

2010

# Obligation to Obey the Law: A Study of the Death of Socrates

Anthony D'Amato

*Northwestern University School of Law*, a-damato@law.northwestern.edu

---

## Repository Citation

D'Amato, Anthony, "Obligation to Obey the Law: A Study of the Death of Socrates" (2010). *Faculty Working Papers*. Paper 111.  
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/111>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Working Papers by an authorized administrator of Northwestern University School of Law Scholarly Commons.

**Obligation to Obey the Law: A Study of the Death of Socrates,**  
by Anthony D'Amato\*, 49 Southern California Law Review 1079-1108 (1976)

**Abstract:** Do we have an obligation to obey any law, no matter how unjust or evil, provided only that it is in fact a valid rule of the legal system in which we happen to be physically located? Reassessment of the relation between law and ethics justifies a new look at the classic statement of legal obligation: the death of Socrates found in the dialogues of Plato. Three possible bases for an ethical obligation to obey the law are examined.

**Tags:** Socrates, estoppel, law and ethics, ethical obligation to obey law

[pg1079]\*\*Do we have an obligation to obey any law, no matter how unjust or evil, provided only that it is in fact a valid rule of the legal system in which we happen to be physically located? The attention given to this problem in recent years as a result of controversies over civil disobedience and post-Watergate reassessment of the relation between law and ethics justifies a new look at the classic statement of legal obligation: the death of Socrates found in the dialogues of Plato. [FN1] Although often cited, Plato's account has rarely been the subject of critical scrutiny. [FN2] Yet the death of Socrates presents the moral dilemma of civil disobedience in the starkest possible situation and suggests a helpful structure for consideration of the ethical bases of one's obedience to the law.

The dialogues suggest three possible bases for an ethical obligation to obey the law. First, a citizen may have assented to the law; that is, we may find that an express or implied agreement to obey exists. Second, short of an implied agreement, his own actions may estop him to disobey—"estoppel" is used here in an ethical sense; if the term were used in a legal sense the argument would of course be tautological. Third, absent any assent or action by the citizen himself, he may simply have been the recipient of benefits conferred by other citizens and therefore arguably should have an obligation to obey the laws enacted by those citizens. [FN3] Logically, these three possibilities seem to exhaust [pg1080] the range of sources of obligation. Assuming that they are exhaustive, I will examine each in the latter part of this essay. At the outset, however, it is necessary briefly to describe Socrates' trial in the context of the Athenian legal system, and then, from the viewpoint both of the legal system and of Socrates' own motivations, to shade in the general ethical considerations surrounding Socrates' decision not to escape from prison.

## I. THE LEGAL CONTEXT

Socrates was accused of the capital crime of corrupting the young with his teachings, [FN4] tried before a judge and jury panel of 500 or 501 members, [FN5] and sentenced to death. The sentence was later effected when he was given poison to drink. At no point during the proceedings did Socrates deny that corrupting the young was a criminal act punishable by death. While that particular crime probably derived from the various codes the Athenians considered "law" (primarily the codes of Draco, Solon, and Cleisthenes), the crime was in a sense a common law offense, [FN6] inasmuch as no precedents were offered which even suggested that engaging in philosophical debate could be considered corruption of the young. Since trials and decisions were not formally reported in Socrates' time, the words "precedent" and "common law" should

be taken in a figurative sense. At Athenian trials, both accusers and accused could and did refer to recent trials of which the tribunals were familiar. [FN7] But to Socrates, and presumably to the Athenian citizenry as a whole, judging from the evidence which exists, a trial and judgment was simply an attempt by the tribunal to apply "the law," an immutable concept which somehow had a separate, independent existence unchanged by specific cases.

The careful reader of the Platonic account, however, will sense a tension between this simplified description of Athenian jurisprudence and the manner in which Socrates' trial was conducted. Many of Socrates' arguments in his defense are addressed not to "facts" or to [pg1081] what might today be called "law-facts," but rather to the law itself. Socrates argued, for example, that his teachings in principle could not have corrupted the young. Although he later believed that he was "a victim of injustice wrought not by [the laws], but by men," [FN8] his final argument for not escaping from prison was that he could not turn against the laws of the state. Nevertheless, he continued until his death to teach all who would listen. Thus, although at a verbal level Socrates seemed to separate the law from the tribunal's interpretation of it, we might reasonably infer that in a real sense he was arguing for what the law should be to a tribunal whose real powers—again as distinct from the verbal theory—consisted of adding (in a common law, developmental sense) to the content of the law through its decision in each case.

## II. THE ETHICAL CONTEXT

### A. FROM THE STANDPOINT OF THE LEGAL SYSTEM

Finding it quite natural that the state would attempt, above all, to protect its young, Socrates agreed that if he were indeed guilty of corrupting the young, he ought to be punished according to law. The poignant difficulty in Socrates' case is that the charge of corrupting the youth of the city was based upon acts that Socrates did and believed in all his life: asking questions of anyone who would listen, probing their answers for weaknesses, examining their logic, and attempting to arrive at truth. By so doing, he helped his listeners to think for themselves. Moreover, he actively tried to persuade fellow citizens, young and old alike, not to care first and foremost for their bodies or for wealth, but rather for the improvement of their minds and souls. He forced no one to listen to him, nor did he charge any money for his teaching. He "strove to persuade" his listeners

not to concern [themselves with their] external possessions rather than with [themselves] and the perfection of that self in goodness and wisdom; and not to concern [themselves] with the trappings of the state rather than with the state itself.... [FN9]

Since Socrates was accused of corrupting the young through the ideas he taught and the manner in which he taught them, his acts were inseparable from the crime of which he was accused. Thus, the enormity [pg1082] of his crime could hardly have been greater than in his particular case: it meant that everything he had done in his life was illegal, since his entire life stood for the proposition that he ought to teach his philosophy to anyone who would listen. Socrates believed that "the life unexamined is not worth living." [FN10] The depth of that belief made the accusation of corrupting the young almost equivalent to being charged with the crime of having lived. The asserted obligation to obey the law could hardly be presented more

dramatically.

One of Socrates' defenses at his trial was that there was no tangible evidence of harm to anyone as a result of his teachings. He noted that not a single youth whom he allegedly corrupted was complaining about him at the trial.

If I have already corrupted some of our youth and am now corrupting others, then surely some of them when recognizing as they grow older that I have given them evil advice in their youth, should have made their appearance in court to accuse and punish me: or if they themselves were unwilling, their kinsfolk, fathers, brothers, and other relatives, should now have remembered and punished it, if those near and dear to them had suffered any harm at my hands. [FN11]

If Socrates' pupils were not harmed, who was? Socrates described his accusers as "Meletus, the indignant champion of the poets, Anytus, of the craftsmen and politicians, Lycon, of the orators." [FN12] Socrates reasoned that his pupils went forth and cross-examined others, in his name. He supposed that they found "a plentiful abundance of men who think they possess knowledge but know little or nothing." [FN13] Consequently, Socrates assumed that the persons who had been embarrassed by his pupils became angry at him rather than at themselves, preferring to eliminate the source of their frustration rather than remedy their own ignorance. [FN14]

But even if petty vindictiveness were a motivating force in the accusation, perhaps a more substantial basis for the state's interest in allowing Socrates to be prosecuted may be inferred from the various references throughout the dialogues that Socrates' teaching led the youth [pg1083] against worshipping the gods recognized by the city. [FN15] Socrates was at first uncertain whether he stood accused of teaching the young to worship gods not recognized by the city, or of teaching atheism. [FN16] Meletus replied that Socrates' belief in no gods at all was the basis of his charge. [FN17] Although Socrates produced a contradiction from the answer, [FN18] what was at stake in the exchange was not a definition of "gods" but the establishment of a more troublesome fact: if he taught the youth of the city of Athens to think for themselves, to examine premises carefully, to be careful in their logic, to instruct themselves in ethics, and to learn by their own instruction, then in a sense the young people were worshipping "false gods," inimical to the city's interests. Young citizens who think for themselves and examine premises cannot be counted upon to obey the state's commands or to make good soldiers who obey orders without hesitation.

The Athenian establishment recognized certain gods, certain duties, and a certain lifestyle; these institutions served as a cement keeping the society together and making it strong in battle. Socrates' disinterested pursuit of truth chipped away at this cement and therefore at the foundations of Athenian society. In this basic sense, Socrates' very life, devoted to teaching philosophy, was perceived as a threat to the state. Therefore, it was not by random accident that Socrates was prosecuted. Although the immediate cause of his prosecution may have been a petty vindictiveness on the part of certain poets, orators, and politicians, the basis for their trial of Socrates was nothing less than this perceived threat contained in Socrates' own teachings. This situation is analogous to a modern dictatorship or totalitarian government silencing an individual for having addressed fellow citizens about the true nature of their political system.

The compromise which the court offered to Socrates is further evidence that the real basis of his prosecution was this threat to Athenian society. Socrates was offered acquittal on the condition that he would no longer spend his time in the pursuit of philosophy. He refused the offer, saying: "[A]s long as I breathe and have the power, I shall never abandon philosophy nor cease to admonish you and reveal the truth to anyone of you I may meet from time to time." [FN19] Further [pg1084] evidence can be derived from the discussion surrounding his sentencing. The custom was that the prosecutor and the defendant each would offer a punishment, and the tribunal would choose between the two alternatives. Socrates mentioned the possibility of exile but rejected it. He wanted to teach the citizens of Athens and was not interested in going abroad and teaching others. Socrates sought more than a general freedom to speak, a freedom probably available in some foreign state or in the wilderness; he sought the precise liberty of speaking to his fellow citizens in the state in which he was raised. If Athenians could no longer endure his words and discourses, Socrates foresaw that citizens of other cities would have the same reaction. [FN20] "A fine life mine would be if I left Athens at my age and lived like a hunted thing, constantly changing from city to city." [FN21] While it is not necessarily true that Socrates would have been persecuted abroad, he was making a logical point: if his fellow citizens of Athens did not see fit to acquit him of this crime, there would be no benefit in going abroad, only to endure the same sequence of events. Once convicted by his fellow Athenians, Socrates faced profoundly unacceptable alternatives: to remain in Athens and be punished with death or to go abroad and end his life in compromised, impotent exile. If his teaching was a threat to the state, Socrates certainly did nothing to appease his accusers.

#### B. FROM SOCRATES' PERSPECTIVE

The crucial ethical point of Socrates' trial is the way he characterized the justness of the proceedings against him. In analyzing the trial from an ethical perspective, the wording of the dialogue on this point requires closest scrutiny. Arguing that his accusers were acting unjustly, Socrates drew an important distinction between his accusers and the trial itself. It is a great evil, Socrates said, "to do what Meletus is now doing, endeavouring unjustly to put a man to death." [FN22] Socrates claimed that Meletus' indictment was lodged because he was "at a loss to discover any real guilt wherewith to charge me." [FN23] After having been sentenced to death, Socrates addressed the jurors as "my slayers" and prophesied: "immediately after my death a punishment will come upon you far more bitter than this death sentence of yours." [FN24] Socrates did not use lightly [pg1085] the term "punishment": he reserved it for occasions when a moral wrong had been committed, as is evident from a prior dialogue, *Euthyphro*. [FN25] Socrates thus maintained that the jurors themselves participated in the guilt of the accusers. Socrates apparently was convicted by a vote of 280 out of 500 or 501, for he mentioned that if 30 votes have been cast the other way, he would have been acquitted. [FN26] Apparently, Socrates believed that this majority of 280, along with Meletus, Lycon, and Anytus, shared the guilt for his execution.

Socrates' view of the immorality of the charges against him must be contrasted with his view of the procedures employed by the Athenian judicial system. Socrates believed that the system under which the jury acted was perfectly just; the tribunal sat to dispense justice and to judge according to the laws. [FN27] Questioning the propriety or the procedure of the trial or

suggesting that the jurors acted illegally never occurred to Socrates. [FN28] At the outset he said, "I must obey the law and make my defense." [FN29] Since he openly admitted the nature and purpose of his lifetime activities, Socrates' argument seems to be directed to a matter of interpretation rather than fact. He claimed that his teaching had not corrupted the young, but instead had made Athens a better state. Without modesty Socrates claimed, "[My teaching is] the gods' bidding: and I consider that the city has enjoyed no greater boon than my service to the gods." [FN30] (He later characterized himself as a gadfly who had been charged by the gods with awakening the sluggish Athenian polis. [FN31])

Yet after he had been found guilty, Socrates made it perfectly clear that, in his view, the legitimate legal authorities had spoken and that he must obey their command. He may have been falsely accused, and the 280 jurors who voted to convict him may have been acting wrongly; nevertheless, the Athenian legal system was the backbone of the Athenian state and it had to be respected. Socrates believed that he had been found guilty by "the laws", and that the sentence should be carried out, [pg1086] even though the individuals who served as lawmakers in his case had acted immorally. He deferred to the interpretation of the Athenian laws that resulted in his sentence of death. Socrates personifies these laws in a crucial imaginary dialogue, making his point abundantly clear. Suppose, he said to Crito, that we were on the point of escaping, and

the laws of the city and the commonwealth made their appearance and asked:  
"Tell us, Socrates, what do you propose to do? By this act which you contemplate is it not your intention to destroy us, the laws, and the whole city, as far as you can? Do you think it possible for a state still to exist and not be overturned, in which verdicts that are reached have no force but are set at naught and destroyed by private citizens?" For much might be said, especially by an orator, when a law is threatened which prescribed validity of court verdicts. Shall we reply to the laws: "The state wronged us and rendered an unjust verdict?" Shall we say that, or what shall we say? [FN32]

Crito agreed with this final formulation of the question, whereupon Socrates proceeded to convince him, by arguments which we shall examine, of the error in refusal to obey an unjust verdict. Socrates, therefore, implicitly rejected any distinction between the morality of legal procedures and the substantive results which those procedures produce.

What is important here is the fact that Socrates equated "the law" with the procedures by which the law was formulated and applied to him. The procedures by which Socrates was convicted were undoubtedly just. A public accusation, a trial before 500 or 501 jurors, and a verdict at the conclusion of all evidence constituted fair procedure. Moreover, it did not occur to anyone in those days to question the derivation of the law itself. As has been previously noted, Socrates accepted that corruption of the young was a grave crime. Presumably, we would not find anything wrong in such a derivation today, so long as we believe in the principle of common law crimes—which after several centuries of statutory crimes, we find increasingly difficult to accept. Socrates, then, clearly accepted the verdict of the law, even though he believed himself unjustly accused, and had not the slightest intent of repentance or of changing his ways. Socrates' intellectual process was to equate just procedures and just interpretations of underlying law with the substance of law itself.

[pg1087] What if Crito had asked Socrates whether the law under which he had been convicted was a just or an unjust one? One wishes that Socrates had been asked such a question. Perhaps he would not have known how to reply, which may be why Plato did not put such a question in Crito's mouth. Or perhaps the reply Plato would have assigned to Socrates would have finessed the question by the facile theory that while the law which made corruption of the young a crime was just, its application in this situation was unjust. Since Socrates went to such pains to distinguish the unjustness of his accusers from the legal system itself, the question whether the application of a law could be just or unjust may have never occurred to him. The most we can do is guess what Socrates might have said had such a question been posed directly. He might have replied that only men can act justly or unjustly, rightly or wrongly; the laws cannot be criticized from that perspective. If the laws were necessary to the preservation of the state, and well-adapted to that purpose, Socrates might have called them "good," even though he normally would have preferred to reserve the word "good" for describing the reactions of men.

One commentator has attempted to avoid the problem of whether a law is itself unjust by arguing that Socrates was drawing a basic distinction between doing injustice and suffering it. [FN33] Socrates' accusers were doing injustice to him, but he would not do injustice in return by escaping from prison. His ethical system forbade anyone from doing injustice. Yet while this formulation has superficial consistency, it results in a paradox when applied to the operation of a legal system. Let us first consider the case where there is no law involved: A physically and unjustly harms B. Under the "suffer injustice" formula, B would have a moral obligation not to retaliate by inflicting physical harm upon A. But now contrast the case where a law is involved: A and his friends convict B unjustly and sentence him to death. Until the actual execution is accomplished, B has not been physically harmed. (For this example only, we will assume that a brief term in prison awaiting execution is not itself a physical harm. Alternatively, we might assume that there is no prison term, B being under police surveillance until execution day.) As B awaits execution, the opportunity for escape arises. Unless B escapes, he in effect becomes A's accomplice in effectuating harm upon himself. B is not only suffering injustice, he is helping to do injustice. Of course, if escaping entailed harming someone [pg1088] else (whether A or a third party), then the case would be different. But if B can escape without physically harming anyone—the actual choice offered to Socrates when he could have slipped out of prison in disguise without harming any of his jailors—then why is escaping the doing of injustice? It would appear that *not* escaping would be participating in the doing of injustice.

When his friend Crito visited him in prison, Socrates elicited Crito's assent to the proposition that if escaping were wrong, then Socrates should not escape. Even though the escape that Crito had planned for Socrates would not harm any of the jailors, even though the plan was feasible, and despite the important fact that by escaping he would have more time to instruct people in his philosophy and thereby continue his good works, Socrates felt imprisoned by the unbreakable bond of an obligation: his obligation not to act unjustly. Hence, only if it could be demonstrated that escaping was either right or at least ethically neutral would Socrates not drink the poisoned hemlock on the appointed day.

The next section will examine the possible bases for the obligation not to escape. But no summary of Plato's account of the death of Socrates would be complete without mentioning the pragmatic arguments asserted by Socrates that may have reinforced his decision. The reader, of

course, is left to judge whether these considerations might have been more important than the ethical ones or whether the practical considerations Socrates adduced were meant merely to mollify Crito and in fact were somewhat disingenuous given Socrates' firm decision to adhere to the dictates of morality.

First, if Socrates escaped he might place his friends in danger. They might therefore be exiled and deprived of their country or of their property. Second, if he went to a nearby city, such as Thebes or Megara, he would be viewed as an enemy to their government, as one who destroys the laws. Third, a corrupter of the laws—that is, one who escapes, contrary to the law—would seem more than likely to be a corrupter of the young as well. Escape thereby would serve to confirm his accusation. Fourth, even if he avoided well-governed cities and well-disciplined men, would life be worth living? How could he continue to maintain that goodness and righteousness and laws are man's most precious possessions, if he were to avoid them himself? Additionally, people in foreign cities might regard him as a man so interested in preserving his own life that he had resorted to a ridiculous disguise to [pg1089] slip by the clutches of the law. [FN34] Next, what about his children? Must he take them away and make exiles of them too? Or would they be better brought up and educated in Athens even though he could not be with them? Lastly, what example would be set for his pupils if he were to escape? If he were executed he would depart this life the victim of injustice wrought by men. [FN35] But if he escaped, repaying injustice with injustice and evil with evil, breaking his agreements and covenants, and injuring those whom he should least injure, posterity and the laws of Athens and the laws of all other states would not regard him well. The sound of these arguments, Socrates concluded, "rings in my ears and makes it impossible for me to hear any others." [FN36]

### III. THE POSSIBLE BASES OF OBLIGATION

#### A. PRIOR AGREEMENT TO OBEY THE LAW

Socrates believed that the most important reason why escape from prison would be wrong was that it would be a breach of a "just agreement" he had with Athens. [FN37] We turn now to examine whether there was such an agreement and whether the scope of the agreement was broad enough to include the law under which Socrates was convicted.

##### 1. *Existence of the Agreement*

There was no explicit agreement, oral or written, in Socrates' case, but the ethical question is whether an agreement is properly inferable. If we think of the agreement as an implied contract between citizen and state, Socrates' duties under that contract would have been to obey the valid legislative decrees and judicial verdicts of the state. "Validity" in this sense would be purely formal, as in Hart's jurisprudence; [FN38] any verdict of a properly constituted tribunal would be valid, and the proceedings against Socrates concededly were valid when analyzed in these terms. The "consideration" Socrates received from the state under this implied contract was the benefits of Athenian citizenship: birth, nurture, education, and protection. [FN39]

[pg1090] Anticipating the objection that a minor could not be held to have impliedly consented to such a contract, Socrates argued that since each Athenian citizen was free to leave

the state when he reached manhood, Socrates' decision to remain in the city was tantamount to ratification of the contract requiring his compliance with the laws of the state. [FN40] Socrates added that in his own case the situation was even clearer: he did not leave the city to see the world except for one visit to the Isthmus, and he never travelled anywhere else except in military service. [FN41] Moreover, he raised his children in Athens, proof that he liked the city. Additionally, he did not propose the penalty of exile at his trial. Thus, he was not unwillingly compelled to consent to Athenian legality or deceived into consenting or forced to come to a quick decision to remain in Athens. Was the fact that he remained in the city the same thing as agreeing to its laws? He answered rhetorically, "[W]ho could take pleasure in a city apart from its laws?" [FN42] In summary, Socrates believed himself bound by an implied contract with the city to obey all its laws, not just those which he liked or those which might result in a good verdict for him. Having made this agreement, he would not breach it by attempting to escape.

It would be difficult to argue that *no* agreement can be implied in Socrates' case—or indeed, in the case of most citizens with respect to their states. And certainly an implied agreement is as valid as a written one; paradoxically, we might be more suspicious of a written agreement extracted from a youth of 21 by a state, if the state required such an agreement as a condition of remaining there. But conceding the existence of an implied agreement is merely the first formal step of the argument. We must now determine the nature and scope of Socrates' duties under the agreement.

## 2. *Nature of Socrates' Obligations*

Socrates considered his obligations under the implied agreement as analogous to the duties of a son toward his father. The state, like a father, begat Socrates, nurtured him, educated him, protected him, and told him when he reached the age of majority that he could either leave and escape the constraints of the city's laws or stay and be obedient to all its laws.

[pg1091] Conceding for a moment that the benefits conferred upon Socrates were as described, to whom were the duties then owed? If F, a father, confers such benefits upon S, his son, might not S "repay" F by conferring similar benefits upon G, F's grandson? Is it not more rational to consider the "family line" persisting through time in this manner, than to demand that S devote his life to the care of F even at the cost of ignoring G? If such "forward repayment" is an ethical means of discharging S's obligations to F, then we can look at the state in a similar light. A state is merely a collection of individuals living in a certain geographic area; Hegel has even anthropomorphized it as an organism persisting through time. [FN43] A forward momentum is implicit in the Hegelian clash of thesis and antithesis; thus, the more we anthropomorphize the state as Socrates suggested by his choice of metaphor, the more it makes sense to confer benefits forward in time rather than backward.

Socrates accordingly could have replied that what the state did for him— create, nurture, educate—he repaid by doing the same for his own sons, including the payment of taxes (to the state) to support education, and participation in military service to secure his sons against the state's external enemies. These things, Socrates could have argued, he owed to his sons, and to their generation, but did not owe *back* to the state. Thus, his ethical obligation consisted of doing for his children, and their contemporaries, what the state and his father did for him. One might

argue that the preservation of future generations was a condition precedent to the existence of the present generation, and hence remains a primary ethical obligation.

Socrates could have expanded this argument to assert that even if his teachings resulted in a new state (through a revolution resulting in a new form of government for Athens), he would not have violated his forward-oriented ethical obligation so long as his teachings represented his sincere beliefs of what would be best for his children. As a father, he would thereby only be doing what was best for his son, even if it did not please the son's grandfather. Why should the state, which educated Socrates, have a better idea of what is best for Socrates' children than the product of that education, Socrates himself? If Socrates believed that his idea of what was best was superior to that of the state, why should he have felt morally bound to obey the state rather than follow what he believed to be the best interests of his children?

[pg1092] Since Socrates did not take the forward-oriented approach to the discharge of his obligations, let us now consider the state's specific claims. Although Socrates gave the state credit for begetting, nurturing, and educating him, would not he have been born, nurtured, and educated even if the state did not exist? To be sure, the education he would have received from his parents alone would not have been as extensive as that which he received in the schools. But it was his father, after all, who actually paid for the schools; education was not a gift from the people as a whole. And even if the total cost of education was not paid pro rata by parents, the portion paid out of general state funds was nevertheless an economic "bargain" for the state, since the state decided upon the curricula of the schools. Socrates may have been socialized by Athenian education along certain lines that were in the interests of the people as a whole but not in the interests of the individual: he had instilled in him a love of country, a willingness to die in its service, and other such notions. Hence the state, having received what it had paid for, was not entitled to anything more from Socrates. What of the nurture argument? Did the state provide Socrates with food so that he might survive? Presumably, Socrates' father worked for a living, paying for the food that he received. His work resulted in products or services for which farmers gave up food in exchange. While the system of voluntary exchanges benefited everyone, the state was not a charitable force within it. Does a welfare recipient owe more to the state than a person who is not on welfare? Not necessarily; "welfare" may simply be a rational state loan against the future utility of the recipient. It is not necessarily a claim by the state upon a person's services or obedience.

What did the state provide for Socrates that he absolutely needed? One possibility, not explicitly mentioned by Socrates, is that the state provided him with defense and security against external enemies. Perhaps the claim of state security is implicit in Socrates' "nurture" argument. In any event, the security point is important. If it is true that external nations threatened to pounce upon Athens and enslave it, then the Athenian soldiers, in the army which composed the city's defenses, have conferred a needed benefit on young Socrates. Nonetheless, by serving in the military when he became of age has Socrates not returned in full the benefit conferred? The value that any citizen receives in terms of common defense is repaid when he participates in military service or in paramilitary or civilian defense activities.

[pg1093] The preceding arguments are not intended as necessarily more convincing than the "backward" repayment to the state for benefits conferred; rather, if they are a reasonable

alternative to Socrates' conception of his obligations under the implied contract, then the force of his conclusion that he must obey *all* valid laws of the state is considerably weakened. An equally logical alternative to the state's argument would be that Socrates is only under a duty to repay the citizens of the state by participating in the conferral upon them of benefits similar to those conferred upon himself.

### 3. *Scope of Socrates' Obligations*

a. *Are all laws included?* Despite the preceding argument concerning the nature of Socrates' obligations, one might contend that *if* Socrates had an agreement with the state, he may simply have made a "bad deal" in agreeing to obey all its laws and, hence, is obligated to obey the law under which he was convicted. Perhaps it is in the nature of what we call "contract" that obligations can arise despite a lack of equal bargaining power or roughly similar "consideration" on each side. In other words, while Socrates might discharge some of his obligations by contributing toward the education and security of other people living in the state, he might in addition have the obligation to obey all of the state's laws simply because that was part of the deal. Under this view, we do not examine the adequacy of the state's consideration, but only the fact that there was a nontrivial consideration.

The basic fault in this argument is that the agreement was not explicit. Hence, whether Socrates is bound to obey the law that resulted in his conviction is the very question at issue. If that law was part of his agreement, then under the general theory, he is obligated to obey it. But was it part of the agreement? Or, would such a law have been an "unconscionable" addition? Moreover, is there not an infirmity in any "open-ended" contract, where substantive provisions depend upon future actions of one of the parties? Socrates' implied contract has as one of its terms the open-ended provision that any law thereafter enacted by the state, as party to the contract, will be binding upon Socrates. This open-ended provision is hard to read into Socrates' implied contract.

The state might reply that while no one can specify in advance all the laws that a state might enact, uncertainty does not mean that such a contract can never be made. Moreover, since each citizen has a chance to participate in the making of the laws, the provision is not totally one-sided. How would Socrates have responded?

[pg1094] The Platonic dialogues do not reach this question explicitly. We might imagine one possible answer: that the open-ended contractual provision is reasonable with respect to laws that are foreseeable and related to the kinds of laws passed before the contract was signed. In other words, new laws that fill in details or extend past laws to new technologies would have been reasonably within the scope of the parties' contemplations, and are therefore just. But a totally new and different law, such as one that sentences a man to death for speaking his mind as he has done all his life, would be *ultra vires* even such an open-ended contractual provision. Yet what if the state rejoins that, as a citizen, Socrates has a voice in the formulation of any new law and, indeed, that his voice at his own trial was exceptionally eloquent and was considered seriously by the entire tribunal? Although superficial, it is often said that in submitting to the majority will, a citizen must take the bad laws that are enacted by the majority along with the good. But even on the level of this apparent cliché one might inquire whether a citizen has actually agreed

to accept any law passed by the majority. (Certainly, the American Bill of Rights and other individual rights provisions in the body of the 1789 Constitution were minoritarian safeguards.) What if the majority, without giving any reason, sentenced the individual's children to death? Is *that* within the contemplation of submission to majority rule? Or is there a deeper set of reservations—conscious or subconscious—in any individual's submission to governmental power, whether the government is a representative democracy or a benevolent dictatorship? Are there some possible acts by the government that cannot reasonably be depicted as flowing from a prior agreement to be bound by that government's enactments? If so, an implied agreement does not conclusively determine whether the scope of such an agreement includes obedience to the law making corruption of the young by the teaching of philosophy a capital crime.

b. *Are only just laws included?* Another possible qualification to the scope of Socrates' obligation is his pledge only to obey laws that are just. Thus, he cannot be said to have had an ethical duty to obey unjust laws. This superficially appealing formula, which recurs in the early stages of any argument concerning civil disobedience, has been shown by John Rawls to be perhaps a necessary, but certainly not a sufficient, standard for a potential individual dissenter. Rawls believes that "when the basic structure of society is reasonably just, as estimated by what the current state of things allows, we are to recognize unjust laws as binding [pg1095] provided that they do not exceed certain limits of injustice." [FN44] Although Socrates' Athens would not qualify as a just society under Rawls' other formulae (an immediate disqualification was its system of slavery), it nevertheless may have appeared to Socrates as "reasonably just." Rawls supports his conclusion, in terms that Socrates obviously would accept, by arguing that even in a just society there obviously will be some laws passed by a majority of legislators that will be viewed as unjust by certain groups (just as there will be some decisions of judges that will be viewed as unjust by the losing party). "[M]ajorities (or coalitions of minorities)," he writes, "are bound to make mistakes...." [FN45] Nevertheless, "in the long run the burden of injustice should be more or less evenly distributed over different groups in society...." [FN46] If not, "permanent minorities that have suffered from injustice for many years" might then no longer have a duty to comply. [FN47] In other words, although Rawls probably would not want to formulate it this way, one can infer that there are small injustices and large injustices. Only with respect to the latter does a member of society not have a duty of compliance.

If we applied Rawls' analysis to Socrates' situation, can we say that the law under which he was sentenced to death was merely a singular deviation from a generally just regime? Or is it wrong to consider its consequences as limited simply to the case of one 70-year-old philosopher? In a sense, Athens excised a portion of its brain by eliminating its leading man of intellect—by finding him guilty, essentially, of having lived. Is this not an extreme form of injustice, discharging any duty of obedience to the laws Socrates otherwise would have had? The problem with this line of reasoning, however, is that Rawls imposes his own standard of justice upon a society to determine which laws are ethically enforceable. In contrast, Socrates was unwilling to substitute forcefully his own notion of justice for that of the state ("forcefully," because although Socrates was willing to continue to criticize the state as long as he lived, he was unwilling to take the moderate yet necessary "forceful" act of escaping from prison). Compounding Socrates' difficulty was his belief that the actual law under which he was tried, namely corruption of the young, was a just law in the sense that the law was not to blame for his execution; the injustice consisted of the tribunal's action under that law. Attributing the injustice to the 280 jurors who

voted [pg1096] for his conviction, rather than to the law itself, Socrates probably would not have found that Rawls' distinction between large and small injustices had any application to his own case.

The reply to Rawls' theory, however, has moved us closer to a fundamental dilemma previously posed: that of the distinction between "the laws" and the way the laws are interpreted in the context of real cases. Does Socrates' commitment to the laws include a commitment to the institutional means by which laws are authoritatively determined? Let us examine an extreme case, an example that we would rarely conceive as being a possibility within a rational legal system. Suppose there were a law in Athens at the time Socrates reached his maturity that guaranteed to all persons the right to speak freely and to philosophize without any interference from the state, no matter what the result of such activities. Suppose further that Socrates is brought to trial under the same circumstances as in fact occurred and that he invokes this law in his defense. The tribunal considers it, among the other laws—and precedents, if any—that are invoked, and nevertheless finds Socrates guilty of the capital crime of corrupting the young by virtue of his speaking and teachings. Even further, suppose the court does so without citing any reason why the statute was not a complete bar to their decision. [FN48] Socrates would conclude that the court had rendered a judgment directly contrary to a statute that it would admit is valid. What can Socrates do now? On the one hand, the law that he plainly has relied upon and which he believes clearly applies to his case remains a valid statute. On the other hand, the tribunal which is the authoritative determiner of the law has found him guilty. In *Crito*, Socrates made it clear that under such circumstances he would not substitute his individual judgment for that of the tribunal. Although he felt the tribunal had decided unjustly, [FN49] it was "the law" that was speaking and which Socrates felt a moral obligation to obey. Perhaps Socrates would not have gone quite so far as Bishop Hoadly who said, many centuries later, [pg1097] "[W]hoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them." [FN50] Perhaps he would not have fully agreed with the statement attributed to Chief Justice Hughes that "the Constitution is what the judges say it is." [FN51] Yet Socrates would have to concede that at least part of what he means by "law" consists of a commitment to a course outside himself which is its authoritative interpreter.

This concept of a necessary connection between law, as verbal principles, and the interpretation and application of those principles to concrete cases raises in acute form the ethical dilemma posed by the death of Socrates. As we have seen, Socrates' agreement to obey the laws included a moral commitment to an institutional structure external to himself—or, at minimum, external to himself as the defendant in a trial—as the authoritative interpreter of the laws. Socrates may have argued to the tribunal, he may have believed that they listened to him, and he may even have believed that they understood him; but in the end, the decision regarding the interpretation of the law was theirs and not his.

Accordingly, Socrates' moral commitment to obey the law necessarily involves delegating a part of his own ethical standard to the tribunal. Yet at the heart of his teachings was the proposition that each man must think for himself and must discover what is the truth and what is morally right. Socrates believed that there were certain immutable standards of right and wrong discoverable through a process of logical thinking—in later dialogues these become Platonic

ideals. Socrates further believed that no man should blindly follow the teachings of another even if those teachings were supported by everyone else in the world. [FN52] Therefore, was not Socrates inconsistent in deferring to the application of the law by the tribunal? In his decision not to escape, Socrates certainly did not follow the urgings of his friends; he decided upon his own path of conduct because he thought it was right. But the path that Socrates chose consisted of delegating a portion of his own set of ethics to the lawmaking authorities of Athens, so that they, and not he, decided that the law condemning him to death was morally right and just.

[pg1098] In sum, even under a generously open-ended theory of the content of the implied contract between citizen and state, and even conceding that laws with minor injustices ought to be obeyed (assuming that Rawls' distinction can and should be made), Socrates did not persuasively show that the objectively unjust law under which he was sentenced to death could have been part of the contract. If the existence of the contract is a matter of ethical implication, it seems inconsistent to read into it such a gravely unjust law. On the other hand, if the injustice consists of the *application* of the law to Socrates by the tribunal—and not the law itself—then Socrates should not have concluded that escaping would be an act of disobedience to the law.

## B. OBLIGATION THROUGH ESTOPPEL

In the preceding section, we found that there were grave difficulties in inferring an agreement between Socrates and the state, which would require Socrates to obey any validly enacted law. But what if the notion of agreement with all its contractual connotations is set aside, and we focus, instead, upon whether Socrates is estopped to disobey the law under which he was convicted because of his prior actions as a citizen? Here we are using the notion of estoppel only in its root foundation of fairness, and not in a technical sense. What actions can we say are attributable to Socrates that would, as a matter of fairness, estop him to escape from prison?

The only act attributable to Socrates, for the purpose of the estoppel argument, is his decision to stay in Athens past the age of majority. On the contractual theory previously considered, we have seen that in deciding to stay in Athens, Socrates may have consented to all the laws of the state that were in force at the time of the decision to remain—as well as those which were foreseeable or reasonable modifications. On that theory, if he later committed a robbery he would have no basis for dissociating himself from the state at the moment he was apprehended and charged with that crime. But when we consider an estoppel argument, we have to ask whether the mere act of staying within Athens can properly be interpreted as a continuing submission to all new laws and interpretations as enacted and applied. Let us reverse the order in which we previously considered the implied contract theory, and ask here: first, what the scope of the estoppel would be, and then, whether such an estoppel can properly be inferred.

### [pg1099] 1. *Scope of the Estoppel*

It is efficient to consider the scope of the possible estoppel first, because it can be quickly shown that if an estoppel existed, it must extend to the law under which Socrates was prosecuted. Socrates courageously admitted at his trial that, irrespective of the tribunal's verdict, he would continue teaching philosophy to all who would listen, until the moment of his death. By taking this stand, Socrates essentially conceded that even upon notice that his actions were illegal, he

would continue to so act. More importantly, Socrates expressly disavowed the alternative of exile; he would continue to teach in Athens, where presumably he would continue to derive the benefits that the state confers upon its citizens. Hence, regardless of whether Socrates was estopped to deny the moral force of the law that resulted in his conviction *before* the tribunal acted, he certainly would have been estopped—if there was any estoppel at all—after the tribunal pronounced its verdict. This outcome renders insignificant the inquiry into the scope of the estoppel, for the scope is, in effect, conceded to include the law under which Socrates was convicted.

One distinction should be made clear. The fact that Socrates intended to violate the law after he was given notice that his teachings would be punishable would not mean that he was estopped to deny the moral force of that law. The moral underpinnings of any law are not changed when a person is merely given notice of the law; if unjust from the beginning, the law continues to be unjust. The only difference is that the person then knows for certain that the state will punish him if he continues to resist the law. Thus, in asking next whether an estoppel existed in Socrates' case, we will not look at his planned actions in continued violation of the law in question. We will instead ask whether remaining in Athens was the kind of *voluntary action* which would give rise to a proper inference that Socrates should have been estopped to deny the right of the state to prosecute him for the crime of corrupting the young through his teachings.

## 2. *Existence of an Estoppel*

We thus reach the critical question of whether Socrates' decision to remain in Athens can be construed as a voluntary act that estopped Socrates to deny the right of the state to prosecute him for a newly formulated crime, as Socrates thought it could be. As a starting point for analysis, consider whether a state is like a voluntary organization or [pg1100] club. A local fraternal organization, for instance, might tell its members that unless they obey all the rules of the club, they will be expelled from membership. The rules are a condition of continued membership, and this condition is made known to all prospective members. Is the state an example of such a voluntary organization? Such a conceptual question can obviously be the subject of endless dispute, if dealt with on a purely theoretical level. Let us instead approach it from a practical viewpoint: how could someone leave the state if he no longer accepts its rules and laws?

One way to leave a state is to sell one's possessions and to travel past the state's boundaries. Such emigration is obviously different in kind from quitting a voluntary organization, which normally would not require physical relocation of one's person and belongings. Moreover, emigrating from one state means immigrating into another. States have a monopoly over the earth's geographic surface; to the extent that states are more or less alike, the choice of leaving one state is illusory. Again, this fact is distinguishable from the voluntary organization; by leaving one you do not automatically join another.

A second way to leave a state would be to "opt out" in the sense described by Robert Nozick: a person would form an apolitical, stateless enclave around his house. [FN53] If others did this too, the state would ultimately resemble something of political swiss cheese, having holes wherever citizens disavowed the state. He then would have no right to obtain services from the state, nor would he pay any taxes; presumably, he would negotiate for any goods or services and

pay for them purely upon a barter basis. But in practice states do not allow this kind of opting-out. States typically claim "ownership" of the same land that private persons own; states assert that individuals within their geographic area merely own land vis-a-vis other individuals but do not have an absolute ownership right vis-a-vis the state. This assertion can be backed up with force—although it is not necessarily "right." Therefore, at least from a practical standpoint, the citizen's only real option if he wants to leave the state is to leave physically, liquidating his possessions and abandoning his friends and his good name (or "goodwill" in the business sense).

We are now in a position to ask the more theoretical question. Who, in justice, has a prior right to remain located in a particular [pg1101] geographic area—the state, or a person who wants to opt out of the state? Consider a person who owns a plot of land and a structure upon that land. Did his ownership or that of the state come first in time? Individual ownership results either from the individual's paying someone else for the rights to that plot of land or from someone's gift or devise. The transactions resulting in this chain of ownership probably were supervised and enforced by the state, but that fact alone does not give the state a supervening right of ownership of the equity. If the state originally owned the land, then the question of what the private purchaser received is a matter of interpreting what the state conveyed to him (or his ancestor) and what it retained. For example, the state may have retained the air rights or the mineral rights; it may also have retained jurisdictional rights over that land so that the owner could never opt out of the state. But in many cases, the state did not originally own the land; indeed, in the typical situation, the state arises as a collective, long after persons have staked out the land into plots. If a person owned a plot of land and later a state came into existence, then even if the state asserted rights over that plot of land, the assertion is not backed up by any ownership interest that ought to be recognized as a matter of justice.

The point of these speculations is that when a state claims that a person is estopped by his "act" of continuing to reside on a plot of land that he owns, the state is necessarily asserting that the person's moral choice is either to emigrate or to submit to the state's laws. But the state's moral position would vanish if it had no right to that plot of land vis-a-vis the owner's right. The owner's decision to remain under such circumstances could not be construed as any participation or acquiescence in the state's legal system; it would be equally consistent with opting-out.

### 3. A "Bad Example" Estoppel?

We so far have been considering a possible estoppel arising out of Socrates' act of remaining in Athens. A different kind of estoppel might be said to arise out of an act that he had not yet undertaken, namely, the act of escaping from prison. Socrates could claim that by escaping he would be casting disrespect upon all laws—not just the one under which he was convicted, but also laws that he had consented to all along and that were clearly just. If that is so, then his very acquiescence to those laws might operate to estop his escape (again using "estoppel" not in a technical but in an ethical sense).

[pg1102] Socrates in fact argued to Crito that escape from prison would serve as an example of disrespect for the law. To analyze this position, we probably must concede that escaping from prison would indeed cast disrespect upon the very law under which Socrates was convicted. But this alone would not be "doing injustice" to such a law if the law itself were unjust; rather, the

way to negate an unjust law is to disregard or disobey it, and thus, not participate in the effectuation of its injustice. The important question is: Would escaping from prison cast disrespect on all the other laws?

Let us consider the example of a murderer. The very act of committing the murder does not cast disrespect upon the law of homicide except in a farfetched sense. When a criminal breaks the law he is not damaging the law itself but is in effect calling attention to it and perhaps strengthening it by including himself within the category of persons who have clearly violated the law and thus must pay the penalty. His subsequent imprisonment, if anything, reinforces the criminal code. Similarly, escaping from prison would not be motivated primarily by a disrespect for the law; indeed, the occasional convict who prefers prison life and does not try to escape casts greater disrespect on the laws, for he may have committed a crime merely to get into prison.

Let us take the case of an entirely different kind of "murderer." Suppose a newspaper critic is convicted of "murder" because he "killed" a dramatic production he did not enjoy by criticizing it so severely that the show folded. If such a person then escaped from prison, we might say that his escape was an indication that he did not believe that his conviction as a murderer was valid. He intended to cast disrespect upon such a law; his escape helped dramatize the unjustness of the law. At the same time, his escape would not necessarily cast disrespect on all the other laws, since the public can distinguish his reasons for not adhering to this particular law.

Was Socrates' case more like that of the first murderer or more like that of the second? Socrates clearly communicated with and had an effect on Athenian youth. But what Socrates actually did—teach his philosophy to the young—was not clearly a corruption of the young. If it was, then it was "corruption" in a more strained use of that term somewhat similar to the strained use of the term "kill" as applied to the theatrical production. The murderer in the first example presumably would not dispute the fact that the homicide was morally wrong, whereas the critic in the second case would undoubtedly dispute the contention [pg1103] that killing a play is morally wrong—the art of the theatre is promoted because the play was "killed." Perhaps this observation allows us to place Socrates' case closer to the second hypothetical than the first, for Socrates' clearly felt that his conviction was unjust.

Why, then, did he not escape? Would not his escape have brought home to the public the immorality of the law that sentences a person to death for teaching what he believes? Would not his refusal to escape have operated to inhibit others from thinking for themselves or teaching what they believe? Socrates' decision not to escape contributed to the exaltation of the state above the individual, which probably received its ultimate expression in the nineteenth-century jingoistic cliché "my country, right or wrong." We must reluctantly conclude that Socrates' decision not to escape was not morally necessary and, hence, contributed to a depreciation and diminution of individual rights when asserted against claims made by the state.

### C. PASSIVE RECEIVER OF CONFERRED BENEFITS

We have examined, first, whether Socrates assented to the laws of Athens, and second, whether his active acceptance of the benefits of citizenship could give rise to an equitable

estoppel barring him from escaping from prison. A third possible source of obligation exists: that of the actions of others conferring benefits upon Socrates so that he was under an obligation not to escape, even though he was only a passive recipient of those benefits. Such an argument is hard to infer from the Platonic dialogues, but it has been made with some force in a non-Platonic context by Professor Rawls. Rawls' "principle of fairness," [FN54] which he attributes to Professor Hart, [FN55] is as follows:

when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantage for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. [FN56]

[pg1104] A most frustrating aspect of Rawls' theory is that in crucial places, such as the above quotation, he fails to give a concrete example of what he means. [FN57] We are left wondering whether he believes that it is always true that when a number of other people agree among themselves to undertake an onerous activity possibly benefiting us as well as them, we are suddenly bound to obey their rules. Robert Nozick supplies an illuminating and critical example:

If each day a different person on your street sweeps the entire street, must you do so when your time comes? Even if you don't care that much about a clean street? Must you imagine dirt as you traverse the street, so as not to benefit as a free rider? [FN58]

It is worth spelling out the implicit criticisms in Nozick's test case.

First, if you are not included in the decisionmaking process initially, why should you be ethically bound by the commitment that the others make to the mutually advantageous activity? One possibility is suggested if we take the opposite case, that of a dirty street. Suppose all others in the community decide that they benefit from having a dirty street, and encourage each other to throw their garbage on the street. Must you be bound by their decision regarding what is desirable? This brings into question Rawls' notion of having "benefited" from the group's activity. Is there such a thing as an objective benefit, or is one man's benefit another man's burden? Do we all agree that a clean street is preferable to a dirty one, so that the cases are not reversible? If so, who is to decide—the others or you? Another possibility is that you were a participant in the original decision, by some process of implied agreement. [FN59] If by choosing to live in a particular society you have impliedly agreed to have clean streets, rather than dirty ones, and that implied agreement awaits effectuation by neighbors taking alternate turns to clean the street, then when your turn comes you may not demur on the ground of lack of consent.

This latter argument dovetails with a second criticism implicit in Nozick's account: that you might not care very much about a clean [pg1105] street. To put this in formal terms, in joining the society, you *might* have preferred clean streets to dirty ones, but you might also have had other preferences that could clash with this one. For example, you might not like having clean streets enough to cause you to give up a part of your day which you might spend in more pleasurable or profitable activities. [FN60] A different, and also incompatible, position might be that when you joined the society, you believed that if others did things that benefited you, you

would do *different* things that might return the favor. While your neighbors cleaned your street, you might have been "cleaning up" the local political machine by exposing graft, corruption, and voting frauds. (This is a version in a new context of Plato's theory of the distribution of labor according to talents in his *Republic*.) A third position might be that when you joined the state, you preferred above everything the opportunity for individual consent to whatever substantive policy might be offered. Hence, had you consented explicitly, you would sweep the street, but since you did not, you oppose the activity on that ground alone. Considering all these possibilities, especially the second (repayment by doing a different task), it is hard to make out a case for the group's right to *enforce* their particular rules upon you. Is the only way to "pay" for the benefit of a clean street the precise act of your sweeping the street? (Suppose, for example, that you are the only one on the block for whom sweeping the street would cause a risk of a heart attack.)

A third line of criticism stems from Nozick's third sentence relating to the free-rider problem. Here, in a sense, is the crux of the "fairness" argument on an emotional level. Your neighbors decide to take turns in cleaning the street. Although you agree with them that a clean street would be beneficial to you, you decline to participate. Each neighbor must sweep the streets more frequently since you are not participating. They may decide that this is worth it even though you get a free ride, but they may be very upset by the fact that you are receiving a benefit without doing the work. What moral defenses do you have?

You might first argue that you are not stopping them from cleaning the street. You are not placing any obstacles in their way. Their cost-benefit calculation, determining whether they will find cleaning the street worthwhile even though they must clean it more frequently than would be the case with full citizen participation, is one that they are free [pg1106] to make. Next, though you benefit from the clean street, surely the neighbors are not undertaking the sweeping in order to give you a benefit. Their motive is purely selfish; if their own benefit is not enough to induce a decision to sweep the street, surely they will not be pushed toward a favorable decision by the marginal benefit that you would derive from their decision. (At least, you are not asking them to include your benefit as a factor in their calculation.)

Suppose they say to you, "The only reason you are holding out is that you believe that we will go ahead anyway, and therefore you're going to get a free ride." Perhaps this is true, but if it is, then the neighbors may have simply failed to plan their negotiations rationally. Consider a situation where neighbors along a lakefront want to raise money for a lawsuit against a utility that is polluting the lake. If someone went from door to door collecting funds, one might well imagine a homeowner saying, "I'll think about it. Come back later; in fact, come back to me after you've seen all the others." If the collector agrees, he has made a grave mistake, for the homeowner can calculate that if all the other neighbors pitch in, he can safely turn down the request and nevertheless be sure that the lawsuit will go ahead. Obviously, the better strategy is to stipulate that unanimous consent is necessary; thus, if a neighbor still holds out, the others will have to engage in special pleas to him to do his share, since otherwise the entire project would be ruined. Of course this strategy may not succeed against a homeowner who genuinely does not want to contribute to the project. But should he be *forced* to contribute? (Suppose he owns stock in the utility company.) If he does not contribute, nothing bars the other neighbors from ultimately changing the terms of their agreement so that one neighbor less than unanimity is

enough—if they want the lawsuit badly enough to confer what they believe is a free benefit upon the hold-out neighbor. [FN61]

I discussed the pollution example just for the strategy aspect, but it is clear that different examples may seem to call for different results. We have had three examples. The "clean street" example may have seemed easy because a clean street is generally regarded as a very minor value, almost a negligible one in the universal scheme of things. The "dirty street" example may be a slightly more important value on the negative side: if all the neighbors actively desire a dirty street and insist [1107] upon your contributing your share of garbage, your ethical claim might be not that you failed to consent but rather that the neighbors are irrational and that the project itself is unworthy of your "contribution."

The example of the polluted lake, however, is a more compelling case for Rawls' argument that the hold-out neighbor must be forced to contribute. Contributing neighbors may lend ethical recriminations against the hold-out neighbor, based on one of three possible reasons. First, after considering the merits, they may believe that an unpolluted lake is more important than a clean street; this, however, is an unprincipled stand. Second, "pollution" may harm third parties more than dirty streets may harm bystanders; hence, the contributing neighbors may perceive a duty to life forms within the lake or to future generations, and thus a rational step toward discharging that duty—compelling the hold-out to contribute—is ethically commendable. Nevertheless, all the preceding objections to preferences can apply here. As a single example, suppose the hold-out neighbor simply disagrees with the cost-benefit analysis leading to the lawsuit against the pollutor and argues that although the neighbors' contribution might result in some improvement in conditions, much more progress per dollar expended can come from a contribution toward a different project. Does he nevertheless have a moral obligation to contribute to the lawsuit simply because he will be a partial beneficiary in Rawls' terms? Third, there may be a sense, after all, in which the nature of the action taken makes a difference when analyzed in the light of Rawls' theory of fairness. Here let us recall the military service argument that Socrates could have made. Athens provided Socrates with the benefit of protection against external enemies. He in turn was ethically obliged to serve in the military (or to perform some alternative service). Is there a difference between this and street cleaning? I would argue that there is. The benefit to Socrates of the military was that it provided for his continued existence. Moreover, its need was not contrived by the state but was based on the objective facts of foreign capacity for aggression. The same would be true if rules were made for orderly evacuation from a volcanic eruption. In such a situation, since the benefit is objectively necessary, Rawls' principle can apply, even to the point of the citizens enforcing their rules upon those who would derive the benefit of collective action even if they did not participate. One might object that these judgments are no more objective than a judgment that clean streets are better than dirty ones. I think an answer is that we are dealing with matters of ethical obligation, which ultimately reside in the conscience of an individual. [pg1108] If the individual believes that there is a real threat of foreign aggression or earthquake, he cannot truly object that protection from such a threat is not a benefit to him as he might plausibly object that a clean street is not a benefit. Moreover, he cannot truly object that he has preferences which override survival in the "disaster" examples; thus, the acceptability of Rawls' theory of fairness depends on the nature of the action which is taken by society. [FN62]

If it is agreed, such a conclusion nevertheless does not support the argument that Socrates had an ethical duty not to escape. Athens could not say, "we have shown you an example of a duty irrespective of your consent. All the others are simply a matter of degree, and as matters of degree should not be for you—an interested party—to determine. They are for us and us alone to decide." Socrates could have replied that the entire process of analysis leading to this particular qualified acceptance of the principle of fairness stands for the general proposition that differences in the state's laws necessarily lead to differences in ethical obligation. Socrates may have been ethically obliged to serve in the army; but he was not ethically obliged to submit to capital punishment for teaching philosophy. The two are different. Interestingly, the most crucial theme of the entire *Apology* and *Crito* dialogues is that they are not.

### FOOTNOTES

\*Professor of Law, Northwestern University School of Law. A.B.1958, Cornell University; J.D.1961, Harvard University; Ph.D.1968, Columbia University. Copyright 1976 by Anthony D'Amato

\*\*Numbers in the format [pg1079] refer to the paging in the original article.

[FN1]. *E.g.*, PLATO, *Apology*, in SOCRATIC DIALOGUES ¶ 24A (W.D. Woodhead transl. & ed. 1953) [all dialogues hereinafter cited as PLATO]. Conventional references to the dialogues themselves use the Stephanus edition of Paris, 1578.

[FN2]. *See, e.g.*, K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1966); Allen, *Law and Justice in Plato's Crito*, 69 J. PHIL. 557 (1972); Hall, *Plato's Legal Philosophy*, 31 IND.L.J. 171 (1956); *cf.* M.R. KADISH & S.H. KADISH, *DISCRETION TO DISOBEY* (1973).

[FN3]. This issue is harder than the others to infer from the dialogues and will be examined primarily with respect to recent works by Professors John Rawls and Robert Nozick. *See* notes 54-61 and accompanying text *infra*.

[FN4]. Coupled with that crime, and indistinguishable from it for the most part, was the accusation that Socrates was being irreligious by confusing his young listeners with false gods. Later in this essay I briefly deal with this somewhat metaphysical accusation. *See* notes 16-19 and accompanying text *infra*.

[FN5]. *See* text accompanying note 28 *infra*.

[FN6]. *See, e.g.*, *Shaw v. Director of Pub. Prosecutions*, [1962] A.C. 220 (1961).

[FN7]. *See* Dorjahn, *Legal Precedent in Athenian Courts*, 7 PHIL. Q. 375 (1928). At his own trial Socrates referred to two specific, earlier law-determining instances in his career, one in which he was a judge.

[FN8]. PLATO, *supra* note 1, *Crito* at ¶ 54C. What we know about the death of Socrates is contained in the Platonic dialogues; what "really happened" is as insignificant now as it would be in any case preserved only through records.

[FN9]. PLATO, *supra* note 1, *Apology* at ¶¶ 36C-36D.

[FN10]. *Id.* at ¶ 38A.

[FN11]. *Id.* at ¶¶ 33C-33D.

[FN12]. *Id.* at ¶¶ 23E, 24A.

[FN13]. *Id.* at ¶ 23C.

[FN14]. *See id.* at ¶¶ 23C-23D.

[FN15]. *See, e.g., id.* at ¶¶ 18C, 24C, 26B.

[FN16]. *See id.* at ¶ 26C.

[FN17]. *See id.*

[FN18]. *See id.* at ¶ 27A.

[FN19]. *Id.* at ¶ 29D. He added that he would not behave otherwise, even if forced to die many deaths. *Id.* at ¶ 30C.

[FN20]. *See id.* at ¶¶ 37C-37D.

[FN21]. *Id.* at ¶ 37D.

[FN22]. *Id.* at ¶ 30D.

[FN23]. *Id.* at ¶¶ 27E, 28A.

[FN24]. *Id.* at ¶ 39C.

[FN25]. *See* PLATO, *supra* note 1, *Euthyphro* at ¶¶ 8C-8D.

[FN26]. *See* PLATO, *supra* note 1, *Apology* at ¶ 36A.

[FN27]. *See id.* at ¶ 35C.

[FN28]. Contrast this with Dimitrov's brilliant self-defense at the Reichstag Fire Trial. Dimitrov constantly attacked the court, the Gestapo, the Nazi leaders, and the witnesses; he was acquitted in a most hostile political trial. F. TOBIAS, *THE REICHSTAG FIRE* (1964).

[FN29]. PLATO, *supra* note 1, *Apology* at ¶ 19A.

[FN30]. *Id.* at ¶ 30A.

[FN31]. *See id.* at ¶¶ 30E, 31A.

[FN32]. PLATO, *supra* note 1, *Crito* at ¶¶ 50A-50C.

[FN33]. *See* Allen, *Law and Justice in Plato's Crito*, 69 J. PHIL. 557 (1972).

[FN34]. *See* PLATO, *supra* note 1, *Crito* at ¶¶ 53A-53E.

[FN35]. *See id.* at ¶¶ 54C-54D.

[FN36]. *Id.* at ¶ 54D.

[FN37]. *See id.* at ¶ 50A.

[FN38]. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961).

[FN39]. *See* PLATO, *supra* note 1, *Crito* at ¶ 50D.

[FN40]. *See id.* at ¶¶ 51D, 51E, 52A.

[FN41]. *See id.* at ¶ 52B.

[FN42]. *Id.* at ¶ 53A.

[FN43]. *See* G. HEGEL, *A PHILOSOPHY OF RIGHT* (T.M. Knox transl. 1942).

[FN44]. J. RAWLS, *A THEORY OF JUSTICE* 351 (1971).

[FN45]. *Id.* at 354.

[FN46]. *Id.* at 355.

[FN47]. *Id.*

[FN48]. Compare this with the Supreme Court's denial, without a single reason or explanation, of Massachusetts' motion to invoke the Court's original jurisdiction for the purpose of challenging the constitutionality of the Vietnam War. *See* *Massachusetts v. Laird*, 400 U.S. 886 (1970) (from which Justices Harlan, Stewart, and Douglas dissented). This was the Supreme Court's first denial of original jurisdiction without a reasoned opinion. A. D'AMATO & R. O'NEIL, *THE JUDICIARY AND VIETNAM* 45 (1972). Yet there were substantial grounds for the compulsory invocation of original jurisdiction in this case. *See Brief for Constitutional Lawyers' Committee on Undeclared War As Amicus Curiae*, *Massachusetts v. Laird*, 17 WAYNE L.REV. 81 (1971).

[FN49]. *See* PLATO, *supra* note 1, *Apology* at ¶ 41B.

[FN50]. *Quoted* in H.L.A. HART, *THE CONCEPT OF LAW* 137 (1961).

[FN51]. S. HENDEL, *CHARLES EVAN HUGHES AND THE SUPREME COURT* 11 (1951).

[FN52]. *See* PLATO, *supra* note 1, *Crito* at ¶ 48A.

[FN53]. *See* R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 290 (1974) [hereinafter cited as NOZICK].

[FN54]. *See* J. Rawls, *A THEORY OF JUSTICE* 112 (1971).

[FN55]. *See generally* Hart, *Are There Any Natural Rights?*, 64 *PHIL.REV.* 175, 185 (1955).

[FN56]. J. RAWLS, *A THEORY OF JUSTICE* 112 (1969); *cf.* Fuller, *Two Principles of Human Association*, in *VOLUNTARY ASSOCIATIONS* 3 (J. Pennock & J. Chapman eds. 1969).

[FN57]. The two "examples" given by Rawls—the duties of those elected to office and the duty to obey a contractual promise—are not on point, as Rawls himself seems to admit. *See* J. RAWLS, *A THEORY OF JUSTICE* 114, 344 (1971). *See also* NOZICK, *supra* note 53, at 340 n. 1 (1974).

[FN58]. NOZICK, *supra* note 53, at 94 (1974).

[FN59]. We have already examined the arguments that Socrates was subject to an implied contract (see text at Part III-A *supra*); to the extent that the present arguments shade into those, Rawls' "fairness" theory becomes an attenuated form of implying a contract.

[FN60]. *See* NOZICK, *supra* note 53, at 94 (1974). Nozick expands this argument, but does not make the next one found in the text.

[FN61]. *Cf.* Heyman, *The Problem of Coordination: Bargaining and Rules*, 86 *HARV.L.REV.* 797, 836-59 (1973).

[FN62]. Could it be argued that Socrates' teachings constituted a potential "disaster" for Athens—a true corruption of all the young? Such arguments can always be made, but are they convincing? There is nothing in the Platonic dialogues to suggest that Socrates thought he was doing Athens a disservice by his teachings; quite the contrary. Hence, under his own theory, Socrates could not have believed that his teachings constituted a danger to Athens that the city had a moral right to suppress.