Delphic oracle. Socrates may be relying on his own conviction that he has a moral duty to philosophize and that the gods, being good, want us to do our moral duty. His position would then be very much what we would expect from our reading of the *Euthyphro*. Right and wrong do not depend on the decision of any human or divine agent, though we may be sure that the gods command us to do what is right. Human laws, on the other hand, may be incorrect and inconsistent. We may in the last resort have to break human laws in order to do what is right, but in doing so we can claim the authority of a superior law, namely, that of the gods.

The *Crito* reports a conversation that is supposed to have occurred when Crito visited Socrates in prison a day or two before the latter's execution. Crito, who, in spite of being a close friend of Socrates, seems to have little philosophical insight, urges him to escape. His main point is that if Socrates is put to death he and Socrates' other friends will be seen as having failed him in his hour of need and will thus be disgraced in the eyes of the public. Moreover, by failing to save himself, Socrates will leave his children without a father and create the general impression that he has been totally spineless. In response to these arguments, Socrates points out that he and Crito have always agreed that they should attend not to the views of the ignorant many, but to those of the one who has knowledge. Just as those who undergo physical training follow the advice of the expert trainer, so in matters of right and wrong we should be guided by those with knowledge rather than by public opinion. Given that we think that life with a sick body is not worth living, it would be absurd to allow "that part of us which is improved by justice and spoiled by injustice"—presumably, Socrates means the soul—to become corrupted (47d–e). It is not living as such that matters, but living a good life. Thus the question to be addressed is not what the general public will think if Socrates does not escape, but whether it would be just for him to do so. In fact, Socrates goes on to argue, we must never willingly do any kind of unjust act, even when we have been treated unjustly ourselves.⁸ He thus insists on

to philosophize would conflict with the laws against impiety, but there would be little likelihood of his convincing his fellow citizens that this was the case. So he would in practice have been faced with a choice of defying the law or abandoning his mission. See Weiss 1998, 12; and Kraut 1984, 14–5.

⁸ Vlastos 1991, chap. 7, suggests that this would have seemed extraordinary to most of Plato's contemporaries. Certainly the idea that we should seek to help friends and harm enemies was central to Greek popular morality. On the other hand, *harming* and *doing injustice* need not be synonymous.

the principle that “neither to do wrong nor to return wrong is ever right, not even to injure in return for an injury received” (49d).

At this point Socrates secures Crito’s assent to the claim that one ought always to do what one has agreed to do, provided that it is just.⁹ He goes on to suggest that by leaving prison without persuading the city, they would not only be failing to abide by what they agreed to be just, but would also be harming the very thing that they ought least to harm (49e–50a). Socrates’ point is clearly that by escaping he would be doing an unjustified harm to the laws of the city; to elucidate his position, Socrates personifies the laws of Athens and imagines them coming to complain that by ignoring the verdict of the court he would be destroying them. The laws present two main reasons why this would be particularly unjust. The first main reason appeals to the principle, which Socrates himself accepts, that we ought to keep our agreements (at least when it is just to do so). Socrates has shown his agreement to live by the laws of Athens by remaining in the city throughout his life, by fathering children there, and by refusing the opportunity to go into exile before his trial when it would have been legal for him to do so. The second main reason is that the laws are in a quasi-parental position. They were responsible for his birth and education, so the obligation he owes to them is stronger even than that which he owes to his parents. In fact, he belongs to the laws as a child or slave and must therefore obey them. Even if Socrates has been unjustly convicted, it is human beings who have wronged him, not the laws themselves (54c).

On a superficial reading, at least, the laws appear to maintain that it would always be unjust to disobey them. If this is what they are claiming and if we assume, as most commentators have, that Socrates endorses their view, then there would be a discrepancy between the *Crito* and the *Apology*. Socrates in the *Apology* seems to allow that there are circumstances in which disobedience would be justified, while in the *Crito* he seems to deny it. But the discrepancy between the two dialogues is not the only point that is puzzling. The laws argue that because Socrates has entered into an agreement with them and is, as it were, their child, he has an obligation to obey them. This implies that our obligations to keep agreements and to obey our parents are independent of and prior to positive law. Thus the arguments of the laws themselves seem to imply that there is a distinction between justice and mere lawfulness. If this is right, then there is at least a logical possibility that the laws might require Socrates to do something unjust. Since Socrates also believes that one must never act unjustly, he must recognize that in such circumstances he would be obliged to disobey the law. Indeed, the laws themselves indicate ways in which this might happen. They base their case on the obligations to keep agreements and to obey superiors. These two grounds are distinct and

⁹ See Kraut 1984. Here we have ignored an ambiguity in the passage, which could perhaps be taken to say “we should keep our agreements because it is just to do so.”

could in principle conflict. For example, a parent, or other superior, might order a child to break an agreement. If we think of the laws as quasi-parental superiors, we may ask what would happen if they required us to break an agreement. Conversely, if we think of the obligation to obey the law as resting on an agreement, we may ask what would happen if their requirement clashed with those of some superior authority such as the gods. Presumably, in such cases, the commands of the gods would be overriding. Thus if the laws are taken to be demanding unconditional obedience, their arguments seem to undermine themselves.¹⁰

There are other indications in this dialogue that the arguments of the laws are perhaps not to be taken at their face value. Socrates compares these arguments with what an orator might say (*Crito*, 50b), which suggests that they are not rationally convincing. In this he is arguably right, since the apparent claim of the laws to unconditional obedience seems to go beyond anything they could reasonably justify simply on the basis of their arguments. Ordinary morality, then as now, recognizes that there are cases where it is legitimate to break agreements, and even in ancient Greece parents did not have an unlimited right of control over adult children. Thus neither of the laws' arguments would support a demand for unlimited obedience. It is not surprising therefore that at the end of the laws' speech Socrates does not say that he finds their arguments logically unassailable, but rather that he is overwhelmed by the noise they make: "[T]hese are the words I seem to hear, as the Corybantes seem to hear the music of their flutes, and the echo of these words resounds in me and makes it impossible for me to hear anything else" (54d). Plato may well be hinting here that the laws have overstated their case (Weiss 1998, 134–40).

If we are not supposed to be convinced by the claims of the laws to unconditional obedience, the obvious question is "What we are supposed to believe?" The most useful guide may be the passage at 49e, cited above, where, immediately before introducing the laws, Socrates stipulates that we ought to keep our agreements provided that they are just. The most natural interpretation is that there may be occasions when keeping agreements would be unjust, in which case we ought to break them. Since the obligation to obey the law is seen in part as a matter of keeping agreements, this implies that there may be occasions when it would be unjust to obey the law. This could happen, for example, when obedience to the law would involve the violation of some higher obligation. Socrates would thus have been justified in breaking a law forbidding him to carry out what he saw as his divine mission to engage in philosophy. Similarly, in the circumstances of the *Crito* he would be justified in escaping from prison if remaining there would involve him in violating some higher duty. But no argument presented in the *Crito* suggests that this is the case. So,

¹⁰ For more on these points, see Harte 1999.

because he has no superior obligation to escape, it is his duty to obey the law and await his execution.

A somewhat different solution—similar in spirit, but requiring less discounting of the arguments in the *Crito*—is to take Socrates to be distinguishing between laws commanding one to *suffer* injustice and laws commanding one to *commit* injustice, and to be counseling (a) obedience to the former and (b) disobedience to the latter.¹¹ The *Apology*, as we have seen, is plausibly interpreted as endorsing (b), but Socrates' concern for obeying human authorities when doing so does not clash with obeying divine ones (28d–29d) likewise favors (a). The *Crito* clearly endorses (a), but Socrates' insistence that one should never commit injustice, together with his emphasis on our duty to keep *just* agreements, suggests (b) as well. Hence, the two dialogues would be propounding the same doctrine.

If either of these readings is correct, then we can find a consistent view of the law across the three dialogues we have been considering. According to this view, we must in all things do what is just. Although Socrates claims to be ignorant, he is evidently convinced that there is an absolute standard of justice and that human beings can become clear about this standard through reasoned discussion. By giving a central place to reason, he points forward to Platonic doctrines that will be discussed in the following chapter of this volume. But it is already clear that justice, in Socrates' view, is prior to both the commands of the gods and human laws. Because the gods are wise and good we may be sure that they command only what is just. Thus, to be just is to obey divine law. We have a general obligation to obey human law, but because it is the product of imperfect beings it may sometimes conflict with the requirements of justice and divine law. On such occasions we should break human law in order to do what is just.

2.3. Xenophon

Xenophon (ca. 430–ca. 355 B.C.), like Plato, was one of the young Athenian aristocrats drawn into Socrates' intellectual orbit; and his writings are, like Plato's, among our principal sources of information about Socrates.¹² Unlike Plato, however, Xenophon spent much of his life in exile from Athens, serving as a mercenary soldier in Persia, Sparta, and elsewhere. His writings encompass a variety of topics and genres, but Socratic ideas and values nevertheless inform all his works. As with Plato, we face the usual puzzles about the extent to which the characters in his dialogues represent either Xenophon's views or the views of their historical originals, though from Xenophon at least we do

¹¹ Socrates argues at length in Plato's *Gorgias* that suffering injustice is preferable to committing it.

¹² For a defense of Xenophon's reliability as a source, see Cooper 1999.

have much that is asserted *in propria persona*. While many readers find Xenophon superficial and conventional, others argue that a more careful reading reveals a subtle and creative mind at work.

The two Xenophonic texts that most directly address the nature and status of law are both in the *Memorabilia* (I.2.40–46 and IV.4). In the first, *Mem.* I.2.40–46, Xenophon recounts a (probably fictitious) conversation on the nature of law between the youthful Alcibiades and his guardian, the democratic statesman Pericles. Xenophon's stated purpose in giving us this account is to show how Alcibiades learned the Socratic technique of dialectic simply in order to advance his own political career, but Xenophon may have other purposes as well. In the dialogue, Alcibiades exploits a tension within ordinary Athenian thinking about law; Pericles is torn between a positive conception, identifying law with manmade statutes, and a moralized conception, denying the status of law to statutes that fail to meet certain moral requirements. He does not at first feel this tension when discussing democracy, being a democrat himself, but the tension soon becomes evident when the conversation turns to oligarchy and tyranny, systems of which Pericles disapproves. On the one hand, Pericles feels the pull of the positivist account, according to which whatever is enacted by the supreme power in a state counts as law. But it turns out that, on the other hand, Pericles is still more deeply committed to the conceptual association of *law* with *persuasion*, and of *lawlessness* with *violence*, and so he is driven to conclude that the edicts of tyrannical and oligarchic governments are not laws after all, since they are imposed by force on an unwilling majority rather than emerging from democratic consensus. At this point Pericles does not yet see any conflict between his moralized conception of law and his own political commitments, but is left without an answer when Alcibiades then points out that a democratic government, in forcibly imposing the will of the majority on an unconsenting minority, is departing from lawfulness no less than is a tyrant or a body of oligarchs.

For Cartledge (1997, 5), Alcibiades' argument is a "clever piece of oligarchic pamphleteering" that stigmatizes democracy as "a form of collective tyranny, whereby the ignorant and ill-educated masses ruled despotically over the unwilling and unconsenting elite few." But of course the argument says nothing about the masses being ignorant and ill-educated, and in any case it is just as much an indictment of oligarchy as of democracy. (Indeed, in Roman times Tiberius Gracchus used a similar argument to draw a *democratic* moral: Plutarch *TG* 15; Erskine 1990, 171–80.)

The connection that Alcibiades draws between law and consent surely represents Xenophon's own view, since he likewise attributes to Socrates, with clear approval, the claim that a genuine king is one who rules in accordance with laws (*kata nomous*) over those who consent (*hekontôn*), while he who rules unwilling subjects not by law but by his own will, is a mere tyrant (*Mem.*

IV.6.12).¹³ Why, then, does Xenophon choose Alcibiades, a character he portrays negatively, as the spokesman for this view in I.2.40–46? Perhaps he does so because it allows him to state a criticism of Athenian institutions without being in the position of having to endorse it explicitly; both Alcibiades and Socrates state the premises, but only Alcibiades draws the anti-democratic conclusion.¹⁴ Certainly the greater effectiveness of persuasion over coercion is a theme that pervades Xenophon's writings (*Mem.* I.2.10–11, II.6.31; *Oec.* XXI.12; *An.* V.7, VII.7; *HG* II, VI.1.7–8; *Vect.* I.1–2, V.1–10). It is unclear whether Xenophon's case against violence is purely consequentialist (basing the rightness of an act solely on its having beneficial consequences) or whether he also recognizes a deontological aspect (regarding an action as right even apart from its consequences); there is certainly a deontological flavor to Xenophon's defense of justice over expediency in the "trial of the cloaks" passage (*Cyr.* I.3.16–17).¹⁵ There are no grounds for attributing to Xenophon a special concern with *freedom* in its modern sense(s).

If the rule of a majority over an unwilling minority is no less tyrannical than the reverse, it might seem that nothing short of unanimous consent could justify political authority; but perhaps all that is required is that the ruler do his *best* to gain the consent of his subjects, rather than simply imposing arbitrary edicts. At any rate, Xenophon's aversion to forcible rule is not absolute, since he happily endorses paternalism (*Mem.* I.2.49–60, IV.2.14–18; *Lac.* X.4–6; *Hier.* X.2–4; *Oec.* XIII.5–9). Perhaps compulsory measures are not regarded as "violent" or "forcible" in the forbidden sense if they aim to benefit the ruled; after all, if such paternalistic measures succeed in shaping noble characters, the ordinary problem of backlash against violence will be avoided.

This suggests that Xenophon's criteria for legal legitimacy include not only *consent* but also *benefit*; and indeed some indication of this is found in the Alcibiades/Pericles exchange itself, where it is established that all laws state what ought to be done—but on the assumption that good rather than evil is what ought to be done (*Mem.* I.2.42). The implication is that the legitimacy of a law depends not only on the way in which it is imposed, but also on its beneficial content. This may simply be an instance of Xenophon's apparent con-

¹³ It is striking that Xenophon thinks that lawfulness depends not just on the *benefit*, but also on the *consent*, of the governed; compare Aristotle *Pol.* III.14.1285a27–b21, IV.9.1294b34–39, IV.10.1295a15–24, V.10.1313a5, VII.2.1324b22–36, VII.14.1333b5–1334a10, *EN* IX.5.1167a26–b16, Plato *Plt.* 276d–277a, but contrast Plato *Plt.* 291e–293e. Cf. R. Long 1996, 787–98.

¹⁴ The identification of lawfulness with the choice of persuasion over violence was a Greek commonplace (Lysias, *Funeral Oration*, 2.19). Hence it is the (potentially anarchic) conclusion, not the premise, that is controversial.

¹⁵ Young Cyrus is chastised for adjudicating a dispute over cloaks by awarding a cloak to the disputant it fits best, rather than to its rightful owner. It is equally possible to follow Hume in seeing the passage as an endorsement of *indirect* consequentialism (Hume 1751, Appendix III).

viction (IV.2) that ready-made exceptionless rules of just conduct are hard to come by.

In addition to the benefit and consent criteria, Xenophon also invokes a wisdom criterion: the claim to rule must be based on *knowledge* and *virtue* (equivalent terms for a Socratic).¹⁶ He has Thrasybulus ask the Thirty what entitles them to rule: Are they more just, more courageous, more wise (*HG* II.4.40–42)? We should no more accept a ruler than we would accept a physician without evidence of his expertise (*Mem.* IV.2.3–7), for “kings and rulers [...] are not those who hold the sceptre, or who are chosen by just anyone, or who are selected by lot, or who use violence or deception, but rather those who possess knowledge of ruling” (III.9.10–11). Here the wisdom and consent criteria appear in combination; the benefit criterion may be implicit as well, if Xenophon assumes that anyone who possesses the art of ruling would want to benefit his subjects, would know how to do it, and would also recognize the greater utility of persuasion than of violent measures.

In yet another passage (*Mem.* IV.3.16), we are told that, when the Athenians asked how they should go about worshipping the gods, the Delphic Oracle replied that they should do so in accordance with the *nomos* (“law,” “custom”) of the city. Crucially, Xenophon leaves out what happened next, but his audience would certainly know it and could be expected to supply it: We learn from Cicero (*Leg.* II.40) that when the Athenians explained that their traditions contained many competing and conflicting *nomoi* and asked which of these was meant, the oracle answered “whichever is best.” The clear implication is that Xenophon’s test for whether something is a genuine *nomos* of Athens is the fact that it is best.¹⁷

This may sound odd to modern ears. When we disapprove of governmental edicts, we generally say that they are bad laws or unjust laws, not that they are not laws at all. But the moralized conception of law (which was in fact the orthodox position in legal philosophy throughout most of European history) can be given some plausibility. What is the difference between a command issued by a legislature and a command issued by a mugger with a gun? Both have the *power* to enforce their demands, but the legislature, unlike the mugger, is presumed to have *authority*. Yet the legislature’s authority is conditional, being derived from the people or the constitution. But where do the people, or the con-

¹⁶ Xenophon’s much-noted stress on the importance of noncognitive training does not conflict with his commitment to the Socratic thesis that virtue is knowledge, since for Xenophon the role of noncognitive training is not to supply a motivational force that moral knowledge on its own would lack, but to prevent moral knowledge from being lost; cf. Charlton 1988, 13–33; R. Long unpublished.

¹⁷ Xenophon’s usage is not entirely consistent, however; an unjust provision that he describes at *Mem.* I.2.31 as being “written into law” he describes at IV.4.3 as being “contrary to law.” Presumably “law” has a positive sense in the first passage and a normative sense in the second.

stitution, get *their* authority? If the regress terminates in a bare fact of power, all the subsequent links of the chain seem to revert to mere power, not authority; hence, it can be argued, the regress must terminate with something inherently authoritative, and only a *normative* fact could meet this requirement.

Although the first major passage of Xenophon (the Alcibiades-Pericles dialogue), with related passages, supports a moralized conception of law, the second passage might seem to point to a different view of law. In a conversation between Socrates and Hippias at *Mem.* IV.4, Socrates defines the just as the lawful (IV.4.12; cf. 6.5–6), prompting many commentators to view him as a legal positivist.¹⁸ But Socrates' equation of the just with the lawful does not commit him to a positivist account of *justice* unless he is committed to a positivist account of *law*.¹⁹ Hippias offers such an account (*Mem.* IV.4.13), defining law as a written agreement among citizens concerning what ought and ought not to be done.²⁰ Hippias disparages Socratic respect for law on the grounds that laws are constantly changing, but Xenophon's Socrates counters that cities first go to war and then later make peace (*Mem.* IV.4.14; cf. Plato, *Minos*, 316c); presumably, the idea is that the same principle may issue in different concrete recommendations in different circumstances. Hence, it seems, what is really *nomos* in a city's written agreements is not the concrete applications but the principle they embody.

In his discussion of the passage, Morrison (1995, 334–5) argues that a defender of what he calls “legal idealism” cannot coherently say that “it is just to obey the [positive] law in force, even if that law can and will be changed,” because “[i]f the first law is not beneficial, and its later replacement *is* beneficial, on the idealist interpretation the first law was not a law and should not have been obeyed.” Now Morrison does admit that “[l]egal idealism can accommodate the idea that different laws are best in different circumstances,” so that “when the statutes are changed due to a corresponding change in circumstances, the idealist view can allow that the earlier and later statutes are both ‘law’.” But Morrison objects that this qualification applies only in a “limited range of cases.” Yet Xenophon clearly thinks (as Morrison 1995, 335, sees) that *a general habit of obedience to manmade statutes is beneficial*. So if the state commands something harmful, it is not a law, but if it commands something that is (prior to being commanded) neither beneficial nor harmful,

¹⁸ Striker 1996 and Strauss 1972, from very different perspectives, both agree that Xenophon's text endorses positivism. Striker dismisses the argument as evidence of Xenophon's limitations as a thinker; Strauss dismisses the argument as insincere and looks for a coded anti-positivist message buried in the subtext. But as we shall see, both responses are inappropriate, because there is no positivism in the text to dismiss.

¹⁹ Hence it is also no concession to positivism when Xenophon defines holiness (*Mem.* IV.6.2–4) as the knowledge of what is lawful in relation to the gods.

²⁰ It is not actually clear that even this must be taken as a positivist definition (see the discussion of the *Minos* below, in Chapter 5, Section 5.2), but Hippias probably so intends it.

acting as the new statute dictates is *now* beneficial (as an instance of the general habit of obedience) and so is required by natural—that is, nonconventional—justice.

In any case, Hippias, like Pericles before him, finds his commitment to legal positivism undermined by his other beliefs, though in Hippias' case it is not the unlawful character of violence but, as Xenophon indicates, the recognition of *unwritten laws* that trips him up.²¹ These hold everywhere—and, as Hippias grants, are laid down by the gods. It soon becomes evident, however, that Socrates and Hippias do not have quite the same understanding of what it means for a law to hold everywhere. Hippias thinks that holding everywhere means being *accepted* everywhere, since a law cannot hold where it is not backed up by penalties, and (he assumes) only where people accept a law is it backed up by penalties. But Socrates, in the spirit of an Antiphon moralized,²² argues (*Mem.* IV.4.19–25) that there are penalties inherent in the natural consequences of human actions. Ingratitude naturally breeds distrust, and no one wants to be distrusted; so even if the unwritten law against ingratitude were not *accepted* everywhere, ingratitude would still be *penalized* everywhere, and so is unlawful. Likewise, Socrates says, the prohibition on incest, though not accepted in every country (and therefore, Hippias initially thinks, not a candidate for an unwritten law), is unlawful everywhere because it has bad consequences everywhere (cf. Plato, *Gorg.* 469d–470b).

This notion of natural law as a set of hypothetical imperatives backed up by natural penalties (cf. Barnett 1998, chap. 1) recurs throughout Xenophon's writings. Those who break their oaths, Xenophon tells us, will be punished by the gods (*An.* II.5, III.2); but he also tells us that those who break their oaths suffer by getting a reputation for being untrustworthy (*An.* VII.7), and it is not clear that there is anything more to the divine punishment than this. A tyrant cannot disregard good advice with impunity, since the automatic penalty is that he ends up doing the wrong thing; nor can he kill the wise man with impunity, since in doing so he loses his most reliable advisor (*Mem.* III.9.12). The god commands us to sow in the autumn (as was the Greek custom) by making that the time when sowing has the best consequences (*Oec.* XVII.1–4); the earth is a teacher of justice because it teaches people that they reap benefits from it in proportion as they serve it (*Oec.* V.12–14); it is against the laws (*thesmoi*) of the gods to reap without having sown or to succeed in battle without having trained, and so it is impious to pray for such things (*Cyr.* I.6.6). In Xenophon's historical writings, accounts of wrongdoing are often immediately followed by a description of the natural penalty the perpetrators eventually paid in consequence (*An.* V.1; *HG* I.7.35, V.7.1; *Lac.* XIV.2–7).

²¹ The appeal to unwritten law was another Greek commonplace; cf. Sophocles, *Ant.* 447–56; Thucydides, *History* II.37. See Chapter 1, Section 1.6.2, of this volume.

²² On Antiphon, see Chapter 1, Section 1.3, of this volume.

Some may conclude that Xenophon's profession of belief in the gods is disingenuous, and that for him the causal sequences we find in the natural world are all the reality there is to the notion of divine legislation. But reading Xenophon as a crypto-naturalist would do unneeded violence to his text; his religious beliefs are genuine, though unconventional. He argues rather ingeniously (employing a combination of the arguments from design and from consciousness) for the existence of a divine creator (*Mem.* I.4.8–18, IV.3.13–14; cf. DeFilippo and Mitsis 1994); and if nature is the work of a god, the causal sequences embedded in nature must presumably be the god's handiwork as well. (Hence, although Hippias does not challenge the idea that the unwritten laws are of divine origin, Socrates would have had an argument ready, had Hippias done so.) Xenophon also thinks that some of the causal sequences we need to know are too obscure to discover without divine help; hence, he recommends divination for those cases (and *only* those cases) where the natural connection is not manifest (*Mem.* I.1.6–9).

Xenophon's account of natural penalties clarifies his position on law. We have already seen that no unjust statute counts as a genuine law for Xenophon, but this might suggest that the content of true law is restricted to a *subset* of positive law—namely, all those positive laws that meet Xenophon's normative criteria. But now we see that Xenophon also recognizes laws even where no manmade statutes apply. Hence, contra Morrison (1995, 333), the body of true law for Xenophon includes both *less* and *more* than the body of manmade statutes—less, because it excludes the unjust statutes,²³ and more, because it includes divine law. (This of course is likewise the opinion of jurists from Aquinas to Blackstone.) Hence, there can be no clash between nature and law (cf. *Oec.* VII.30).

As further evidence that law for Xenophon includes both divine (or natural) laws and (just) human laws, consider Xenophon's vindication of the justice of Socrates. To prove this justice, Xenophon first points out Socrates' obedience to positive law (*Mem.* IV.4.1), but then describes Socrates' disobedience to positive law (IV.4.2–3; cf. *HG* I.7.15),²⁴ and finally cites Socrates' refusal to employ flattering appeals to the jury on the grounds that such conduct was “contrary to the laws” (*para tous nomous*)—though of course it was at that time contrary to no *positive* law. Hence, Xenophon's Socrates apparently regards the *laws of Athens* (i.e., the laws that hold there, the laws whose violation is penalized there; cf. *Mem.*

²³ The phrase “unjust statute” is not unambiguous. In the light of the discussion in Plato's *Apology* and *Crito*, we should perhaps distinguish between statutes that it is unjust for the legislator to *enact* and statutes that, once passed, it is unjust for the subject to *obey*; arguably it is only the latter that Socrates means to exclude as unlawful.

²⁴ Significantly, as Xenophon describes the cases, it seems clear that Socrates would have disobeyed the same commands even if they *had* been authorized by positive law, since obeying them would be unjust.

IV.4.13) as containing requirements not embodied in any manmade Athenian statute.

Xenophon's theory of divine law raises a question analogous to that posed in Plato's *Euthyphro*: Do the gods issue these edicts because they are just and lawful, or are the edicts just and lawful because the gods issue them? The *Euthyphro* suggests a theologically objectivist view: Divine approval is a *response* to the non-theologically based property of promoting human welfare. Xenophon's account of divine law might seem to tend in the same direction, since the things the gods forbid are things that naturally tend to have bad results for human beings. But on the other hand, given Xenophon's teleological cosmology, the divine mind *constructed* the natural world. It is not as though, for example, the god saw in his wisdom that jumping off cliffs has bad results, and so he benevolently commanded us not to do it; rather, the god *made* the cliff, and the law of gravity, and the fragile structure of the human body, and his making these things as he did is what his commanding us not to jump off cliffs *amounts* to—so the binding force of these commands is a product of divine will. Hence, Morrison (1995) concludes that the theologically subjectivist reading must be the right one (cf. Striker 1996).

However, premises drawn from Xenophon's own text show that his own commitments are theologically objectivist:

- (1) Nature contains cause-and-effect sequences that count as natural laws backed up by penalties. [defended in *Mem.* IV.4 and *passim*]
- (2) The natural world is the product of the Divine Mind. [defended in *Mem.* I.4, IV.3.13–14, and to some extent also in IV.4.24–5, as an inference from (1)]
- (3) Therefore, the cause-and-effect sequences that count as natural laws backed up by penalties are the product of the Divine Mind. ([1], [2])
- (4) The Divine Mind, in constructing the natural world, was guided by a concern to promote human welfare. [defended in *Mem.* IV.3]
- (5) Therefore, the cause-and-effect sequences that count as natural laws backed up by penalties are designed to promote human welfare. ([3], [4])

Hence, for Xenophon's Socrates as for Plato's, human welfare seems to be an independent standard to which divine law must measure up in order to be authoritative.

Xenophon, like many of his contemporaries, supports the "mixed constitution," a blend of aristocratic and democratic elements (*HG* II.3.48)—which is no great surprise, in the light of his argument that the despotism of the rich over the poor and the despotism of the poor over the rich are equally objectionable (*Mem.* I.2.40–46). Yet Xenophon also gives an impression of sympathizing with the sentiment "For forms of government let fools contest;

Whate'er is best administer'd is best." For Xenophon, the welfare of a regime depends primarily on the virtue or vice of its rulers rather than on constitutional structures; Persia did well under Cyrus and badly under his successors, despite the same laws remaining in place (*Cyr.* VIII.1.7–8, 8.1–2; cf. *Vect.* I.1). For the successors found it possible to keep to the letter of the law while distorting its spirit; a written law cannot guarantee its own correct application (*Cyr.* VIII.8.8–11). Hence, Xenophon concludes that a king is superior to written laws because he is a *law with eyes* (*Cyr.* VIII.1.22; cf. *Oec.* XII.19–20). Thus the first aim of Lycurgus, founder of the Spartan constitution, was not—contrary to popular belief—to instill respect for law in the citizens of Sparta, but rather to secure first the support of the Spartan elite (*Lac.* VIII.1–2); virtuous leaders are more important than laws. Yet at the same time Xenophon has a horror of constitutionally unrestrained factions scorning procedural niceties and disregarding the rule of law, be those factions democratic (*HG* I.7.26–29), oligarchic (*HG* II.3.20–21), or autocratic (*HG* VII.1.43–45).

Xenophon's remarks on governmental administration do not add up to a system; but in other respects Xenophon appears to have a reasonably coherent legal philosophy. Natural law is based on cause-and-effect relationships with a bearing on human welfare; human law derives its authority from natural law. Xenophon's theory of natural law would exercise a profound influence on later developments in legal philosophy, particularly among the Stoics.

2.4. Cyrenaics and Cynics

Apart from Plato and Xenophon, the Socratic thinkers most important for legal philosophy are the Cyrenaics and the Cynics. Each school traced its ancestry to a disciple of Socrates—the Cyrenaics to Aristippus of Cyrene (ca. 435–355 B.C.), whence the name “Cyrenaic,” and the Cynics to Antisthenes (ca. 446–366 B.C.).²⁵ In the case of both movements, however, there is a dispute as to whether the school's founder has been correctly identified. The Cyrenaic doctrine in its systematic form appears to derive not from Aristippus of Cyrene but from his grandson and namesake, Aristippus the Mother-Taught; and while the traditional story that Diogenes of Sinope (ca. 412–ca. 324 B.C.), who gave Cynic doctrine its distinctive shape, was the student of Antisthenes is chronologically possible (barely), it is now thought unlikely.²⁶ Nonetheless, whatever their personal involvement, Aristippus and Antisthenes uncontro-

²⁵ Whether the label “Cynic” first arose because Antisthenes taught at the Cynosarges gymnasium (so D.L. VI.1.13) or because the Cynics were “doglike” (*kunikoi*) in their shamelessness and ferocity, it was for the latter reason that the name stuck.

²⁶ For a summary of the argument, see A. Long 1996, 45. On the other hand, Goulet-Cazé (1996) argues that Aristotle's reference to *kuôn*, “the Dog,” at *Rhet.* III.10.1411a24–5 is probably to Antisthenes (rather than, as is usually thought, Diogenes), which would bolster Antisthenes' claim to be the first Cynic.

vertibly exercised a strong influence on the schools that later claimed them as founders.

The urbane hedonism of the Cyrenaics and the rough asceticism of the Cynics initially seem so different from one another that one might easily wonder in what sense they could be part of the same Socratic movement, but each school could reasonably claim to be developing some aspect of Socrates' legacy.²⁷ In any case, the differences between the two schools are easily exaggerated; hedonism regards pleasure as the highest good, while asceticism embraces self-discipline and self-denial, but the "ascetic" Cynics advised indulging one's sexual desires as freely as animals, while the "hedonistic" Cyrenaics cautioned that pleasures should be pursued only so long as one is not mastered by them but can take them or leave them (D.L. II.8.69, 75). Aristippus endorses the Cynic view that those who lack philosophic wisdom are mere slaves (II.8.72), and both schools emphasize self-mastery and self-construction (cf. Foucault 1985; 1986).

The relevance of the Cyrenaics and Cynics to legal thought lies in their social philosophy. Both Aristippus and Diogenes practice a certain kind of independence and detachment from the world; but for Aristippus this means adapting himself with effortless flexibility to every social circumstance, while for Diogenes it means "defacing the currency" by rejecting social conventions and material comforts, mocking the establishment, and seeking maximal self-sufficiency. Hence, Diogenes throws away his cup as a superfluous luxury upon seeing a child drinking from his hands (D.L. VI.2.37). Aristippus cultivates the social graces and biting wit of a courtier, cajoling favors from tyrants like Dionysius of Syracuse, whereas Diogenes scorns social distinctions and, invited to ask Alexander of Macedon for a favor, tells him to step out of Diogenes' light. Yet Aristippus might well justify his life of luxury with the same reply that Diogenes gives to justify his life of squalor: that sunshine is not sullied when it lands on filth (D.L. VI.2.63). Diogenes refers to Aristippus as a "royal dog" (*basilikon kuôn*; D.L. II.8.66); the epithet is (no doubt deliberately) ambiguous between the complimentary "regal Cynic" and the abusive "king's lapdog," and either judgment could plausibly be defended.²⁸

The generally indulgent lifestyle of the elder Aristippus was worked into a comprehensive system by his grandson, Aristippus the Mother-Taught. The new theory was hedonistic and egoistic in ethics and psychology alike; among its implications (II.8.91–3) is the doctrine that "wisdom is good not for itself but on account of its consequences," and so "nothing is just or noble or base by nature, but only by convention [*nomos*] and habit [*ethos*]"; nevertheless,

²⁷ Plato's Socratic dialogues, for instance, exhibit concerns congenial to each group; see Irwin 1992 and 1997, Rudebusch 1999.

²⁸ Diogenes and Aristippus are also described as similar in their reliance on gifts and money from friends, but the amounts required were no doubt vastly different.

“the virtuous man will do nothing inappropriate, on account of the penalties imposed and on account of reputation [*doxas*].” The latter rationale appears to clash with the elder Aristippus’ statement (D.L. II.8.68) that if all laws were abolished, the virtuous man would continue to act in the same way as before.²⁹

At least one early Cyrenaic, Theodorus (late fifth century B.C.), maintains (D.L. II.8.98–9) that patriotism is irrational (since a wise man would not risk his life to save a country of fools), and that social conventions exist in order to hold communities together, but only because their citizens lack wisdom; in themselves theft, adultery, sacrilege, and the like are not wrong by nature and should be indulged in when the circumstances call for doing so; and likewise there is nothing wrong with gratifying one’s sexual appetites in public, since whatever is appropriate in private is equally appropriate in public. This antinomian attitude is embraced by the Cynics as well; Diogenes endorses theft, adultery, and cannibalism (D.L. VI.2.72–3), and also masturbates in public, saying that he wishes his appetite for food could be satisfied as easily (VI.2.46). The Cynic philosophers Crates (ca. 368–287 B.C.) and his wife Hipparchia likewise have sexual intercourse in public (D.L. VI.7.97). This attitude of indifference to the public is arguably a development of Antisthenes’ advice to be concerned solely with virtue and to despise reputation and social convention (VI.1.11), and indeed goes still further back to Socrates’ insistence that we should care for no one’s opinion but that of the wise, but this antinomian development of the idea appears to have been pioneered by Diogenes.

The Cyrenaics and Cynics are also like-minded in their cosmopolitan rejection of local ties and allegiances. On the Cyrenaic side, we are told (Xenophon, *Mem.* II.1.8–13) that in Aristippus’ view, to be a ruler is to take on an unwelcome burden of responsibility, and to be ruled is to be a slave; hence, Aristippus favors a “middle path” that leads “neither through rule nor through slavery but through freedom,” avoiding compulsion by not submitting to any regime but being a *xenos* (“stranger,” “guest,” “foreigner”) everywhere. Theodorus calls the cosmos his only homeland (D.L. II.8.99). On the Cynic side, Antisthenes holds (VI.1.12) that to the wise man nothing is foreign (*xenon*), while Diogenes claims to be a “citizen of the cosmos” (*kosmopolitês*; D.L. VI.2.63; cf. 72) and may well have coined the term. Again, Crates claims to be at home in every land (VI.7.98; frag. 15 Diehl), also identifying himself as a “citizen of Diogenes” whose homeland was the Land of Penia (Poverty) and the City of Pera (Knapsack) (VI.5.93; frag. 6 Diehl).

Scholars debate whether these forms of cosmopolitanism are “positive” or “negative”—that is, whether they represent a genuine allegiance to a global community or merely an alienation from all local ones. Cynic cosmopolita-

²⁹ But similar remarks are attributed to Aristotle (D.L. V.1.20) and Xenocrates (Cicero, *Rep.* I.3), so it may just be a commonplace that has attached itself to Aristippus.

nism seems negative in contrast with later, more Stoic forms of cosmopolitanism, which stress participation in human life rather than dropping out. On the other hand, Cynic cosmopolitanism seems more positive than that of the Cyrenaics; the Cyrenaics may practice more outward conformity than the Cynics, but they are less engaged, as is suggested by the difference between the elder Aristippus' advice to be a *xenos* everywhere, and the Cynics' advice to be a citizen everywhere (Diogenes) and a *xenos* nowhere (Antisthenes). (However, among the Cyrenaics, Anniceris and the younger Aristippus, unlike Theodorus, did endorse patriotism.) To be sure, being a citizen of Poverty and the City of Knapsack sounds a bit less positive than being a citizen of the Cosmopolis, and may suggest a withdrawal from society, but *kunismos* was a proselytizing faith, and Diogenes presents his mocking attacks on convention as philanthropically motivated: Other dogs bite to harm, but he bites to save (Stobaeus, *Eclogues* III.462).³⁰

With Diogenes in particular we see the first steps toward the later Stoic theory of the Cosmopolis.³¹ Diogenes is said (D.L. VI.2.72) to have offered the following argument:

- (1) Without the polis, the civilized (*asteion*) is of no benefit.
- (2) The polis is civilized.
- (3) Without law, the polis is of no benefit.³²
- (4) Therefore, law is civilized.

The sense of the argument is elusive. Assuming that Diogenes must have had a negative attitude toward polis, law, and civilization, Schofield (1991, 130–40; 1995, 134) and Moles (1995, 130–1; 1996, 107–8) take *asteion* pejoratively; Goulet-Cazé (1982) by contrast takes *asteion* approvingly, but only to conclude—on the basis of Stoic parallels—that the argument is of Stoic provenance and not attributable to Diogenes at all. Yet Diogenes did not always use *polis* and *politeia* pejoratively, since he spoke approvingly of the cosmos as the true *polis* and *politeia* (D.L. VI.2.63, 72), so why should he not on occasion have drawn a distinction between true and false *nomos* as well?

³⁰ Moles 1996 argues convincingly against a purely negative interpretation of Cynic cosmopolitanism.

³¹ Diogenes' own preferences, if he had any, among existing political systems are difficult to discern. According to one story (D.L. VI.2.50) he, unlike Thucydides and Plato, thought highly of Harmodius and Aristogeiton, the tyrannicide heroes of Athenian democracy, whatever that may imply about his political sentiments; yet he was also an admirer of Sparta over Athens (VI.2.27, 59).

³² Or: Without the polis, law is of no benefit; *nomou de aneu poleôs ouden opbelos* could bear either meaning. But the first reading is more likely, if, as seems plausible, Diogenes is consciously echoing Plato's "to whom would a polis be acceptable without laws?" (*tini gar an polis areskoi aneu nomôn*) at *Crito* 53a.

Proceeding from the assumption that the argument is Diogenes', and that the Stoics got it from him, let us further assume that he meant by *asteion* what they meant by it. We know from Clement (*Strom.* IV.26, as quoted in *SVF* III.327) and Arius Didymus (Stobaeus, *Eclogues* II.103.14–17, as quoted in *SVF* I.587) that the Stoics used *asteion* approvingly, arguing that nothing counts as a genuine polis unless it is *asteion*. We also know from Cicero (*Leg.* II.12–13) that some Stoics argued as follows:

- (1) If being without *X* makes the state worthless, then *X* is good.
- (2) Being without law makes the state worthless.
- (3) Therefore, law is good.
- (4) But unjust statutes are not good.
- (5) Therefore, unjust statutes are not laws.

Putting Arius Didymus, Clement, and Cicero together, we can reconstruct Diogenes' intended argument as follows, supplying some implicit premises.³³

- (1) [If being without *X* makes a good/civilized thing of no benefit, then *X* is good/civilized.]
- (2) Without the polis, the good/civilized is of no benefit.
- (3) Therefore, the polis is good/civilized. ([1], [2])
- (4) Without law, the polis is of no benefit.
- (5) [Therefore, being without law makes a good/civilized thing of no benefit.] ([3], [4])
- (6) Therefore, law is good/civilized. ([1], [5])

Propositions (3) and (6) must mean not that existing cities and laws are good/civilized (a claim that Diogenes would not accept), but, *more stoico*, that nothing counts as a city or a law unless it is good/civilized. Presumably, only the Cosmopolis will count as a city, and only the dictates of reason as laws. And perhaps it is in this city that Diogenes will employ his vaunted art of ruling (D.L. VI.2.29, 74); for Diogenes also offers the following argument (VI.2.37; cf. I.12) as well:

- (1) All things belong to the gods.
- (2) Friends share all their belongings in common.
- (3) Therefore, all things belong to the friends of the gods. ([1], [2])
- (4) The wise are friends of the gods.
- (5) Therefore, all things belong to the wise. ([3], [4])

³³ Notice too that (3) below is here treated as an inference from (2) rather than as an independent premise; this reading makes better sense of the argument, and brings out the parallel with Cicero.

This is presumably one of the arguments Diogenes uses to justify theft (D.L. VI.2.72–73), since if all things belong to the wise, then the wise have the authority to take whatever they can make good use of. But if gods rule the universe, and the wise enjoy a share in all that the gods possess, it would seem to follow that gods and wise men rule the universe together. The Cynics, like Xenophon, thus lay the foundations for the more detailed theories of natural law and cosmopolitanism that will be developed in the Hellenistic era by Stoics and others, while the Cyrenaics, with their stress on the instrumental character of social relationships, lay the foundations for the contractarian approach to law that will be championed by the Epicureans.

Further Reading

Socrates has been the subject of an extensive literature. Scholars have debated the “Socratic problem,” that is, the comparative value of Plato, Xenophon, Aristophanes, and other ancient authorities as sources for the views of Socrates. Most scholars have regarded Plato as the most reliable, and *Apology* and *Crito* as especially important sources for Socrates’ views about the law. *Apology* is discussed by Brickhouse and Smith 1989, Reeve 1989, and Colaiaco 2001. Brickhouse and Smith 2002 is an excellent collection of translated ancient and modern writings on the trial of Socrates. On Socrates’ views on obeying the law in *Crito*, see Woozley 1971 and 1979; Allen 1980; and Kraut 1984. Scholars often consider whether the views attributed to Socrates in *Apology* and *Crito* are consistent, an issue taken up by Santas 1979, chap. 2, and Brickhouse and Smith 1994, chap. 5; 2000, chap. 6.

Some of the best recent research on the early Socratic philosophers is collected in Vander Waerdt 1994b, which includes essays on Plato, Aeschines, Aristippus, Antisthenes, and four on Xenophon. Morrison 1988 has compiled an invaluable compendium of bibliographical information on Xenophon. An influential study of Xenophon is Strauss 1972. Recent defenses of Xenophon as a source for Socrates’ views include Morrison 1988 and Cooper 1999. Morrison 1995 argues for a legal-positivist interpretation of Xenophon’s *Memorabilia*. Annas 1993, chap. 11, offers a thoughtful discussion of Cyrenaic social philosophy. A rich source of articles on Cynic social philosophy is Branham and Goulet-Cazé 1982.